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IN THE

MICHIGAN COURT OF APPEALS

FROM

January 24, 1978 to March 14, 1978

WILLIAM H. LEWIS
SUPREME COURT REPORTER

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JUDGE

WALTER P. CYNAR

Born November 14, 1919, in Hamtramck, Michigan, Judge Cynar graduated from Western Michigan University in 1943 with a Bachelor of Arts degree in Sociology. He attended Georgetown Law School and received an LL. B. degree in 1949 from the University of Detroit Law School.

Judge Cynar served in the United States Navy from 1943 to 1946 in mine disposal and deep-sea diving operations. He was discharged as a Lieutenant Senior Grade.

He practiced law in the Detroit area as a trial attorney until 1966, when he was elected as judge of the 16th judicial circuit in Macomb County. He was appointed to the Court of Appeals by Governor William G. Milliken effective February 27, 1978.

His professional affiliations include the Michigan Bar Association, the Law-Science Academy of America, the Advocates Club of Detroit, the National Advocates Club and the Michigan Judges Association. He has served on the Boards of Directors of the Macomb Bar Association and the Negligence section of the Michigan Bar Association and was treasurer of the Family Law section of the Michigan Bar Association.

He was married to Toni Ezersky, a former school teacher, on August 28, 1943, and they are the parents of five children, Christopher, David, Mark, Mary and John.

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COURT OF APPEALS CASES

PEOPLE v SECRETO

1. CRIMINAL LAW—CRIMINAL SEXUAL CONDUCT—RAPE—CONVICTION—ONE ACT.

   A defendant may be convicted and sentenced only once for a single act of criminal sexual conduct.

2. CRIMINAL LAW—INSTRUCTIONS TO JURY—NECESSARILY INCLUDED LESSER OFFENSES.

   It is reversible error to refuse to give requested instructions on necessarily included lesser offenses.

3. CRIMINAL LAW—CRIMINAL SEXUAL CONDUCT—RAPE—INSTRUCTIONS TO JURY—NECESSARILY INCLUDED LESSER OFFENSES—NEW TRIAL—PROSECUTOR'S OPTION.

   A proper remedy, where a defendant has been convicted of first-degree criminal sexual conduct and the trial court erred by not giving the defendant's requested instructions on the necessarily included offenses of second and fourth-degree criminal sexual conduct but did give a requested instruction on third-degree criminal sexual conduct, is to remand the cause for entry of judgment of conviction of second-degree criminal sexual conduct and resentencing; a conviction for second-degree criminal sexual conduct is warranted because the jury was given the choice between first and third-degree criminal sexual conduct, which under the theory presented, that injury was caused to

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REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 165.
65 Am Jur 2d, Rape § 32.
Conviction or acquittal of one offense, in court having no jurisdiction to try offense arising out of same set of facts, later charged in another court, as putting accused in jeopardy of latter offense. 4 ALR3d 874.

[2–4] 21 Am Jur 2d, Criminal Law §§ 185, 494.
Instructions as to conviction of lesser offense, against which statute of limitations has run, where statute has not run against offense with which defendant is charged. 47 ALR2d 890.

[3, 4] 65 Am Jur 2d, Rape § 110
What constitutes penetration in prosecution for rape or statutory rape. 76 ALR3d 163.

the victim and force or coercion was used to accomplish sexual penetration, differ in that first degree includes the causation of personal injury as a statutory element while third degree does not and the jury necessarily found that an injury resulted from the act; however, if the prosecutor is of the opinion that justice would be better served by a new trial, the trial court should, upon notification by the prosecutor prior to resentencing, vacate the judgment of conviction and grant a new trial on the original charge.

4. CRIMINAL LAW—CRIMINAL SEXUAL CONDUCT—RAPE—LESSER INCLUDED OFFENSES—COMMISSION OF OTHER FELONY—STATUTES.

Third-degree and fourth-degree criminal sexual conduct are not lesser included offenses to the greater offense of first-degree criminal sexual conduct where the first-degree criminal sexual conduct charge is based on the theory of sexual penetration occurring under circumstances involving the commission of any other felony (MCLA 750.520b[1][c]; MSA 28.788[2][1][c]).

Appeal from Oakland, William R. Beasley, J. Submitted December 8, 1977, at Lansing. (Docket No. 27769.) Decided January 24, 1978. Leave to appeal applied for.

Phillip J. Secreto, Jr., was convicted of two counts of first-degree criminal sexual conduct and one count of unarmed robbery. Defendant appeals. Affirmed in part, reversed in part, and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *James L. McCarthy,* Assistant Appellate Counsel, for the people.

Lustig & Friedman, P. C., for defendant on appeal.

Before: R. M. BURNS, P. J., and ALLEN and R. M. MAHER, JJ.

PER CURIAM. Phillip Joseph Secreto, Jr., appeals from two convictions and sentences for first-degree

criminal sexual conduct, MCLA 750.520b(1)(c) and (f); MSA 28.788(2)(1)(c) and (f), and a conviction and sentence for unarmed robbery, MCLA 750.530; MSA 28.798.

There was no error in the trial court's voir dire of prospective jurors and the criminal sexual conduct statute was not unconstitutionally vague as applied to the facts of the case.

However, the case must be remanded for vacation of the first-degree criminal sexual conduct convictions and sentences, and a conviction for second-degree criminal sexual conduct entered and the appellant resentenced.

The appellant was convicted and sentenced twice, under different theories, for the one act of criminal sexual conduct with which he was charged. A defendant may only be convicted and sentenced once for a single act of criminal sexual conduct, *People v Willie Johnson,* 75 Mich App 221; 255 NW2d 207 (1977). Therefore, one conviction and sentence must be vacated.

Further, regardless of which count the appellant were to be convicted on, the conviction and sentence for first-degree criminal sexual conduct must be vacated and a conviction for second-degree sexual conduct entered and the appellant resentenced.

On Count I, brought under MCLA 750.520b(1)(c), the appellant requested an instruction on the necessarily lesser included offense of second-degree criminal sexual conduct (under MCLA 750.520[c]; MSA 28.788[3]). The request was denied, a reversible error under *People v Ora Jones,* 395 Mich 379; 236 NW2d 461 (1975), *People v Thompson,* 76 Mich App 705; 257 NW2d 268 (1977).

On Count II, brought under MCLA 750.520b(1)(f), the appellant requested instructions

on the necessarily included lesser offenses of second (under MCLA 750.520c[1][f]; MSA 28.788[3][1][f], third (under MCLA 750.520d[1][b]; MSA 28.788[4][1][b], and fourth (under MCLA 750.520e[1][a]; MSA 28.788[5][1][a]), degree criminal sexual conduct. The trial court granted the request to instruct on third-degree criminal sexual conduct, but denied the requests for instructions on second and fourth degree, reversible error under *Ora Jones, supra,* and *Thompson, supra.* The conviction must be vacated, but a conviction under second, rather than fourth, degree criminal sexual conduct should be entered, and the appellant sentenced accordingly.

Because the jury was given the choice between first and third-degree criminal sexual conduct, which under the theory of Count II differ in that first degree includes the causation of personal injury as a statutory element while third degree does not, the jury necessarily found that an injury resulted from the act. Second and fourth-degree criminal sexual conduct, under the theory charged in Count II, differ from each other in the same respect. Thus a conviction for second-degree criminal sexual conduct is warranted.

Under Count I there are no crimes corresponding to third and fourth-degree criminal sexual conduct and thus those offenses are not lesser included offenses, necessarily or otherwise, to the greater offense of first-degree criminal sexual conduct brought under MCLA 750.520b(1)(c).

However, if the prosecutor is of the opinion that justice would be better served by a new trial, the trial court should, upon notification by the prose-

cutor prior to resentencing, vacate the judgments of conviction and grant a new trial on the original charges,[1] *Thompson, supra.*

The conviction and sentence for unarmed robbery is affirmed.

Reversed and remanded in part, affirmed in part.

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[1] We do not believe it is error to charge a defendant under more than one theory of criminal sexual conduct for a single act, but it is error to enter more than one judgment of conviction and sentence for a single act.

PEOPLE v BRECKENRIDGE

1. FALSE PRETENSES—INDICTMENT AND INFORMATION—TIME VARIANCES—PRIOR EVENTS—PREJUDICE.

   Time is not of the essence of the offense of obtaining money by means of false pretenses and a prosecutor may introduce evidence of events prior to the time of the charged crime specified in an indictment, particularly where the defendant does not allege prejudice and where the evidence of prior events is essential to an understanding of the crime charged.

2. FALSE PRETENSES—INDICTMENT AND INFORMATION—AMENDMENTS—TIME VARIANCES—PROOFS.

   It is not error to permit the amendment of an information during trial to enlarge the time period during which the crime of obtaining money by false pretenses occurred; the prosecution is not required to set forth in the information the false pretenses by which the offense was accomplished, and proof of the crime is not restricted to the exact transaction as it took place between the complaining witness and the accused.

3. FALSE PRETENSES—INDICTMENT AND INFORMATION—CONTINUANCES—EVIDENCE—PREJUDICE—APPEAL AND ERROR.

   Failure to ask for a continuance in a prosecution for obtaining money by false pretenses, where the defendant is entitled to one, leads the Court of Appeals to presume that the defendant was not prejudiced by the failure of the prosecution to indicate at an earlier time that it was going to introduce evidence of events occurring prior to the time specified in the indictment.

4. FALSE PRETENSES—INSTRUCTIONS TO JURY—EVIDENCE—MATERIAL MISREPRESENTATIONS—HARMLESS ERROR.

   An instruction on "continuous misrepresentation" in a prosecution for obtaining money by false pretenses, which defendant

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REFERENCES FOR POINTS IN HEADNOTES

[1–3, 5] 32 Am Jur 2d, False Pretenses §§ 21, 61.
[4] 32 Am Jur 2d, False Pretenses § 72.
[6] 32 Am Jur 2d, False Pretenses § 49 *et seq.*
[7, 9, 10] 69 Am Jur 2d, Securities Regulation—State § 10.
[8] 69 Am Jur 2d, Securities Regulation—State § 38.

asserts is a non-existent doctrine, is harmless error even if there is no such doctrine where there was considerable evidence of material misrepresentations over an extended period of time and sufficient evidence of defendant's misrepresentations during the time specified in the indictment to render any error harmless.

5. FALSE PRETENSES—INDICTMENT AND INFORMATION—EVIDENCE—ADMISSIBILITY OF PRIOR EVENTS—STATUTES.

A statute permits evidence of events occurring within a 6 month period following the time stated in an information or indictment to be admitted in a trial for obtaining money by false pretenses; there is no limitation in the statute on the admission of events occurring prior to the time stated in the information or indictment and no authority exists which supports the proposition that the statute prohibits the admission of such evidence (MCLA 767.60; MSA 28.1000).

6. FALSE PRETENSES—ELEMENTS—RELIANCE.

Failure to establish the element of reliance in a trial for obtaining money by false pretenses is reversible error.

7. STATUTES—UNIFORM SECURITIES ACT—SECURITY TRANSACTIONS—COURTS—COURT RESPONSIBILITY.

The Uniform Securities Act makes unlawful various acts in connection with the offer, sale or purchase of any security and whether or not a particular transaction comes within the purview of the act depends upon the language of the statute and the real nature of the transaction; it is the court's responsibility to ascertain the substance of the transaction and the real intent and purpose of the parties (MCLA 451.501, 451.809; MSA 19.776[101], 19.776[409]).

8. STATUTES—SECURITY LAWS—STOCKHOLDERS AND PROMOTERS—FRAUDS AND IMPOSITIONS—HAZARDOUS UNDERTAKINGS.

The purpose of securities laws, in general, is to prevent stockholders and promoters from perpetrating frauds and impositions on unsuspecting investors in hazardous undertakings and to protect credulous and incompetent persons from their own inclinations to speculate in hazardous enterprises.

9. STATUTES—UNIFORM SECURITIES ACT—BUSINESS ENTERPRISES—VENTURE CAPITAL—SECURITY TRANSACTIONS.

The salient feature of securities sales under the Uniform Securities Act is the public solicitation of venture capital to be used in a business enterprise; subjection of the investor's money to the risks of an enterprise over which she or he has no manage-

rial control is the basic economic reality of a security transaction as defined in the act.

10. STATUTES—UNIFORM SECURITIES ACT—ECONOMIC REALITIES—LOANS—PURCHASE OF SECURITIES—STATUTORY PROTECTION OF INVESTORS.

Security statutes must turn on the economic realities underlying a transaction and where the underlying realities establish that a loan was made rather than the offering, selling, or purchase of securities there is no violation of the Uniform Securities Act, which was intended to protect investors, not persons engaged in commercial loan transactions.

Appeal from Kent, John T. Letts, J. Submitted November 1, 1977, at Grand Rapids. (Docket No. 28463.) Decided January 24, 1978. Leave to appeal denied, 402 Mich 915.

Don Breckenridge was convicted of obtaining money by false pretenses and violation of the Uniform Securities Act. Defendant appeals. Affirmed as to Count I, reversed as to Count II, and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *David H. Sawyer,* Prosecuting Attorney, *Donald A. Johnston, III,* Chief Appellate Attorney, and *Carol S. Irons,* Assistant Prosecuting Attorney, for the people.

Cholette, Perkins & Buchanan (by *Robert A. Benson),* for defendant.

Before: R. M. MAHER, P. J., and M. F. CAVANAGH and N. J. KAUFMAN, JJ.

PER CURIAM. On January 29, 1976, a jury convicted Don Breckenridge of obtaining money by false pretenses, MCLA 750.218; MSA 28.415, and of violating the Uniform Securities Act, MCLA 451.501, 451.809; MSA 19.776(101), 19.776(409). De-

fendant was sentenced to a term of imprisonment for not less than 3-1/2 nor more than 10 years.

Defendant Breckenridge was a divisional manager for Investor's Diversified Services (IDS), a company which sells mutual funds, saving certificates, tax exempt bonds and insurance.

In January or February of 1973, defendant approached Dale Discher, vice-president and treasurer of Amway Corporation, about obtaining loans, apparently for construction.

Discher testified that by an arrangement made in February, 1973, Amway Corporation was to loan money to Mr. Breckenridge against 30-day promissory notes which would be secured by shares in defendant's Investor's Stock Fund Account worth not less than 140% of the loan amount. An assignment of the shares accompanied each note.

As a result of the February, 1973, arrangement, a series of 30-day notes was given by defendant over the next year until, in February, 1974, there were 56 different notes. On February 11, 1974, all the then-outstanding notes were consolidated into one note for $650,000. A security agreement, accompanying the note, provided that defendant Breckenridge granted to Amway a security interest in 41,800 shares of IDS stock.

Also accompanying the note was a document entitled "Funds Change of Name, Ownership or Beneficiary". This document provided that Don Breckenridge did "assign for value received * * * 41,800 shares described above". The issuing company was listed as Investors Stock Fund, Inc. The name of the assignee was not provided. The form stated "ALL STOCK CERTIFICATES MUST BE ATTACHED". No stock certificates were attached.

Three more notes for a total of $200,000 secured

by additional shares in the Investor's Stock Fund Account were given by defendant. The method for exchanging the notes for the loans did not change throughout the period. Kenneth S. Gfeller, an assistant to Discher, delivered checks to defendant and picked up documents prepared in connection with the loan. The notes and accompanying materials were always prepared by Breckenridge.

In May, 1974, defendant resigned his position with IDS, apparently after IDS auditors examined his personal books in his absence. Defendant never held more than 148 shares in his Investor's Stock Fund Account.

Count I of the indictment alleged that on or about the 11th day of February, 1974, and on divers other dates between that date and April 17, 1974, defendant did, with intent to defraud, obtain $850,000 from the Amway Corporation by use of false pretenses.

As to this count, defendant alleges three errors, two of which relate to representations occurring a year before the date of the crime specified in the indictment. Defendant first charges that the trial court erred by instructing the jury that it could consider representations which occurred more than one year before the date of the crime specified in the indictment.

February 11, 1974, the first date cited in the indictment, was the date on which outstanding promissory notes given for loans were consolidated into one note for $650,000. The testimony concerning occurrences prior to February, 1974, was essential to understand and explain the February, 1974 note.

Time is not of the essence of the offense of obtaining money by means of false pretenses. It is therefore perfectly proper to permit an amend-

ment at trial changing the dates to that shown by the testimony. *People v Hoffmann,* 142 Mich 531; 105 NW 838 (1905). Similarly, in *People v Clum,* 213 Mich 651; 182 NW 136 (1921), the Court held, in a prosecution under the blue sky laws, that it was not error to permit an amendment of the information during trial to enlarge the time period during which the charged crime occurred. The holding was based on the fact that time was not of the essence of the offense.

In the present case, following the precedents in *People v Hoffmann, supra,* and *People v Clum, supra,* the court could have permitted the indictment to be amended. There was no amendment, but the omission does not constitute reversible error.

In *People v Winslow,* 39 Mich 505 (1878), defendant was convicted of conspiracy to defraud by false pretenses. The Court stated that it was not necessary, in a case of this sort, to set forth in the information the false pretenses by which the offense was accomplished; nor in the proof of them can the prosecution be restricted to the exact transaction as it took place between the complaining witness and the accused. 39 Mich at 507. It reasonably follows that a prosecutor may introduce evidence of events occurring prior to the time of the charged crime specified in the indictment, particularly when, as in this case, the defendant does not allege prejudice and when the evidence of prior events is essential to an understanding of the crime charged.

Defendant, had he asked for one, would have been entitled to a continuance. See *People v Clum, supra.* His failure to so ask leads us to presume he was not prejudiced by the failure of the prosecution to indicate at an earlier time that it was

going to introduce evidence of events occurring prior to February, 1974.

The judge, wishing to portray for the jury the series of events leading up to the February 11 consolidation, instructed on "continuous misrepresentation", a doctrine defendant asserts is nonexistent. The argument is more semantic than legal.

It cannot be denied that defendant, up until February 11, 1974, and for two months afterwards, continued to misrepresent his position. Even if there is no doctrine of continuous misrepresentation, it was harmless error, if error it was, to use the term. There was considerable evidence in this case of material misrepresentations over an extended period of time. Apart from those misrepresentations, there was sufficient evidence of defendant's misrepresentations during the time specified in the indictment to render any error harmless.

Defendant also contends that MCLA 767.60; MSA 28.1000 prohibits in a trial for obtaining money by false pretenses consideration by the jury of representations which occurred more than one year before the date of the crime specified in the indictment.

The statute permits evidence of events occurring within a 6-month period following the time stated in the indictment to be admitted in a trial for obtaining money by false pretenses. There is no limitation in the statute on the admission of events occurring prior to the time stated in the indictment. No authority exists which supports the proposition that the statute prohibits the admission of such evidence. We must therefore reject defendant's contention.

Defendant's final claim of error under Count I is that the prosecution failed to establish the element of reliance requisite to the charged crime.

Failure to establish the element of reliance in a trial for obtaining money by false pretenses is reversible error. *People v Wilde,* 42 Mich App 514; 202 NW2d 542 (1972). The record may not support a finding that Discher, the person with whom defendant dealt directly, relied upon defendant's misrepresentations. Kenneth Gfeller, however, was also an agent for Amway, the victim of the alleged crime. Gfeller testified that he reviewed the documents signed by defendant to be assured of their correctness.

The evidence of reliance in this case was sufficient, if believed by the trier of facts, to establish that element. Gfeller testified that he reviewed the documents; the documents declared that defendant owned a large amount of stock which was pledged as collateral for the various loans. The jury could reasonably have inferred that if Gfeller found the documents were not in order, no loan would have been made. The element of reliance was sufficiently established by the evidence.

Count II of the indictment alleged a violation of the Uniform Securities Act, MCLA 451.501, 451.809; MSA 19.776(101), 19.776(409), that in connection with the offer, sale or purchase of securities, the defendant employed a device, scheme or artifice to defraud, make untrue statements of material facts, or engage in an act, practice or course of business which operated as a fraud or deceit upon Amway Corporation, and that he sold securities in the form of promissory notes secured by the pledge of 56,300 shares of stock as collateral.

The Uniform Securities Act makes unlawful various acts in connection with the offer, sale or purchase of any security.

The word "sale" is defined in the Uniform Sales

Act at MCLA 451.801(j)(1); MSA 19.776(401)(j)(1). The word sale does not include "[a]ny bona fide pledge or loan". MCLA 451.801(j)(6)(A); MSA 19.776(401)(j)(6)(A).

Whether or not a particular transaction comes within the purview of a state securities law such as the Uniform Securities Act depends on the langauge of the statute and the real nature of the transaction. *State v Hodge,* 204 Kan 98; 460 P2d 596 (1969). The court must ascertain the substance of the transaction and the real intent and purpose of the parties, looking beyond labels and devices. *People v Blankenship,* 305 Mich 79; 8 NW2d 919 (1943).

Whatever the parties may call it, the nature of the transaction between defendant and Amway strongly suggests a loan was made. Defendant was given money by Amway for his temporary use. Each time defendant obtained money from Amway, he promised to repay that money in 30 days. This was accomplished with a series of promissory notes. Defendant promised to (and did) pay interest; he also purported to give collateral for the money obtained by assigning stock.

The crucial question, then, becomes whether the transaction is within the regulatory purpose of the law. *Sarmento v Arbax Packing Co,* 41 Cal Rptr 869; 231 Cal App 2d 421 (1964). Are the promissory notes of such a character as fairly to fall within the scope of the statute?

We cannot say that the transaction is one intended to be covered by the Uniform Securities Act. The purpose of state securities laws, in general, is to prevent stockholders and promoters from perpetrating frauds and impositions on unsuspecting investors in hazardous undertakings and to protect credulous and incompetent persons

from their own inclinations to speculate in hazardous enterprises. *Meek v State,* 54 Okla Cr 415; 22 P2d 933 (1933).

Mindful of this purpose, a court, in interpreting the Uniform Securities Act, must ascertain whether a party's activities constituted an offer or sale of securities as those terms are defined. *Hardtke v Love Tree Corp,* 386 F Supp 1085 (ED Wis, 1975).

Defendant's activities here were not of such a character as to constitute an offer or sale of securities. The salient feature of securities sales under the Uniform Securities Act is the public solicitation of venture capital to be used in a business enterprise. Subjection of the investor's money to the risks of an enterprise over which she or he has no managerial control is the basic economic reality of a security transaction as defined in the context of the Uniform Securities Act. See *State of Hawaii by its Commissioner of Securities v Hawaii Market Center, Inc,* 52 Hawaii 642; 485 P2d 105 (1971).

Any securities statute must turn on the economic realities underlying a transaction. *United Housing Foundation, Inc, v Forman,* 421 US 837; 95 S Ct 2051; 44 L Ed 2d 621 (1975). The underlying realities of the transaction in this case establish that a loan was made. Breckenridge was not asking Amway to venture risk capital in an organization he was running. He was borrowing money secured by notes, not offering, selling, or purchasing securities.

In interpreting Federal securities acts, pertinent provisions and definitions of which are similar to those presently at issue in the Uniform Securities Act, courts have made a point of distinguishing loans from other transactions.

"The question whether a note constitutes a covered

security depends on whether the note was procured for purposes of speculation or investment or *for purposes of making a commercial loan.* As a matter of policy, this distinction is a valid one. The federal securities laws are designed to protect investors, *not persons engaged in ordinary consumer or commercial loan transactions* * * * . Thus courts have restricted application of the Acts to those notes procured for investment and have excluded notes issued in the context of a commercial loan transaction." *Bronstein v Bronstein,* 407 F Supp 925, 930 (Ed Pa, 1976). (Emphasis supplied.)

The Uniform Security Act adopted by the state of Michigan is likewise intended to protect investors, not persons engaged in commercial loan transactions, as was defendant here.

In *McClure v First National Bank of Lubbock, Texas,* 497 F2d 490 (CA 5, 1974), one of the issues raised was whether a pledge of corporate stock for renewal of a bank loan constituted a sale within the meaning of the Securities Exchange Act of 1934. The court held that the pledge of stock, in the circumstances of the case, did not constitute a sale.

"A commercial bank in accepting a pledge of stock as additional consideration for the extension of an overdue commercial loan does not necessarily affect the securities industry * * * mere acceptance of a stock pledge as collateral in a privately negotiated transaction between borrower and lender does not, of itself, bring within the scope of the federal securities acts a transaction otherwise outside their purview." 497 F2d at 495.

While the interpretation Federal courts have placed upon terms under the Federal securities acts is not binding upon state courts as they interpret the Uniform Securities Act, the similarity of the purpose and provisions of the state and

Federal securities statutes, particularly those purposes and provisions pertinent to the facts at hand, cannot be ignored. Interpretation of one offers valuable guidelines as to the interpretation of the other.

As a matter of law, we find that the transaction between Breckenridge and Amway, in which defendant gave Amway a series of notes secured by shares he did not own in exchange for $850,000, constituted a loan which by definition is exempt from the Uniform Securities Act.

Defendant's conviction as to Count I is affirmed; as to Count II, the conviction is reversed. Remanded for resentencing.

PEOPLE v JACKSON

CRIMINAL LAW—BENCH TRIAL—FINDINGS OF FACT—APPEAL AND ERROR—HARMLESS ERROR.

A judge who sits without a jury in criminal cases is obliged to articulate for the record the reasons for his decision in findings of fact, but a judge's failure to find the facts does not require remand where it is manifest that he was aware of the factual issue, that he resolved it, and that it would not facilitate appellate review to require further explication.

Appeal from Recorder's Court of Detroit, Thomas L. Poindexter, J. Submitted December 6, 1977, at Detroit. (Docket No. 28698.) Decided January 24, 1978.

Theron D. Jackson was convicted of felonious assault. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Principal Attorney, Appeals, and *Robert Monk,* Assistant Prosecuting Attorney, for the people.

Robert Mann, for defendant on appeal.

Before: M. F. CAVANAGH, P. J., and J. H. GILLIS and D. C. RILEY, JJ.

PER CURIAM. Charged originally with a single

REFERENCES FOR POINTS IN HEADNOTE

76 Am Jur 2d, Trial § 1250 *et seq.*

Validity and construction of federal criminal procedure Rule 23, dealing with trial by jury or by the court. 13 L Ed 2d 1119.

count of assault with intent to murder, MCLA 750.83; MSA 28.278, defendant appeals his conviction, following a bench trial, of felonious assault, MCLA 750.82; MSA 28.277.

He raises a single issue: whether the trial judge erred reversibly in rendering a general guilty verdict rather than finding the facts specially and separately stating his conclusions of law.

The record clearly establishes by defendant's admission that he stabbed the complainant in the shoulder with a knife during an altercation that arose out of an automobile accident. Defendant rear-ended the car driven by complainant when complainant stopped suddenly at a red light. Although defendant claimed to have acted in self-defense, he admitted that he exited his car with a hunting knife in hand and that neither the complainant nor his companion were armed when they emerged from their car. The testimony by the prosecution's witnesses indicates that defendant was the unprovoked aggressor.

The only issues for the trial judge to determine were whether the defendant acted in self-defense and whether he assaulted complainant with an intent to murder. These decisions rested on the credibility of the defendant as compared to that of the complainant, his companion, an off-duty police officer who disarmed the parties and broke up the fight and two officers who responded to the scene. Clearly, a reading of the record discloses the paths that the trial judge followed in reaching his verdict, namely, that defendant did not act in self-defense and that he lacked the *mens rea* necessary for assault with intent to murder.

The most recent Supreme Court decision on the applicability of GCR 1963, 517.1 to criminal bench trials, *People v Jackson,* 390 Mich 621, 627; 212

NW2d 918 (1973), serves to clarify a previously confused rule:

"We are now of the opinion that in criminal cases as well as civil cases a judge who sits without a jury is obliged to articulate the reasons for his decision in findings of fact. Findings of fact in a nonjury case serve a function paralleling the judge's charge in a jury case, that of revealing the law applied by the fact finder.[3]"

" [3]A judge's failure to find the facts does not require remand where it is manifest that he was aware of the factual issue, that he resolved it and it would not facilitate appellate review to require further explication of the path he followed in reaching the result as, for example, where the only factual issue is identification. *See People v Green,* 32 Mich App 482; 189 NW2d 122 (1971). *See, also, People v George Scott,* 21 Mich App 217–218; 175 NW2d 312 (1970)."

We are of the opinion that this case falls squarely within the exception to the rule as enunciated in *Green, supra,* and approved by the Supreme Court in *Jackson.* No purpose would be served by remainding this case to the trial judge for findings of fact and conclusions of law.

Before closing, however, we would remind the trial court that needless appeals can be eliminated if, in future cases, somewhat greater effort is expended in satisfying the letter, as well as the spirit, of GCR 1963, 517.1.

Affirmed.

HILTON v GENERAL MOTORS CORPORATION

1. WORKMEN'S COMPENSATION—EMPLOYERS-EMPLOYEES—SUFFICIENT NOTICE—INJURY TO EMPLOYEES—STATUTES.

   The complaints by an employee to his supervisors regarding dust conditions in his place of employment were not sufficient, under the workmen's compensation statute regarding notice of death or disability, to give the employer notice of the employee's injured or disabled condition resulting from the dust where the employee never informed his supervisors that the dust conditions were causing him injury or were disabling him (MCLA 418.441; MSA 17.237[441]).

2. APPEAL AND ERROR—WORKMEN'S COMPENSATION—WORKMEN'S COMPENSATION APPEAL BOARD—EMPLOYERS-EMPLOYEES—OCCUPATIONAL INJURIES—FACT OF DISABILITY—CAUSE OF DISABILITY—TIMELY NOTICE—STATUTES.

   The Workmen's Compensation Appeal Board erred in failing to appreciate the significance of sickness and accident benefit information submitted to an employer by an employee 6 days after the employee had been informed by his own doctor of his occupationally-related emphysematous condition where such information provided the employer with notice of the fact of disability, as distinguished from notice of the cause of disability; this notice of the fact of disability was timely under the workmen's compensation statute which provides that an employee must inform the employer of his disability within 120 days after he learns of his disability and of its work-related nature (MCLA 418.441; MSA 17.237[441]).

3. WORKMEN'S COMPENSATION—EMPLOYERS-EMPLOYEES—INJURY—NOTICE—SUFFICIENCY—FACT OF INJURY—CAUSE OF INJURY—STATUTES.

   Notice of a work-related injury occurring to an employee is sufficiently given to his employer if the employer is informed thereby of the fact of injury or disability; the sufficiency of such

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 82 Am Jur 2d, Workmen's Compensation §§ 442–456.

[4] 82 Am Jur 2d, Workmen's Compensation § 540 *et seq.*

notice does not turn upon whether the employer is or is not informed of the cause of disability; therefore, the fact that the employee indicates in sickness and accident benefit reports to the employer that the injury he received was not work-related does not make his notice insufficient under the workmen's compensation statute regarding notice of death or disability (MCLA 418.441; MSA 17.237[441]).

4. WORKMEN'S COMPENSATION—WORK-RELATED INJURIES—DETERMINATIONS—REFEREES.

A determination regarding the work-related nature of an injury under the workmen's compensation law is to be made by the workmen's compensation referee and not by the employer.

Appeal from the Workmen's Compensation Appeal Board. Submitted June 13, 1977, at Lansing. (Docket No. 29797.) Decided January 24, 1978.

Claim by Clyde H. Hilton against General Motors Corporation for workmen's compensation. Compensation granted. The Workmen's Compensation Appeal Board reversed. Plaintiff appeals by leave granted. Reversed.

MacDonald, FitzGerald & MacDonald, for plaintiff.

Munroe & Nobach, P. C. (by *Richard R. Weiser),* for defendant.

Before: D. E. HOLBROOK, JR., and ALLEN and D. R. FREEMAN,* JJ.

PER CURIAM. Plaintiff appeals to this Court from an adverse decision entered by the Workmen's Compensation Appeal Board barring the plaintiff from relief under the Worker's Disability Compensation Act because he had failed to give timely and

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

sufficient notice of his disability to his employer under MCLA 418.441; MSA 17.237(441).

It is undisputed that the plaintiff was disabled as a result of an occupationally-related emphysematous condition. Plaintiff testified before the hearing referee that he had been employed at the Buick Motor Division of General Motors from 1955 to 1958, during which time he worked in the area of heat treatment and assembly. After a long layoff, the plaintiff returned to work in 1967, and from then until February 29, 1970, worked in the Buick Motor foundry, principally as a grinder. While working in the foundry he found the grinding machine dirty and dusty and filed a grievance complaining about dust emissions. He also complained to his foreman who advised plaintiff to wear a mask. Plaintiff tried wearing a mask but gave it up when he found he could not work with a mask, and informed his foreman. After working in the foundry for a year, plaintiff developed a shortness of breath, finding it generally difficult to breathe.

On February 27, 1970, plaintiff was transferred to the transmission plant where he was assigned to assembly and sub-assembly. On March 1, 1971, the appellant resigned his employment due to breathing difficulties and pains in his back and chest. On March 3, 1971, the plaintiff was medically informed by his own doctor of his emphysematous condition and its work-related nature. On March 9, 1971, the appellant submitted to the defendant an application for accident and sickness benefits. In the application form, the applicant was asked the question: "Do you claim that this disability was caused by your work for General Motors?" The plaintiff responded "No" to this question. When asked at the time of hearing why he had denied work relation of his disability, the

plaintiff stated that he did not know why he had so answered the form.

On appeal, the plaintiff contends that complaints as to dust levels made by plaintiff to his employer during his foundry employment constituted sufficient notice, as a matter of law, to satisfy the requirements of MCLA 418.441; MSA 17.237(441). This contention lacks support in the record. Although the plaintiff made various complaints about the dust conditions in the foundry to supervisory personnel during his employment at the foundry, the record does not reveal that the plaintiff ever informed supervisory personnel that the dust conditions were causing him injury or were disabling him. In the absence of such notice, we hold that complaints by an employee about the dust conditions in foundries are not sufficient to give an employer notice of an employee's injured or disabled condition under the test enunciated by the Supreme Court in *Norris v Chrysler Corp,* 391 Mich 469; 216 NW2d 783 (1974). Contrast *West v Northern Tree Co,* 365 Mich 402; 112 NW2d 423 (1961). As such, the board's finding in this regard was not lacking in evidentiary support and cannot be questioned upon appeal by this Court.

The board's decision was nonetheless erroneous in that it failed to appreciate the significance of the sickness and accident benefit information submitted by the plaintiff to the defendant on March 9, six days after the plaintiff had been informed of his disability by his own doctor. This notice of the fact of disability (as distinguished from notice of the cause of disability) was clearly timely under MCLA 418.441; MSA 17.237(441), which provides that an employee must inform the employer of his disability within 120 days after he learns of his disability and of its work-related nature. *Lewis v*

Chrysler Corp, 394 Mich 360; 230 NW2d 538 (1975). The fact that the employee-plaintiff indicated therein that the injury was not work-related did not make this notice "insufficient" under the test of sufficiency enunciated in *Norris, supra.* Under *Norris,* notice is sufficient if the employer is informed thereby of the fact of disability or injury. Under the *Norris* test, sufficiency of notice does not turn upon whether the employer is or is not informed of the cause of disability. A determination of work relation is to be made by the hearing referee and not by the employer. *Norris, supra,* at 480.

Under *Lewis, supra,* the notice was timely, and under *Norris, supra,* the notice was sufficient; therefore, the board erred, as a matter of law, in holding the plaintiff barred from obtaining relief under the act. Accordingly, we reverse the decision of the Workmen's Compensation Appeal Board and reinstate the decision of the hearing referee awarding plaintiff benefits under the act.

We reached an opposite result in *Meads v General Motors Corp,* 78 Mich App 494; 260 NW2d 143 (1977), a case presenting very similar facts. However, in *Meads,* the plaintiff took normal retirement at age 65 and never complained to anyone about the poor air quality or its effects on his lungs. By contrast, this plaintiff repeatedly complained about the conditions, quit his job at age 50, and almost immediately filed a request for sickness disability benefits. Given these additional factors, we believe that *Norris, supra,* and the recently released *Krol v Hamtramck,* 398 Mich 341; 248 NW2d 195 (1976), require reversal of the appeal board's decision.

Reversed, costs to plaintiff.

MONCADA v MONCADA

1. APPEAL AND ERROR—EQUITY—PARENT AND CHILD—CHILD SUPPORT ORDERS—PRESUMPTION OF VALIDITY—CLEAR ERROR.

The standard of review on appeals from orders for child support provides that the lower court's decision is to be presumed correct and that the appellant bears the burden of showing the decision to be clearly erroneous; however, because of the history of appellate review in equity, the appellant may establish clear error more readily in an equity case than in cases historically heard at law.

2. APPEAL AND ERROR—CLEAR ERROR—EVIDENCE—PARENT AND CHILD—LAWS OF EMPLOYMENT—AMBIGUOUS EVIDENCE.

Clear error by a lower court in finding that a petitioner's act in leaving the site of his employment rendered him responsible, at least in part, for the loss of his employment was not shown on the evidence admitted at trial where the evidence regarding the loss of his job was ambiguous and the record was silent on the questions of whether petitioner ever returned to the work site, under what circumstances he was informed that he had lost his job, and whether he made any effort to regain it.

3. DIVORCE—PARENT AND CHILD—CHILD SUPPORT MODIFICATION—FATHER'S INCOME—REDUCTION—UNEXERCISED ABILITY TO EARN.

The father's income is one of the factors to which a court must look when entertaining a petition for modification of child support payments provided for in a judgment of divorce; in some cases a reduction in the father's income would compel a modification; however, the father's duty to pay support is not limited by his income and the court may also look to his unexercised ability to earn.

4. DIVORCE—PARENT AND CHILD—CHILD SUPPORT—MODIFICATION—FATHER'S INCOME—VOLUNTARY REDUCTIONS—BAD FAITH—UNCONSCIONABLE DISREGARD FOR WELFARE.

Voluntary reductions in a father's income will not warrant a

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 704.

[2] 5 Am Jur 2d, Appeal and Error § 844.

[3] 24 Am Jur 2d, Divorce and Separation § 844 *et seq.*

[4, 5] 24 Am Jur 2d, Divorce and Separation § 848.

modification of child support payments provided for in a judgment of divorce where the reduction was made in bad faith or where the father voluntarily worsens his financial position through unconscionable disregard for the welfare of his dependents.

5. DIVORCE—PARENT AND CHILD—CHILD SUPPORT MODIFICATION—FATHER'S INCOME—VOLUNTARY REDUCTION—BAD FAITH—WILFUL DISREGARD OF INTERESTS.

A father's voluntary reduction in income is not an adequate reason for a trial court's refusal to modify a child support order where bad faith or a wilful disregard for the interests of the dependent children by the father are absent.

Appeal from Eaton, Richard Robinson, J. Submitted June 13, 1977, at Grand Rapids. (Docket No. 30461.) Decided January 24, 1978.

Complaint by Jean Moncada against Joe Moncada for divorce. Divorce granted. Defendant subsequently petitioned for a reduction in his weekly child support payments. The court ordered his obligation for current payments reduced and further ordered that the difference between the former and the revised payments would continue to accrue for the duration of defendant's unemployment. Defendant appeals. Reversed and remanded.

Greater Lansing Legal Aid Bureau, Inc. (by *Philip E. Hodgman* and *Chris Campbell),* for defendant.

Before: M. J. KELLY, P. J., and M. F. CAVANAGH and J. R. Rood,* JJ.

PER CURIAM. Petitioner was brought before the lower court on a motion to show cause why he should not be held in contempt for failure to make

* Former circuit judge, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

weekly child support payments of $133. Mr. Moncada was without work at the time, and was receiving unemployment compensation of $136 per week. He petitioned the lower court to reduce his weekly payments to a level commensurate with his income. The court ordered that his obligation for current payments be reduced to $105 per week, but that a further $28 per week (the difference between the former and the revised payments) would continue to accrue for the duration of his unemployment. From this order petitioner appeals as of right.

Petitioner had previously been employed as a construction worker with a gross income of $338 per week. It was on the basis of this income that his support payments had been set at $133 weekly. Petitioner lost this job, and the circumstances under which he did so define the issues herein raised.

Petitioner testified that he reported to work as usual at 8 a.m. on a Monday morning. He worked until noon, when a piece of machinery broke and everyone was sent home. He reported back to work the next morning, but by 11:30 the machinery still hadn't been repaired. Petitioner, who had work to do at home and was not being paid for his time at the job site, thought that the equipment might not be repaired that day, and asked his employer if he could leave. His employer expressed indifference, and petitioner went home.

At the time of the hearing on his petition to modify support, petitioner still hadn't returned to work. A letter from the treasurer of the company was read into evidence. According to this letter, petitioner had voluntarily walked off the construction site, which act the company regarded as self-termination of employment. However, this letter

was contradicted by a subsequent letter from the president of the company, who stated that petitioner had been temporarily laid off from work, and would be put back on the payroll at a later date. This version of events was corroborated by petitioner's testimony that he began receiving unemployment compensation immediately after termination of his employment. See MCLA 421.29(1)(a); MSA 17.531(1)(a).

Petitioner testified that after losing his construction job he had worked part-time picking pickles, and had applied part of his $150 to $200 of earnings from this work to the payment of child support. Petitioner further testified that he was seeking work through friends and through cooperation with the Michigan Employment Security Commission.

At the conclusion of the hearing the trial court announced its order, and, addressing petitioner, stated:

> "I figure your unemployment problems are self-generated, and you are responsible for them, or at least you contributed to it."

The central questions on this appeal are whether the foregoing evidence was sufficient to establish that petitioner contributed to his own decrease in income and, if so, whether this was a legally sufficient ground for refusing him the relief he sought.

In *Causley v LaFreniere,* 78 Mich App 250, 254–255, n 2; 259 NW2d 445 (1977), this Court addressed the apparent conflict in the authorities regarding the standard of review on appeals from orders for child support. As we explained in *Causley,* the lower court's decision is presumed correct,

and the appellant bears the burden of showing that decision to be clearly erroneous. However, because of the history of appellate review in equity, the appellant may establish clear error here more readily than in cases historically heard at law.

The evidence in the instant case regarding petitioner's loss of his job is ambiguous. The record is silent on the question of whether petitioner ever returned to the work site, under what circumstances he was informed that he had in fact lost his job, and whether he made any effort to regain it. However, on the evidence admitted, we cannot say that the lower court clearly erred in finding that petitioner's act in leaving the work site rendered him responsible, at least in part, for the loss of his employment. The question then becomes whether this is good cause for denying a reduction in child support.

The father's income is one of the factors to which a court must look when entertaining a petition for modification of child support. *McCarthy v McCarthy,* 74 Mich App 105, 109; 253 NW2d 672, 674 (1977). Indeed, this Court has speculated that "in some cases a reduction in income would compel a modification". See *Cymbal v Cymbal,* 43 Mich App 566, 568; 204 NW2d 235, 236 (1972). However, the father's duty to pay support is not limited by his income; the court may also look to the father's unexercised ability to earn. *Travis v Travis,* 19 Mich App 128, 130; 172 NW2d 491, 492 (1969). See also *Baird v Baird,* 368 Mich 536, 541; 118 NW2d 427, 429 (1962).

Although we have found no Michigan cases directly on point,[1] there is well-reasoned authority

[1] In the related but arguably distinguishable area of contempt proceedings to enforce support orders there is precedent from this

for the rule that voluntary reductions in income, *if made in bad faith,* will not warrant a modification of support payments. *Nelson v Nelson,* 225 Or 257; 357 P2d 536 (1960).[2] See also 89 ALR2d 7, 54–58, Anno: *Change in financial condition or needs of parents or children as ground for modification of decree for child support payments.* We also believe that no modification is warranted where the father voluntarily worsens his financial position through unconscionable disregard for the welfare of his dependents. *Cf. Cullimore v Laureto* and *Sword v Sword,* in footnote 1, *supra.* However, absent bad faith or willful disregard for the interests of the dependent children, a voluntary reduction of income is not an adequate reason for refusing modification of a support order.

In this case the lower court denied petitioner an adequate adjustment of support obligations solely

Court and the Supreme Court for viewing unrealized earning capacity in light of the father's state of mind. In *Cullimore v Laureto,* 66 Mich App 463; 239 NW2d 409 (1976), the Court reviewed a trial court order holding the defendant in contempt for failure to make support payments. MCLA 552.201; MSA 25.161. The trial judge had "found the defendant to be a recalcitrant, whether conscious or merely unconcerned". 66 Mich App at 465; 239 NW2d at 410. In affirming, the Court stated:

"The record amply supports a conclusion that this defendant comfortably accepts his unemployed status. Given the defendant's seven-year record of nonpayment and his self-proclaimed ability as a mechanic, it is difficult to dispute the judge's finding that he was able but unwilling to assume his support obligations." 66 Mich App at 466; 239 NW2d at 410.

The same issue was before the Michigan Supreme Court in *Sword v Sword,* 399 Mich 367, 379; 249 NW2d 88, 92 (1976), wherein the Court stated:

"If the judge concludes from the testimony of defendant and others that defendant has 'sufficient ability to comply with' the order or 'by the exercise of due diligence could be of sufficient ability, and has neglected or refused' to comply, defendant may be found in contempt of court."

[2] *Nelson* defined bad faith as follows:

"To find bad faith it would be necessary to show that defendant acted with a purpose of jeopardizing the interests of his children." 225 Or at 261; 357 P2d at 538.

because he had "at least * * * contributed" to his own unemployment problems. There was no finding, nor any evidence to support a finding, that petitioner had acted in bad faith or willful disregard of his children's needs. Accordingly, the lower court's order was clear error. The case is reversed and remanded for further consideration of Mr. Moncada's petition in light of the views expressed herein. No costs.

M. J. KELLY, P. J., concurs in the result only.

PEOPLE v HENDRIX

1. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—ROBINSON HEARING—PRODUCTION OF WITNESSES—DUE DILIGENCE.

A trial judge's finding at a *Robinson* hearing that although the prosecutor lacked due diligence in the production of a res gestae witness due diligence would not have produced the missing witness was error where the prosecution attempted to serve the subpoena only two days prior to trial and, had the police contacted the witness a reasonable time before trial, she would have known not to leave when she did for a two-week vacation and would have been available as a witness.

2. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—PRODUCTION OF WITNESSES—CUMULATIVE TESTIMONY.

An exception to the general rule requiring the production of res gestae witnesses exists where the testimony of the witness would be merely cumulative.

3. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—PRODUCTION OF WITNESSES—EVIDENCE—CUMULATIVE TESTIMONY—RELEVANT TESTIMONY.

The testimony of a res gestae witness who was not produced at trial would have been relevant and would not have been merely cumulative to that of three other witnesses who were produced where (1) a defendant was identified by the three witnesses as one of the perpetrators of a robbery, (2) there was no dispute that the robbery had taken place and therefore only the identity of the perpetrators was at issue, (3) the nonproduced witness had viewed the perpetrator from a unique vantage point, yet was unable to identify the defendant as the perpetrator, and (4) the missing witness's nonidentification of the defendant would have been in conflict with the identification testimony of those who did testify; therefore, the trial judge erred in his conclusion that the witness's testimony would have been merely cumulative.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 81 Am Jur 2d Witness § 2.

Appeal from Recorder's Court of Detroit, John P. O'Brien, J. Submitted December 13, 1977, at Detroit. (Docket No. 30564.) Decided January 24, 1978. Leave to appeal applied for.

Bobby J. Hendrix was convicted of assault with intent to rob being armed. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Principal Attorney, Appeals, and *Andrea L. Solak,* Assistant Prosecuting Attorney, for the people.

Campbell & McDonald, for defendant on appeal.

Before: N. J. KAUFMAN, P. J., and BRONSON and D. E. HOLBROOK, JJ.

PER CURIAM. Bobby Jack Hendrix was charged with assault with intent to murder, MCLA 750.83; MSA 28.278 (Count I) and assault with intent to rob being armed, MCLA 750.89; MSA 28.284 (Count II). A jury found him not guilty on Count I and guilty on Count II. He was sentenced to a 10 to 20 year prison term and appealed as of right.

On March 26, 1976, this Court in an unpublished per curiam opinion remanded the case for a "*Robinson* hearing".[1] On July 26, 1976, a *Robinson* hearing was held and the court found that due diligence would not have produced the missing witness and, further, that her testimony in any event would have been cumulative. Defendant appeals as of right from this decision.

The prosecutor's proofs indicated that on February 1, 1974, a Detroit tavern was robbed by three

[1] *People v Robinson,* 390 Mich 629; 213 NW2d 106 (1973).

armed men. An off-duty Detroit police officer was shot and wounded. The three men escaped. Defendant was arrested the next day. Various employees and patrons of the tavern testified as to the occurrences of February first. Defendant was identified by three of these witnesses. Some witnesses thought the defendant went to the back of the bar and held a gun on the cook and others testified that defendant sat at the bar and pulled out a gun and announced a robbery. Testimony was given by various witnesses that they saw the assailants fire their guns.

During the trial, defense counsel and the prosecutor stipulated that the robbery and assault had taken place and also stipulated that the only issue for the jury was the identity of the criminals.

At trial, the trial judge found that the prosecutor lacked due diligence in the production of the res gestae witness, Mrs. McMichael. The prosecutor admitted this to be true. The trial judge at the *Robinson* hearing found that due diligence would not have produced the missing witness. We do not agree.

The identity of Mrs. McMichael was known to the police and her name was indorsed on the information filed March 11, 1974. It can hardly be said to be a duly diligent effort by the prosecution to attempt to serve the subpoena only two days prior to trial on August 6, 1974. Had the police contacted Mrs. McMichael a reasonable time before trial, she would have known not to leave on August 3, 1974, for a two-week vacation and would have been available as a witness. Therefore, the trial judge erred in finding that due diligence would not have produced the missing witness.

An exception to the general rule requiring production of res gestae witnesses exists when the

testimony of the witness would be merely cumulative. *People v Cornell Harris,* 56 Mich App 267; 224 NW2d 57 (1974), *People v Gordon,* 60 Mich App 412, 416; 231 NW2d 409 (1975), *People v Keefe,* 69 Mich App 431; 245 NW2d 78 (1976).

The issue then becomes whether the testimony of Mrs. McMichael would be cumulative. After listening to the testimony of Mrs. McMichael at the *Robinson* hearing, the trial judge determined that her testimony would have been cumulative. We do not agree.

The cases of *People v Castelli,* 370 Mich 147; 121 NW2d 438 (1963) and *People v Gordon, supra,* are apposite. In *Castelli, supra,* three witnesses testified to a robbery and the robber's flight from the scene. The three corroborated each other in description of the robber and where he ran. According to a police report, another woman sitting in a nearby car told police that at that time and place she, too, saw a man running where the others testified that they had seen him. Her description of the man differed from that of the other witnesses. The Court stated in 370 Mich at 155 in part as follows:

"She was not called as witness by the people nor was her name indorsed on the information. The first that defendant or his counsel heard of her was at trial. The court stated that it did not appear from the police report that the witness had been able to get a good view or more than a fleeting glimpse of the running man or that she would be able to identify him and that, hence, it did not feel that the trial should be delayed so that she could be brought in to testify because it did not appear that her testimony would be helpful to either party. *Inasmuch as identity of the robber was a major issue in the case, the testimony of every witness who could describe him was of utmost importance. If, as the police report indicates, the description by one not called*

as a witness would be in conflict with that of those who did testify, defendant was entitled to the benefit thereof before the jury. Her testimony would not have been merely cumulative. Failure to indorse this woman's name on the information and to produce her at trial was reversible error." (Emphasis added.) (Citation omitted.)

Thus, in a case practically "on all fours" with the case at bar, the Michigan Supreme Court concluded the testimony of an additional res gestae witness as to the identity of a robber, which differed from that of three other witnesses who had identified defendant as the robber, was of the utmost importance, was not cumulative, and her failure to testify was reversible error.

In *People v Gordon, supra,* the res gestae witness whom the prosecutor failed to produce was one of several persons who had the opportunity to view the perpetrators of an unarmed robbery. The witness testified at the *Robinson* hearing that he had witnessed the robbery but at a lineup two days later he could not identify defendant Gordon as the perpetrator. This Court stated in part in 60 Mich App at 416:

"There has been no showing by the prosecutor of why the witness was not endorsed. Although the witness's testimony concerning the description of the robbery was cumulative, the fact that he had a favorable vantage point and yet was unable to subsequently identify the defendant was relevant testimony."

In the case at bar, defendant was identified as one of the perpetrators of the robbery by three witnesses. There was no dispute that the robbery and assault had taken place; only the identity of the perpetrators was at issue. The res gestae witness who was not produced at trial had viewed the

perpetrator from a unique vantage point when she handed him change at the bar, yet she was unable to identify defendant Hendrix as the perpetrator. Her testimony would thus have been relevant and would not have been merely cumulative in that her nonidentification of defendant would be in conflict with that of those who did testify. The trial judge therefore erred in his conclusion that Mrs. McMichael's testimony would have been merely cumulative.

Reversed and remanded.

PIERCE v RILEY

1. APPEAL AND ERROR—LAW OF THE CASE—SUBSEQUENT TRIAL.

A conclusion reached in an earlier appeal to the Michigan Supreme Court becomes the law of the case and is not subject to review on appeal from a subsequent trial; courts will not review former decisions made by the same court in the same cause and based on the same facts.

2. APPEAL AND ERROR—EQUITY—FINDINGS OF FACTS.

The Court of Appeals reviews equity cases *de novo* but will not disturb the trial court's findings unless convinced that a different result would have been reached had the Court occupied the trial court's position.

3. WATERS AND WATER COURSES—RIPARIAN RIGHTS—INLAND LAKES—USES—REASONABLENESS.

Reasonableness remains the criterion for use of water by riparian owners; where there are several owners to an inland lake, such proprietors and their lessees and licensees may use the whole lake for boating, swimming, fishing and other similar riparian rights, so far as they do not interfere with the reasonable use of the waters by other riparian owners.

4. WATERS AND WATER COURSES—RIPARIAN RIGHTS—ARTIFICIAL USES—REASONABLENESS.

Matters to be considered in determining whether a use of riparian rights is reasonable include (1) what the use is for, (2) its extent, duration, necessity, and its application, (3) the nature and size of the stream, and the several uses to which it is put, (4) the extent of the injury to the one proprietor, and of the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 991.

[2] 5 Am Jur 2d, Appeal and Error § 822.

[3] 78 Am Jur 2d, Waters § 54.

Rights of fishing, boating, bathing, or the like in inland lakes. 57 ALR2d 569.

[4] 78 Am Jur 2d, Waters § 286.

[5] 78 Am Jur 2d, Waters §§ 275, 276.

[6] 78 Am Jur 2d, Waters § 256.

benefit to the other, and (5) all other factors which may bear upon the reasonableness of the use.

5. WATERS AND WATER COURSES—RIPARIAN RIGHTS—INLAND LAKES AND STREAMS ACT—PROCEEDINGS—STATUTES.

There is nothing in the Inland Lakes and Streams Act that limits the rights of a riparian owner to institute proceedings in any circuit court of the state against any person when necessary to protect the owner's riparian rights (MCLA 281.961; MSA 11.475[11]).

6. EQUITY—COURTS—EQUITABLE SOLUTION—ECONOMIC BURDEN—DEVELOPMENT WITH ISSUE IN LITIGATION.

The Court of Appeals should not weigh the economic positions of the respective parties and consider the burden placed on each to arrive at an equitable and enlightened solution to an equity case where the economic burden of the defendants was caused by the defendants' decision to proceed with further development of a marina at their own risk while the issue of the reasonableness of the development was still in litigation.

Appeal from Oceana, Harold VanDomelen, J. Submitted November 3, 1977, at Grand Rapids. (Docket No. 31302.) Decided January 24, 1978. Leave to appeal applied for.

Complaint by Don Pierce and others in the Stony Lake Cottage Owners Association against Stanley D. Riley and others, individually and doing business as Holiday Shores on Stony Lake, to enjoin the defendants' unreasonable use of their riparian rights. Judgment for defendants. Plaintiffs appeal. Defendants cross-appeal. Reversed.

Peter W. Steketee and *Cholette, Perkins & Buchanan* (by *Don V. Souter),* for plaintiffs.

Walter A. Urick, for defendants.

Before: R. M. MAHER, P. J., and M. F. CAVANAGH and N. J. KAUFMAN, JJ.

PER CURIAM. The original complaint in this

action was filed in August, 1966. This is the fourth time the matter has come before this Court. Plaintiffs are owners of property on Stony Lake in Oceana County. They originally filed suit in circuit court seeking to enjoin defendants, also owners of land abutting Stony Lake, from granting right of way easements for lake access to nonriparian owners in a development called Holiday Shores. In June, 1967, the trial court dismissed plaintiffs' complaint, but this Court, on appeal, remanded for further consideration in light of *Thompson v Enz,* 379 Mich 667; 154 NW2d 473 (1967). See *Pierce v Riley,* 16 Mich App 419; 168 NW2d 309 (1969). *(Stony Lake I).*

On remand, the trial court again dismissed plaintiffs' complaint. This Court reversed that decision in *Pierce v Riley,* 35 Mich App 122; 192 NW2d 366 (1971), *(Stony Lake II),* and enjoined defendants from granting riparian rights to nonriparian owners. Defendants' proposed use of the lot as the site of a dredged channel was deemed unreasonable. The Supreme Court, on December 22, 1971, denied defendants' application for leave to appeal.

Plaintiffs then requested, at the trial court level, that the dredged area in the riparian lot be filled and the docks removed. The trial court refused the request, plaintiffs appealed, and in *Pierce v Riley (Supplemental Opinion)* 51 Mich App 504; 215 NW2d 759 (1974), *(Stony Lake III),* this Court ordered the filling of the channel.

On leave to appeal, the Supreme Court on June 27, 1974, reversed the Court of Appeals and ordered the circuit court to hold the cause in abeyance pending findings of fact and a decision by the Department of Natural Resources on an application by defendants pursuant to MCLA 281.951 *et*

seq.; MSA 11.475(1) *et seq.,* the Inland Lakes and Streams Act, and to grant appropriate relief thereafter. 392 Mich 765; 219 NW2d 434 (1974).

When the DNR had completed its review, the trial court made various findings: it held that the Court of Appeals decision finding defendants' originally proposed use of the riparian lot unreasonable *(Stony Lake II)* had not been reversed; that the Supreme Court order of June 27, 1974, found the Court of Appeals remedy in *Stony Lake III* (to refill and restore the channel) was inequitable relief; that, therefore, defendants were not required to fill the channel in the riparian lot but that they could still not grant riparian rights to the owners of nonriparian lots in Holiday Shores; and, finally, that defendants were not prohibited from using the riparian lot as a marina according to a lawful permit from the DNR. The court enjoined plaintiffs from exercising any administrative rights before the DNR.

On December 6, 1976, the trial court adopted most of the restrictions which defendants had unilaterally imposed on their use of the riparian lot, including a limitation on the number of boat slips (down from 100 to 60), a restriction on usage of the marina to only owners of the Holiday Shores subdivision, their families and guests, and a limitation allowing lot owners the right to dock no more than one boat at the marina. Plaintiffs appeal from this judgment. Defendants cross-appeal, requesting this Court to hold that defendants' present use of its recreational outlet is reasonable in light of the DNR's study and the circuit court opinions entered in this matter. Thus have we arrived at *Stony Lake IV.*

The core of the present controversy is the Supreme Court's Delphic order of June 27, 1974, 392

Mich 765. We do not construe that order as overruling either *Stony Lake I* or *Stony Lake II.* The use of the lot as described in *Stony Lake II* is still unreasonable. In its order, the Supreme Court concerned itself with the remedy, not the finding of unreasonableness. The law of *Stony Lake II* remains the law of the case. Defendants applied for leave to appeal the decision in *Stony Lake II,* an application which was denied by the Supreme Court. A conclusion reached in an earlier appeal to the Michigan Supreme Court becomes the law of the case and is not subject to review on appeal from a subsequent trial. *Leland v Ford,* 252 Mich 547; 233 NW 410 (1930), *Watkins v Gabriel Steel Co,* 268 Mich 264; 256 NW 333 (1934), *Detroit Power Screwdriver Co v Ladney,* 39 Mich App 629; 197 NW2d 857 (1972), *Allen v Michigan Bell Telephone Co,* 61 Mich App 62; 232 NW2d 302 (1975).

> "It is the well-settled rule that courts will not review former decisions made by the same court in the same cause, and on the same facts." *The People's Savings Bank v Eberts,* 96 Mich 396, 398; 55 NW 996 (1893).

The question, therefore, is not now subject to review on appeal to this Court.

Further uncertainty engendered by the Supreme Court's June 27 order pertains to the filling of the channel.

We do not agree with the trial court that the Supreme Court, by its order instructing the circuit court to hold the cause in abeyance pending findings of fact by the DNR, found the refilling and restoration of the channel to be inequitable relief. Granted, the order is subject to various interpretations, but we do not believe it foreclosed the trial court from considering the refilling of the channel as one of the possible remedies in this protracted

legal battle. It was error for the trial court to preclude the possibility from its consideration.

True, the DNR in making its findings found that, within limitations, the marina would have no adverse impact on the lake. But it is likewise true that the DNR's review of the matter concluded that filling the channel, should such a remedy be chosen, would not adversely affect Stony Lake, provided certain safeguards were effectuated. A permit is required for both the maintenance of a marina and the filling of the channel, a fact upon which the Supreme Court order does not comment.

The Inland Lakes and Streams Act, pursuant to which the DNR makes its findings, states that one of its purposes is to protect riparian rights and the public trust in inland lakes and streams. We must view the Supreme Court order from the perspective of the purpose of the act. In protecting the public trust, the Legislature was keeping watch over the environmental impact of various operations on inland lakes and streams.

It was sound business sense for defendants to apply for a permit to maintain a marina to which the DNR has given its stamp of approval. But the business acumen of defendants cannot preclude this Court from protecting the interests for which the Legislature had regard nor can it preclude plaintiffs from exercising their rights as riparian owners. The act explicitly states that it shall not modify the rights and responsibilities of any riparian owner to the use of his or her riparian water.

Accordingly, the DNR's approval of the marina does not end the matter. Its simultaneous approval of a landfill (undoubtedly because it was unable to interpret the Supreme Court's order) confronts us again with the question of a proper final remedy. The Court of Appeals reviews equity cases *de novo,*

but we will not disturb the trial court's findings unless we are convinced that we would have reached a different result had we occupied that court's position. *Pyne v Elliott,* 53 Mich App 419; 220 NW2d 54 (1974).

The original use contemplated by defendants called for the granting of easements to 90 nonriparian lot owners to and through the riparian lot, #91, in which a channel was built. In *Stony Lake II,* this Court found and it is the law of the case that such use is unreasonable, since the number of families having access to the lake would have increased 66% and the number of families per surface acre of lake would have increased from about 0.5 to 0.89. 35 Mich App at 124.

> "[T]he construction of 90 residences with ready access to the lake at all times, will not significantly decrease the number of people using the lake as members of the general public, but it will increase drastically the use of the lake by local residents, the people who put the heaviest burden on a lake this small in area." 35 Mich App at 127.

Reasonableness remains the criterion for use of water by riparian owners. When there are several owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating, swimming, fishing and other similar riparian rights, so far as they do not interfere with the reasonable use of the waters by other riparian owners. *Battle Creek v Goguac Resort Association, Ltd,* 181 Mich 241; 148 NW 441 (1914), *Burt v Munger,* 314 Mich 659; 23 NW2d 117 (1946), *Tobias v Tobias,* 345 Mich 263; 75 NW2d 802 (1956). *Cf. Botton v State,* 69 Wash 2d 751; 420 P2d 352 (1966), 3 Tiffany, Law of Real Property (3d ed), § 739, p 151.

In *Thompson v Enz, supra,* at 687, our Supreme Court propounded standards for determining what constitutes reasonable usage. See also, *Stony Lake I* and *Stony Lake II.* The factors there set forth must be applied suitably in each situation.

"No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injuries to the one proprietor, and the benefit to the other; and all other factors which may bear upon the reasonableness of the use."

In the instant case, that the DNR approved defendants' use of the channel as a marina does not *ipso facto* make that use reasonable in the circumstances, *i.e.,* where there are competing reasonable uses. It must be conceded that the trial court put certain restrictions on the use of the marina. We are, however, bound by and agree with the concept of reasonableness delineated in *Stony Lake II.*

The limitations imposed are irrelevant to the fact that, just as in *Stony Lake II,* the usage of the small lake will increase substantially because of the presence of a much larger number of persons, *viz.,* the Holiday Shores owners, with ready access to the lake. The particular usage proscribed in *Stony Lake II* is not significantly changed through the concept of a marina. Indeed, defendants assert that from the outset the channel has been advertised as and used as a marina. This only enforces a finding that if the channel was being so used at the time of *Stony Lake II,* such usage continues to be unreasonable. The present marina concept

"drastically increases the use of the lake by local residents, the people who put the heaviest burden on a lake this small in area". 35 Mich App at 127.

The DNR report itself noted on page 9 that "[t]here will predictably come a time when the scope of use presently deemed reasonable will become unreasonable". Neither we nor plaintiffs are bound by the DNR's findings as to present reasonableness. The Inland Lakes and Streams Act specifies that nothing in the act limits the right of a riparian owner to institute proceedings in any circuit court of the state against any person when necessary to protect his or her riparian rights. MCLA 281.961; MSA 11.475(11).

The only effective relief in this case is the refilling and restoration of the channel. The DNR has reported, pursuant to the Supreme Court order, that such action will have no adverse impact on Stony Lake if the department's recommendations are followed.

Refilling the channel is the only way in which all riparian owners will be able to make a reasonable use of the lake without interfering with the rights of others. Only by refilling the channel can this protracted litigation be ended; another remand would simply lead to more proposed uses for the channel. The problem, however, lies as much in the fact that the channel is used at all as it does in the way the channel is used. Providing residents of Holiday Shores with a means of ready access places an undue burden on the lake which unreasonably interferes with the rights of other riparian owners.

We are not unaware that use of the channel is no longer proposed, but is now reality. Defendants chose to proceed with the development at their own risk while the issue was still in litigation.

They cannot now ask us to be persuaded by a factor they have intentionally created. Courts do well, in cases of this sort, to weigh the economic positions of the respective parties and consider the burdens placed on each to arrive at an equitable and enlightened solution. But defendants have so imposed the economic burden on themselves that it would be inappropriate for this Court to take it into account.

We therefore order defendants to fill the channel in compliance with a permit issued by the Department of Natural Resources. Guidelines provided by the department must be followed. These include provision for a silt screen or some other suitable measure to reduce the drift of fill material into the lake proper. In addition erosion control measures, such as sodding, seeding, revegetation and riprap, must be implemented.

The judgment of the trial court is reversed.

IN THE MATTER OF AMENDMENT OF PLAT OF SEQUANOTA HEIGHTS

(BELFY v KRCHAK)

STATUTES—PLATS—VACATION OF PLATS—AMENDMENT OF PLATS—CONSTRUCTION OF STATUTES—STANDING.

The statute which sets forth the requirements of who has standing to apply to a circuit court to "vacate, correct, alter or revise" a recorded plat contains a conflict as to whether such action may be brought by a single lot owner in a subdivision or whether two-thirds of the landowners must join in the action; a rule of statutory construction that whenever possible all portions of a statute should be given effect leads to a construction which allows standing to the owner of a single lot as well as to a group of two-thirds of the lot owners if such a group should bring an action; this construction is further reinforced by the presence of a section which confers standing upon a single lot owner to bring an action to "amend" a plat (MCLA 560.222; MSA 26.430[222]).

Appeal from Charlevoix, Martin B. Breighner, J. Submitted June 14, 1977, at Grand Rapids. (Docket No. 31322.) Decided January 24, 1978.

Complaint by John Belfy, Audrey Belfy, and others against George Krchak, Sylvia Krchak, and others to amend a recorded subdivision plat. Accelerated judgment for defendants. Plaintiffs appeal. Reversed and remanded.

Michael D. Lewis, for plaintiffs.

Hoffman & Hoffman, for defendants George Krchak, Sylvia Krchak and Eveline Township.

REFERENCE FOR POINTS IN HEADNOTE

82 Am Jur 2d, Zoning and Planning § 343.

Before: M. J. KELLY, P. J., and M. F. CAVANAGH and J. R. ROOD,* JJ.

PER CURIAM. Plaintiffs brought this action seeking to amend the plat of the Sequanota Heights subdivision to widen a private road and decrease the size of certain lots. Plaintiffs are the proprietors of lots 10, 11, and 12 of this 16-lot subdivision. Defendants Krchak are the owners of lots 8 and 9; defendants Marme own lots 1, 14, 15, and 16.

According to plaintiffs' complaint, a private road 20 feet in width is located between lots 7 and 8 along the southern boundaries of lots 9 through 16. This road is impassable in winter and contains 90-degree turns which prohibit snow removal and service to plaintiffs' lots by fire trucks and other emergency vehicles. Plaintiffs averred that to correct these alleged defects the road had to be widened to a minimum of 40 feet and lots 7 through 16 each reduced in size by 20 feet along the boundary of the road.

The several defendants answered, denying plaintiffs' allegations, and also moved for accelerated judgment claiming that since 2/3 of the subdivision's property owners had not signed plaintiffs' petition, plaintiffs lacked standing.

The trial court held that since this Court had construed MCLA 560.222; MSA 26.430(222) to require 2/3 of the property owners to join in a petition to vacate a plat, plaintiffs' petition must be dismissed. From this grant of accelerated judgment, plaintiffs appeal as of right.

A reading of the relevant statutory provisions discloses the problem herein:

* Former circuit judge, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

"Sec. 221. The circuit court may as provided in sections 222 to 229:

"(a) Order a recorded plat to be amended by a change in a dimension which results in changing the size or shape of any part of the plat.

"(b) The circuit court may vacate, correct, alter or revise all or any part of a recorded plat." MCLA 560.221; MSA 26.430(221).

"Sec. 222. (1) To amend a recorded plat, the proprietor of the subdivision or any lot in the subdivision may apply to the appropriate circuit court.

"(2) To vacate, correct, alter or revise a recorded plat or any part of it, the proprietor of a subdivision or any lot in a subdivision; the governing body of a municipality which considers it necessary or advisable in the interests of the welfare, health or safety of its citizens; 2/3 of the proprietors collectively, of lands in the subdivision, and who also own 2/3 by area of the lands may apply to the appropriate circuit court." MCLA 560.222; MSA 26.430(222).

There is an obvious conflict between the portion of MCLA 560.222(2) before the first semicolon, allowing the proprietor of any lot in a subdivision to bring an action, and the portion of MCLA 560.222(2) after the last semicolon, requiring 2/3 of the landowners to join in an action.

The trial court resolved this conflict against the plaintiffs based upon this Court's decisions in *Feldman v Monroe Township Board,* 51 Mich App 752; 216 NW2d 628 (1974), *lv den* 391 Mich 837 (1974), and *In re Vacation of Plat of Mollie Britton Estate,* 57 Mich App 468; 226 NW2d 526 (1975). In both of those cases the 2/3 requirement was held to be a prerequisite to standing. However, the majority opinion in *Britton, supra,* offers a well-reasoned critique of *Feldman, supra,* in the following language:

"Looking into my somewhat murky crystal ball I

think that something like the following occurred. When the act was written the 2/3 language was taken out of old § 63 and put into the section governing standing. Then, probably because the Supreme Court regarded it as unconstitutional, the provision making it mandatory that the court grant the relief prayed for was eliminated. However, due to an oversight the 2/3 language was left in the statute. Perhaps, as the plaintiff suggests, the Legislature meant to shift the burden of proof when the 2/3 requirement was met. However, the Legislature left out any mention of what significance the 2/3 requirement would have.

"I also think that a comparison of the language used in subsection 1 of § 222 with the language of subsection 2 is instructive. Subsection 1 confers standing on the proprietor of the subdivision or any lot in the subdivision. Subsection 2 uses the same language and then lists others who have standing. It seems to me that the Legislature meant that a larger class was to have standing under subsection 2 than under subsection 1. Yet, under *Feldman* the class in subsection 2 is narrowed.

"I agree with *Feldman* that the statute is inartfully drafted. I also agree that it is unlikely that the Legislature added the 2/3 language only to have it negated by the earlier language. However, I would point out that it is equally unlikely that the Legislature would confer standing on a proprietor of a lot only to have it taken away by a later clause.

"The rule of statutory construction that whenever possible all portions of the statute should be given effect is violated by *Feldman*. It is not necessary to find a conflict between two portions of the statute. Effect can be given to both provisions if the statute is interpreted as it is written. Granted not many people will ever make use of the 2/3 provision but at worst this approach treats surplusage as surplusage. The *Feldman* approach uses surplusage to reach a result contrary to the legislative intent." 57 Mich App at 471–472.

To us, this construction is preferable. We are free to adopt it as the denial of leave by the

Supreme Court in *Feldman, supra,* does not constitute an affirmance.

We are further persuaded that this is the better interpretation of the statute in light of the unequivocal language of § 222(1). Here, plaintiffs, defendants, and the trial court all treated plaintiffs' petition as it was named: a petition to amend the plat. Under § 222(1), petitioners clearly have standing to amend a recorded plat. Because of the statute's failure to define any distinction between "amending" and "vacating, correcting, altering or revising", we prefer not to base our interpretation solely upon the terminology which a petitioner utilizes.[1] The presence of that section, however, reinforces a construction of the statute which would confer standing upon these plaintiffs. Each of them is a proprietor of a lot in the subdivision and each would be affected by the proposed amendment to the plat. The statute should not be interpreted in a manner which denies them the opportunity of having a court review the merits of their petition.

The judgment below is reversed and the cause is remanded for trial. No costs.

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[1] Further reference to the problem relating to the lack of definition of terms in the act appears in Cunningham, *Public Control of Land Subdivision in Michigan: Description and Critique,* 66 Mich L Rev 3, 75 (1967).

PEOPLE v ROBERT L. THOMPSON

1. SEARCHES AND SEIZURES—AUTOMOBILES—TRAFFIC VIOLATION—SUSPICION OF OTHER OFFENSE.

   A general search of an automobile by police after a stop for a traffic violation is not justified where there is no suspicion of an offense other than the traffic violation.

2. SEARCHES AND SEIZURES—AUTOMOBILES—PROBABLE CAUSE—SEARCH INCIDENT TO ARREST.

   A police officer was justified in searching a defendant's automobile where the defendant was stopped for a traffic violation and upon approaching the defendant, who was standing outside his automobile, the officer detected the smell of burning marijuana, placed the defendant under arrest, and searched his person, finding marijuana and a large sum of money; the officer had reasonable cause to believe that the automobile contained more contraband or additional evidence of possession or use of marijuana.

3. SEARCHES AND SEIZURES—AUTOMOBILES—INVESTIGATIVE STOP—REASONABLENESS.

   Reasonableness is the test that is to be applied for both the stop of and the search of moving motor vehicles; said reasonableness will be determined from the facts and circumstances of each case; fewer foundation facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved, and a stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police.

Appeal from Ingham, Jack W. Warren, J. Submitted December 8, 1977, at Lansing. (Docket No. 31352.) Decided January 24, 1978.

REFERENCES FOR POINTS IN HEADNOTES

[1] 68 Am Jur 2d, Searches and Seizures §§ 39, 68.
[2] 68 Am Jur 2d, Searches and Seizures §§ 45, 58, 99.
[3] 68 Am Jur 2d, Searches and Seizures § 16.

Robert L. Thompson, Jr., was convicted of possession of heroin and possession of cocaine. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *John E. Steele,* Assistant Prosecuting Attorney, for the people.

Kenneth A. Birch, for defendant on appeal.

Before: R. B. BURNS, P. J., and ALLEN and R. M. MAHER, JJ.

PER CURIAM. On the morning of February 18, 1974, defendant was arrested and charged with possession of marijuana, MCLA 335.314(c); MSA 18.1070(14)(c), MCLA 335.341(4)(d); MSA 18.1070(41)(4)(d), possession of heroin, MCLA 335.306; MSA 18.1070(6), MCLA 335.314(b); MSA 18.1070(14)(b), MCLA 335.341(4)(a); MSA 18.1070(41)(4)(a), and possession of cocaine, MCLA 335.316; MSA 18.1070(16), MCLA 335.341(4)(b); MSA 18.1070(41)(4)(b). A fourth count was dropped. Defendant pled guilty to possession of marijuana. He received and served a 90-day sentence.

After a motion to suppress the evidence and a motion for reconsideration of the motion to suppress were both denied, a jury convicted defendant of possession of heroin and possession of cocaine. Defendant appeals, seeking reversal of the trial court's denial of his motion to suppress and requesting a new trial.

Defendant had been validly stopped by state police for traffic violations. The officer who approached defendant as he was standing outside his car smelled burning marijuana. He arrested defendant, searched him and found six marijuana

cigarettes. The officer then searched defendant's vehicle, finding suspected controlled substances in a small black leather coin purse in the console.

It is the search of his automobile which defendant contests. The initial stop of defendant's car, for traffic offenses, was valid. *People v Whalen,* 390 Mich 672; 213 NW2d 116 (1973). But when there is no suspicion of an offense other than the traffic violation, a stop does not warrant a general search of the automobile. *People v Gonzales,* 356 Mich 247; 97 NW2d 16 (1959), *People v Marshall,* 25 Mich App 376; 181 NW2d 578 (1970).

The police action at issue, however, is more than a general search accompanying a traffic stop. After defendant was stopped, the state police officer detected the smell of burning marijuana and validly placed defendant under arrest. Probable cause existed for the officer to believe a crime was being committed in his presence. *People v Parisi,* 46 Mich App 322; 208 NW2d 70 (1973), *rev'd on other grounds,* 393 Mich 31; 222 NW2d 757 (1974), *People v Hilber,* 69 Mich App 664; 245 NW2d 156 (1976), *People v Ridgeway,* 74 Mich App 306; 253 NW2d 743 (1977).

The search of defendant's person incident to the arrest was also valid. *Chimel v California,* 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), *People v Hall,* 57 Mich App 553; 226 NW2d 562 (1975). While it is true that *People v Hilber, supra,* holds that the smell of marijuana does not justify a search of the vehicle without a warrant, the officer here relied on more than the smell of marijuana. The search of defendant's person incident to his arrest produced six marijuana cigarettes and a large sum of money. These facts, together with the knowledge that defendant had recently been in his car with access to the console, were sufficient to

give the officer probable cause to believe the console contained more contraband or additional evidence of possession or use of marijuana.

We note that the search in this case was of a motor vehicle. The standard used to determine the validity of such a search was enounced in *People v Whalen, supra.*

"1. Reasonableness is the test that is to be applied for both the stop of, and the search of moving motor vehicles.

"2. Said reasonableness will be determined from the facts and circumstances of each case.

"3. Fewer foundation facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved.

"4. A stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police." 390 Mich at 682.

Applying the *Whalen* standard in this case, we find that the officer possessed sufficient evidence and information on which to make a warrantless search of defendant's automobile.

We deem defendant's other assignments of error to be without merit. See *Crampton v 54-A District Judge,* 397 Mich 489; 245 NW2d 28 (1976), *People v Goans,* 59 Mich App 294; 229 NW2d 422 (1975), *People v Burrell,* 21 Mich App 451; 175 NW2d 513 (1970), *People v McPherson,* 38 Mich App 534; 197 NW2d 173 (1972).

Affirmed.

GUERRERO v BRIGHTON ATHLETIC ASSOCIATION

1. WORKMEN'S COMPENSATION—AWARD—INTEREST—STATUTES.

A workmen's compensation award is grounded in contract, and is not a money judgment, therefore, the interest rate on an award is 5%, the statutory contract rate, and not 6%, the money judgment rate (MCLA 438.31; MSA 19.15[1]).

2. WORKMEN'S COMPENSATION—ENFORCEMENT OF AWARDS—APPEAL AND ERROR—EVIDENCE—ADMISSIONS.

A trial judge's refusal, in an action to enforce a workmen's compensation award, to permit any testimony by the individual defendants directed to the question of who were the officers and directors of the defendant association at the time the plaintiff was injured was error where (1) the trial judge relied upon a 1973 annual corporation report to establish the identities of the individual officers and directors to be liable, (2) that report was filed after the injury occurred, (3) the 1972 report, which was the last one filed prior to the injury, lists two directors not shown on the 1973 report, and (4) the trial judge concluded that the defendants' answer, in which they admitted the *existence* and *content* of the records, precluded them from asserting that the officers or any of them, were not in fact the proper defendants.

Appeal from Shiawassee, Peter J. Marutiak, J. Submitted October 12, 1977, at Lansing. (Docket Nos. 31374, 31375.) Decided January 24, 1978.

Complaint by Juan F. Guerrero against the Brighton Athletic Association, also known as Brighton Athletic Club, Inc., and A. David Marsh, Dale Leming, Fred Dymond, George Kirchner,

REFERENCES FOR POINTS IN HEADNOTES

[1] 45 Am Jur 2d, Interest and Usury §§ 63, 64, 68, 74.
81 Am Jur 2d, Workmen's Compensation § 4.

[2] 82 Am Jur 2d, Workmen's Compensation §§ 553, 565–568, 631.

Skip Davis, Ernie Buck and Tom Jarvis, to enforce an award of workmen's compensation. Judgment for plaintiff. Defendants appeal. Affirmed in part, reversed in part and remanded.

Russell O. Vail, for plaintiff.

Marston, Sachs, Nunn, Kates, Kadushin & O'Hare, P. C. by *(David K. Barnes),* for defendants.

Before: DANHOF, C. J., and ALLEN and H. L. HEADING,* JJ.

PER CURIAM. This is an appeal from a circuit court proceeding to enforce a workmen's compensation award entered on May 30, 1975. Defendant association failed to appear and defend against the workmen's compensation claim and also failed to appeal timely from the award entered thereon. A motion for delayed appeal to the Workmen's Compensation Appeal Board was denied on February 20, 1976, and on June 8, 1977, this Court denied leave to appeal from that denial.

Plaintiff commenced the present action to enforce the award[1] in circuit court pursuant to § 863 of the Worker's Disability Compensation Act, MCLA 418.863; MSA 17.237(863), and, on December 14, 1976, the trial court entered judgment for plaintiff as follows:

"It is further ORDERED, that upon entry of this ORDER FOR JUDGMENT, Plaintiff may immediately proceed and liquidate the Defendant, Brighton Athletic

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

[1] Plaintiff was awarded $94 per week for 215 weeks, for loss of industrial use of his leg, plus reimbursement of plaintiff's hospital and medical expenses in the amount of $1,201.88.

Club, Inc., and account to the Court for proceeds received, and if any portion is returned unsatisfied and then immediately proceed against all other Defendants, jointly and severally, until said ORDER FOR JUDGMENT is satisfied."

On appeal defendants raise several claims of error, only two of which we need address. First, we are of the opinion that the circuit judge erred in enforcing the referee's award of interest at the rate of 6% per annum. The rate of interest is unrelated to the underlying merits of the compensation award, and therefore the rule of *Simm v Dearborn,* 54 Mich App 263, 265; 220 NW2d 768 (1974), does not fetter the trial court's discretion to amend the referee's award by incorporating the proper statutory rate of interest in the judgment entered thereon. It is clear from a careful reading of *Solakis v Roberts,* 395 Mich 13, 18–22; 233 NW2d 1 (1975), that no question of retroactivity is here involved; the Court in Solakis merely "restated" the rule first announced in *Wilson v Doehler-Jarvis Division of National Lead Co,* 358 Mich 510; 100 NW2d 226 (1960), that a workmen's compensation claimant has a *contractual* right to interest on his award at the rate of 5% pursuant to MCLA 438.31; MSA 19.15(1).

In framing the judgment entered below, the trial judge relied upon a 1973 annual corporation report to establish the identities of the individual officers and directors to be liable. That report was filed after the injury occurred. The 1972 report, which was the last one filed prior to the injury, lists two directors not shown on the 1973 report. The trial judge concluded that defendants' answer, in which they admitted the *existence* and *content* of the records, precluded them from asserting that the officers and directors shown on the 1973 re-

port, or any of them, were not in fact the proper defendants. He therefore refused to permit any testimony directed to the question of who were officers and directors of the association when the injury occurred. In this the trial judge erred, and a remand is required to determine this question. At most, defendants can be said to have admitted that the 1973 report containing the names listed thereon existed at a date subsequent to the time of plaintiff's injury, according to the date shown on the report itself. Defendants did not thereby necessarily admit that they were officers or directors of the defendant association at the time plaintiff suffered injury, as alleged by plaintiff. The trial judge should have granted defendants' request for a hearing to determine who were the officers and directors of defendant association at the time of plaintiff's injury, and on remand he shall do so if the judgment properly entered against the association is returned unsatisfied and enforcement of the award as against the individual officers and directors is sought by plaintiff pursuant to MCLA 418.647; MSA 17.237(647).

Our disposition makes it unnecessary to decide whether the judgment entered, which permitted plaintiff to proceed against the individual defendants only after any portion of the judgment against the association was returned unsatisfied, complied with the requirements of *Wyrybkowski v Cobra Pre-Hung Doors, Inc,* 66 Mich App 555; 239 NW2d 660 (1976). A separate enforcement proceeding against the individual defendants will now be necessary in any event.

Nor is it necessary for us to consider for the first time on appeal[2] defendants' collateral attack, on

[2] The circuit court did not rule on defendants' due process arguments because it concluded that it was precluded from doing so under MCLA 418.863; MSA 17.237(863), which provides simply that the

due process grounds, on the compensation award that plaintiff sought to enforce in circuit court. If the individual defendants again attempt to raise their due process claim on remand, however, the circuit court should determine whether such a claim may be raised for the first time in an enforcement proceeding.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. No costs, neither party having prevailed in full.

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circuit court "shall render judgment in accordance * * * [with the award] unless proof of payment is made". *See Simm v Dearborn,* 54 Mich App 263; 220 NW2d 768 (1974).

Although we express no opinion on the question, it appears that the gist of defendants' claim was that the want of due process alleged deprived the referee of personal jurisdiction to render an award enforceable as against the individual defendants, and that therefore the award was void and unenforceable as to them. If that were true, the individual defendants would not be foreclosed from raising such a claim to bar enforcement of the award as against them. *See generally,* 49 CJS, Judgments, § 421, pp 822, 828, § 422, p 828.

DOCHOD v CENTRAL MUTUAL INSURANCE COMPANY

1. INSURANCE—INSURERS—DUTY TO DEFEND—ALLEGATIONS IN COMPLAINT.

   The duty of an insurer to defend an action brought by a third party against the insured depends upon the allegations in the complaint of the third party.

2. INSURANCE—INSURERS—DUTY TO DEFEND—DUTY TO PAY.

   The duty of an insurer to defend an action brought against the insured by a third party is severable from the duty to pay; that an insurer may ultimately be found not liable is a matter separate and apart from its obligation to defend the insured.

3. INSURANCE—INSURERS—DUTY TO DEFEND—THEORIES OF RECOVERY.

   An insurer's duty to defend its insured extends to the defense of actions of the nature and kind covered by the policy, and the insurer has a duty to defend, despite theories of liability asserted against the insured which are not covered under the policy, if there are any theories of recovery that fall within the policy.

4. INSURANCE—AMBIGUITIES IN POLICY—RESOLUTION AGAINST INSURER.

   Ambiguities in an insurance policy are to be resolved against the insurer and most favorably to the premium-paying insured.

5. INSURANCE—INSURERS—DUTY TO DEFEND—INTENTIONAL ACT OF INSURED—ALLEGATIONS OF COMPLAINT—NEGLIGENCE.

   An insurer has a duty to defend its insured in an action brought against the insured by a third party even though the insured admits and it is stipulated that the insured inflicted injury upon the third party intentionally and the policy excludes liability for intentional acts of the insured where the complaint asserts, among several causes of action, negligence, which comes within the coverage of the insurance policy.

REFERENCES FOR POINTS IN HEADNOTES

[1–5] 44 Am Jur 2d, Insurance §§ 1538–1542.

Allegations in third person's action against insured as determining liability insurer's duty to defend. 50 ALR2d 458.

Appeal from Kent, R. Stuart Hoffius, J. Submitted November 1, 1977, at Grand Rapids. (Docket No. 77-378.) Decided January 24, 1978.

Complaint by John Dochod against Central Mutual Insurance Company for recovery of the costs of defending an action for damages brought against the plaintiff by a third party which the defendant refused to defend, and for damages for mental suffering. Judgment for plaintiff. Defendant appeals. Affirmed.

Reamon, Williams, Klukowski & Craft, P. C. (by *William G. Reamon* and *Themis J. Fotieo),* for plaintiff.

Hillman, Baxter & Hammond (by *Joel M. Boyden* and *Phillip J. Nelson),* for defendant.

Before: R. M. MAHER, P. J., and M. F. CAVANAGH and N. J. KAUFMAN, JJ.

PER CURIAM. Defendant appeals as of right from a January 19, 1977, judgment awarding plaintiff damages in the amount of $2,371, together with interest and costs, following a nonjury trial.

The case arises from an incident which occurred in the early morning hours of July 28, 1974, when John Womble was struck and injured by an automobile driven by the plaintiff in this matter, John Dochod. At approximately 11 p.m. on the preceding evening, plaintiff had met several friends, including John Womble, at "Nutsy's Pub". After having several drinks at the bar, the group proceeded to the home of Jerome Keller where more drinks were consumed.

As time went on, Dochod and Womble had a

sharp disagreement which turned into a fight. After losing this scuffle, plaintiff left the Keller home, went to his own house, obtained two handguns and returned to Keller's about 15 to 20 minutes later. Following a heated discussion with Jerome Keller, plaintiff again drove from the scene, threw one of the guns down a sewer manhole and put the other in the trunk of his car. He then returned to the Keller home.

Shortly after his return, Dochod again became involved in a dispute with Womble. It is apparent from the testimony that Womble tried to reach for Dochod while plaintiff sat in his car. Dochod pulled away in the car and then tried to back into Womble as he lay in the street. Plaintiff finally hit him with the car after several passes.

On July 31, 1975, Womble filed suit against Dochod. The three count complaint asserted causes of action in negligence, wilful and wanton misconduct or gross negligence and assault and battery.

The incident was reported by plaintiff to his insurance company, which declined to accept the tendered defense of *Womble v Dochod* due to the fact that during its investigation, which occurred before the commencement of Womble's suit, Dochod informed Central Mutual that he had intentionally struck Womble. Central Mutual's decision not to defend Dochod was based upon a provision in the insurance contract which excluded any application of the contract in cases in which the bodily injury complained of was caused intentionally by the insured.

Dochod then retained private counsel to defend him in the action brought by Womble. Plaintiff also commenced the present action seeking to recover the costs of his defense in the case of *Womble v Dochod* and seeking damages for mental

suffering. Dochod alleged that defendant had wrongfully refused to assume his defense.

The matter was submitted to the court sitting without a jury on the basis of stipulated facts. It was stipulated that for purposes of this particular case it could be assumed that a finder of fact would determine that the actions of John Dochod were intentional within the relevant provisions of the policy issued by defendant. The trial court found that defendant had wrongfully refused to defend plaintiff in his prior action and accordingly judgment was entered for plaintiff. From this judgment, defendant appeals.

In Michigan the duty of the insurer to defend the insured depends upon the allegations in the complaint of the third party in his or her action against the insured. *Guerdon Industries, Inc v Fidelity & Casualty Company of New York,* 371 Mich 12; 123 NW2d 143 (1963), 7A Appelman, Insurance Law and Practice, § 4683.

"The insurer's duty to defend under an insurance contract is measured by the allegations in the pleadings of the person who is suing the insured, *Guerdon Industries, Inc. v Fidelity & Casualty Company of New York, [supra],* * * * and is not dependent on the insurer's ultimate liability to pay. * * * *City Poultry & Egg Co v Hawkeye Casualty Co,* 297 Mich 509; 298 NW 114 (1941) * * * . The insurer's duty to defend is not limited to meritorious suits * * * and may even extend to actions which are groundless, false, or fraudulent, * * * so long as the allegations in the action against the insured even arguably come within the policy coverage. * * * The insurer is under a duty to defend if the complaint alleges facts constituting a cause of action within the insurance coverage, even if other facts constituting causes of action not covered by the policy are also alleged." *Space Conditioning, Inc v Insurance Company of North America,* 294 F Supp 1290, 1293 (ED Mich, 1968).

When considering whether the insurer has a duty to defend the insured, it must be remembered that the duty to pay is severable from the duty to defend. *Zurich Insurance Co v Rombough,* 384 Mich 228; 180 NW2d 775 (1970). The one is not dependent on the other. That an insurer may ultimately be found not liable, therefore, is a matter separate and apart from its obligation to defend the insured.

In the instant case, Womble asserted three counts in his complaint against Dochod. At least one of those counts, the claim for negligence, comes within the coverage of plaintiff's insurance policy. The duty to defend extends to the defense of actions of the nature and kind covered by the policy, irrespective of what the ultimate finding may be. *Zurich Insurance Company v Rombough, supra.* Hence, an action for negligence is one to which Central Mutual's duty to defend extends.

There was at least one count, for assault and battery, which was quite clearly excluded from coverage by a clause in the policy. But an insurer has a duty to defend, despite theories of liability asserted against an insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *The Western Fire Insurance Co v J R Snyder, Inc,* 76 Mich App 242; 256 NW2d 451 (1977).

Moreover, the competing provisions of the policy, that which excludes coverage for intentionally caused injuries and that which provides coverage for negligently inflicted harm, produce an ambiguity. Ambiguities in an insurance policy are resolved against the insurer. *Nickerson v Citizens Mutual Insurance Co,* 393 Mich 324; 224 NW2d 896 (1975). Our Supreme Court examined similarly competing provisions in *Zurich Insurance Co v*

Rombough, supra, and concluded that the insurer in such a situation is still obliged to defend. Relying upon the language of Justice Tobriner in *Gray v Zurich Insurance Co,* 65 Cal 2d 263; 54 Cal Rptr 104; 419 P2d 168 (1966), the Court noted that ambiguous policy provisions must be decided against the insurance company and most favorably to the premium-paying insured. 384 Mich at 232.

Appellant Central Mutual argues that this case is distinguishable from the class of cases dealing with an ambiguous policy resulting from competing provisions. In this case, it was stipulated and plaintiff Dochod admitted that his actions were intentional. Therefore, Central Mutual claims, it relieved itself of a duty to defend. An insurer's duty to defend, however, is predicated not on facts disclosed by an insurer's independent investigation which indicates or even proves noncoverage, but only upon allegations in the complaint against the insured. See *Campidonica v Transport Indemnity Co,* 217 Cal App 2d 403; 31 Cal Rptr 735 (1963), *McFadyen v North River Insurance Co,* 62 Ill App 2d 164; 209 NE2d 833 (1965), *Missionaries of the Company of Mary, Inc v Aetna Casualty & Surety Co,* 155 Conn 104; 230 A2d 21 (1967), *Employers' Fire Insurance Co v Beals,* 103 RI 623; 240 A2d 397 (1968).

As Judge Learned Hand has stated, the duty to defend means

> "that the insurer will defend the suit, if the injured party states a claim, which, qua claim, is for an injury 'covered' by the policy; it is the claim which determines the insurer's duty to defend; and it is irrelevant that the insurer may get information from the insured, or from any one else, which indicates, or even demonstrates, that the injury is not in fact 'covered.'" *Lee v*

Aetna Casualty & Surety Co, 178 F2d 750, 751 (CA 2, 1949).

At most, the stipulation makes the issue of plaintiff's insurance coverage ambiguous. The policy coverage provision, which favors the insured, and the stipulation, which does not, are at odds. We deem it reasonable in this situation to follow Michigan policy as to insurance contracts and resolve any doubts in favor of the insured.

Central Mutual was under an obligation to defend plaintiff and wrongfully refused to do so. The judgment of the trial court is affirmed. Costs to appellee.

PEOPLE v JOHNSON

1. ARREST—CRIMINAL LAW—ARREST WITHOUT WARRANT—INVESTIGATORY STOPS—CRIMINAL ACTIVITY AFOOT—PROBABLE CAUSE.

   Probable cause to arrest without a warrant is not necessary for an investigatory stop; what is necessary is a reasonable belief that criminal activity may be afoot.

2. ARREST—CRIMINAL LAW—ARREST WITHOUT WARRANT—PROBABLE CAUSE—STATUTES.

   Any peace officer may, without a warrant, arrest a person when a felony has been committed and he has reasonable cause to believe such person committed it (MCLA 764.15[c]; MSA 28.874[c]).

3. ARREST—CRIMINAL LAW—ARREST WITHOUT WARRANT—PROBABLE CAUSE.

   The reasonable or probable cause required to support an arrest without a warrant stems from some fact, circumstance, or information which creates an honest belief in the mind of a reasonable, prudent man that the person arrested has committed a felony; actual facts creating an actual belief can alone give rise to probable cause.

4. ARREST—CRIMINAL LAW—ARREST WITHOUT WARRANT—SUSPICION OF CRIMINAL ACTIVITY—PROBABLE CAUSE.

   A suspicion of criminal activity is an insufficient basis on which to justify an arrest without a warrant.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4] 5 Am Jur 2d, Arrest §§ 44, 45.
What constitutes probable cause for arrest—Supreme Court cases. 28 L Ed 2d 1978.
[2] 5 Am Jur 2d, Arrest § 24 *et seq.*
[5] 68 Am Jur 2d, Search and Seizure §§ 37, 93.
[6, 7] 68 Am Jur 2d, Search and Seizure §§ 84, 85, 89–91.
Constitutionality of searching premises without search warrant as incident to valid arrest—Supreme Court cases. 23 L Ed 2d 966.
[7] 68 Am Jur 2d, Search and Seizure § 88.
[8] 29 Am Jur 2d, Evidence § 425.
Modern status of rule governing admissibility of evidence obtained by unlawful search and seizure. 50 ALR2d 531.

5. ARREST—CRIMINAL LAW—ARREST WITHOUT WARRANT—PROBABLE CAUSE—AFTER-ACQUIRED FACTS.

Information obtained after an arrest without a warrant can have no bearing on the determination of probable cause to make the arrest; therefore, a defendant's statements and articles discovered after a search of his person are not articulable facts giving the police probable cause to make the arrest.

6. ARREST—CRIMINAL LAW—ARREST WITHOUT WARRANT—PROBABLE CAUSE—PERSON'S HOME—FORCIBLE INTRUSION.

It is impermissible to allow law enforcement officials to forcibly intrude upon the privacy of a person's home to obtain the factual bases required for probable cause to make an arrest without a warrant.

7. SEARCHES AND SEIZURES—WITHOUT WARRANT—PLAIN VIEW—JUSTIFIABLE INTRUSION.

Police officers must be rightfully in a position in which evidence is plainly visible in order to apply the plain view doctrine; to justify a seizure of evidence without a warrant, there must be a prior justification for the officer's intrusion and discovery of the evidence must be inadvertent.

8. SEARCHES AND SEIZURES—PROBABLE CAUSE—INADMISSIBLE EVIDENCE.

A finding of probable cause for a search and seizure without a warrant cannot be grounded on legally inadmissible evidence.

Appeal from Oakland, Steven N. Andrews, J. Submitted December 8, 1977, at Lansing. (Docket No. 77-1106.) Decided January 24, 1978.

Charles Johnson was charged with delivery of a controlled substance. Defendant's motion to suppress evidence and quash the information was granted. The people appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people.

Robert Mann, for defendant.

Before: R. B. BURNS, P. J., and ALLEN and R. M. MAHER, JJ.

PER CURIAM. On February 10, 1976, defendant was arrested and charged with delivery of a controlled substance, MCLA 335.316; MSA 18.1070(16) and MCLA 335.341(1)(b); MSA 18.1070(41)(1)(b). After a preliminary examination in the district court, defendant was bound over for trial to the circuit court. On February 17, 1977, the circuit court entered an order granting defendant's motion to suppress the evidence and quash the information. The people appeal as of right.

According to testimony given at the preliminary exam, George Hartley, a Ferndale undercover officer assigned to the Oakland County Narcotics Enforcement Team, met with Palmer Johnson, an unnamed codefendant, in the parking lot of an apartment complex in Southfield. Hartley and Palmer Johnson conversed briefly about Hartley's purchase of cocaine from Palmer Johnson. During the conversation another car pulled into the parking lot; Palmer Johnson stated, "That is my man"; after walking over he entered the other car which left the immediate area. Officer Hartley could not describe the driver of the car nor could he determine whether the car proceeded to park in the apartment lot.

A second undercover officer, on surveillance inside the apartment building in a small room off the lobby, saw Palmer Johnson and another man come into the building but could not see well enough to identify the other man. The officer watched them get on the elevator and then observed at which floor the elevator stopped. He next saw Palmer Johnson, wearing a brown coat and black gloves, come off the elevator alone and leave the apartment building.

Palmer Johnson returned to Officer Hartley's car where the two discussed the purchase of cocaine. They settled on a price of $1,630 for an ounce. Palmer Johnson then departed the vehicle and reentered the apartment building. He signed the register in the main foyer and took the elevator to the eighth floor. Ten or fifteen minutes later, he reappeared without the brown coat and gloves he had been wearing. He delivered the cocaine in a clear plastic bag. Officer Hartley paid the $1,630 and promptly arrested Palmer Johnson.

The second undercover officer, after learning of Palmer Johnson's arrest, checked with the desk guard and learned that Palmer Johnson had jotted down apartment 804 in the register. The officer, along with four or five other men, without either a search warrant or an arrest warrant, proceeded to the eighth floor, approached apartment 804 and knocked on the door. Someone inside asked who was there. The officer identified himself.

In the next four or five minutes, the officer testified, he heard doors opening and closing, water running, and a toilet flushing. During this four to five minute period, the police continued pounding on the door and yelling obscenities at the occupant.

At length, defendant Charles Johnson opened the door. He was wearing black trousers with a white substance on them, later determined to be cocaine. The officer could see a brown coat folded on a chair in the living room. Charles Johnson was then informed he was under arrest.

Defendant lay spread-eagled on the floor of the apartment with two officers standing over him while he was advised of his rights. During this time, defendant made the statements that he had flushed three dope quarters of cocaine down the

toilet; that the cocaine delivered to Officer Hartley was mostly mixed; and that he did not have much cocaine left.

At the preliminary examination the district court found that a crime was committed and that there was probable cause to believe that defendant committed the crime. The circuit court, however, determined that the arrest of Charles Johnson was illegal because the police were without probable cause. Consequently, the court found the evidence seized—the pair of pants—was unlawfully obtained and granted defendant's motion to suppress.

The prosecutor relies upon the stop and frisk cases—*Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), and its progeny—to justify the arrest of defendant. In so relying, the prosecutor as much as admits the lack of probable cause, since that line of cases, as is pointed out in the prosecutor's brief, deals with forcible stops of individuals in connection with the investigation of possible criminal behavior, even though there is no probable cause to make an arrest.

Probable cause to arrest is not necessary for an investigatory stop. What is necessary is a reasonable belief that criminal activity may be afoot. *People v Lillis,* 64 Mich App 64; 235 NW2d 65 (1975). But the reliance on *Terry v Ohio, supra,* is misplaced. The police conduct here involved was much more than a stop and frisk to ask defendant his name, his address and for an explanation of his activities. It was a forcible intrusion into defendant's home by five or six police officers pounding on the door and yelling obscenities.

Only if probable cause existed could police make a valid warrantless arrest of the defendant. The statute states, "Any peace officer may, without a warrant, arrest the person * * * when a felony

has been committed and he has reasonable cause to believe that such person has committed it". MCLA 764.15(c); MSA 28.874(c).

Reasonable or probable cause stems from some fact, circumstance or information which creates an honest belief in the mind of a reasonable and prudent person. *People v Napolitano,* 2 Mich App 601; 141 NW2d 356 (1966), *People v Langston,* 57 Mich App 666; 226 NW2d 686 (1975). Actual facts creating an actual belief can alone give rise to probable cause. *People v Panknin,* 4 Mich App 19; 143 NW2d 806 (1966).

The only actual fact linking defendant to criminal activity was that Palmer Johnson signed the register at the desk with the notation "apartment 804". When police approached the apartment, they had only a suspicion of criminal activity, an insufficient basis on which to justify an arrest. *People v Griffin,* 33 Mich App 474; 190 NW2d 266 (1971), *People v Harold Williams,* 63 Mich App 398; 234 NW2d 541 (1975).

The police had no other bases upon which probable cause could be predicated. Information obtained after the arrest can have no bearing on the determination of probable cause. *People v Gwinn,* 47 Mich App 134; 209 NW2d 297 (1973). Defendant's statements and the articles discovered after a search of his person, therefore, are not articulable facts giving the police probable cause to make an arrest. There were no facts connecting defendant directly to the crime for which Palmer Johnson was arrested.

The pants seized by the police do not provide the necessary probable cause, nor does anything the officers may have seen in the apartment. Defendant opened his door only after the police pounded on it continuously and yelled abusively at him

inside. Such conduct is essentially coercive; defendant did not consent to the police entrance. What the police saw when the door was opened must be discounted for the probable cause determination. Before they forced defendant to open the door of his home, no probable cause existed to arrest or to search. It is impermissible to allow law enforcement officials to forcibly intrude upon the privacy of a person's home to obtain the factual bases required for probable cause.

The prosecutor argues further that the laboratory report which stated that defendant's pants were sprinkled with cocaine was admissible in evidence since the pants were seized after a plain view search. We disagree.

For the plain view doctrine to apply, the officers must be rightfully in a position in which evidence is plainly visible, there must be a prior justification for the officers' intrusion and discovery of the evidence must be inadvertent. *People v Harden,* 54 Mich App 353; 220 NW2d 785 (1974). The police must see contraband from a place where they have a right to be. *People v Walker,* 64 Mich App 138; 235 NW2d 85 (1975).

Only after intimidating police behavior did defendant open his door, allowing the officers to see his cocaine-covered pants. Defendant did not willingly open the door but was harassed by the police until he opened it. The initial intrusion was not otherwise legitimate. The police were not properly in the place. As the requisites were not met, the pants could not have been seized as the result of a plain view search. *People v Walker, supra.* As evidence, the pants were legally inadmissible. A finding of probable cause cannot be grounded on legally inadmissible evidence. *People v Staffney,* 70 Mich App 737; 246 NW2d 364 (1976). Here the

evidence was the product of impermissible police conduct. Because it was the only evidence introduced, the circuit court acted properly in suppressing the evidence and quashing the information.

The decision of the circuit court is affirmed. Our disposition of this case does not preclude the prosecutor from bringing defendant to trial on the basis of other legally admissible evidence.

HORTON v CITY OF KALAMAZOO

1. MUNICIPAL CORPORATIONS—CREDIT—PRIVATE PURPOSE—TAXING POWER—PUBLIC PURPOSES—CONSTITUTION.

The Michigan Constitution forbids a city to loan its credit for a private purpose, or to exercise its taxing power for anything but public purposes; public funds cannot be used to further a private enterprise (Const 1963, art 7, §§ 21, 26).

2. STATES—MUNICIPAL CORPORATIONS—LEGISLATIVE ACTS—GOVERNMENT POWERS—PUBLIC PURPOSE.

The state and its political subdivisions are limited to such legislative acts and such governmental powers as exhibit a public purpose.

3. MUNICIPAL CORPORATIONS—POLICE POWER—PROPER PURPOSE.

The protection of the public from illegal activity is a proper purpose for the exercise of the police power.

4. MUNICIPAL CORPORATIONS—LEGISLATIVE BODY—ACTIONS—PRESUMPTIONS.

The actions of a municipal legislative body enjoy a presumption of validity.

5. CONSTITUTIONAL LAW—PUBLIC PURPOSE—COURTS—LEGISLATIVE DETERMINATIONS.

The courts are especially deferential toward legislative determinations of public purpose since a determination of what constitutes a public purpose involves considerations of economic and

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5] 56 Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 588–591.

[2] 56 Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 229, 230.

[3] 56 Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions §§ 438–442.

[4] 56 Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions § 502.

[5–7] 56 Am Jur 2d, Municipal Corporations, Counties and Other Political Subdivisions § 230.

[8] 5 Am Jur 2d, Appeal and Error § 612.

social philosophies and principles of political science and government that should be made by the elected representatives of the people.

6. MUNICIPAL CORPORATIONS—EXPENDITURES—PUBLIC PURPOSE—PRIVATE PARTIES—BENEFITS—COST.

An expenditure serves a public purpose, even if private parties also profit from it, where the likely benefits of the expenditure to the community outweigh its likely cost; payments made to private parties may serve a public purpose.

7. MUNICIPAL CORPORATIONS—EMPLOYER-EMPLOYEE—REIMBURSEMENT—MATTERS OF INTEREST TO CITY—PERSONAL BENEFIT.

A city may properly reimburse an employee for expenses incurred in presenting the city's case to a decision-maker on a matter of undoubted interest to the city where there is no apparent prospect of personal benefit to the employee himself.

8. APPEAL AND ERROR—ISSUES NOT HEARD IN LOWER COURT.

A claim may not be reviewed for the first time on appeal where it was not the subject of a ruling by the court below.

Appeal from Kalamazoo, Raymond W. Fox, J. Submitted December 8, 1977, at Grand Rapids. (Docket No. 77-1376.) Decided January 24, 1978.

Complaint by Jeffrey B. Horton against the City of Kalamazoo, several individual members of the City Commission of the City of Kalamazoo, three city attorneys, and a city police officer seeking to enjoin the city from providing funds and services for expenses incurred by the police officer in suits brought by him to abate public nuisances, and for an accounting and restitution. Summary judgment for defendants. Plaintiff appeals. Affirmed.

Holman, Pelletier & Horton, for plaintiff.

Morris & Culver, P. C., for defendants.

Before: DANHOF, C. J., and T. M. BURNS and M. J. KELLY, JJ.

PER CURIAM. Defendant city, through its city commission, furnished legal counsel to defendant Fouts, a city police officer, and agreed to pay his costs in three actions brought by Fouts in the name of the state under the padlock law, MCLA 600.3805; MSA 27A.3805, to abate public nuisances. Plaintiff sued to enjoin the providing of funds and services, sought restitution and an accounting. The trial court held that the expenditures were for a public purpose. From its grant of summary judgment in favor of the defendants, plaintiff appeals.

The Michigan Constitution forbids a city to loan its credit for a private purpose, Const 1963, art 7, § 26, or to exercise its taxing power for anything but public purposes, Const 1963, art 7, § 21. The state and its political subdivisions are limited to "such legislative acts and such governmental powers as exhibit a public purpose". *Gaylord v Gaylord City Clerk,* 378 Mich 273, 295; 144 NW2d 460 (1966). Public funds cannot be used to further a private enterprise. *McManus v Petoskey,* 164 Mich 390, 395; 129 NW 681 (1911), *Skutt v Grand Rapids,* 275 Mich 258; 266 NW 344 (1936). But what constitutes a public purpose cannot be precisely defined; to a considerable extent each case has to be decided on its own facts. *Gregory Marina, Inc v Detroit,* 378 Mich 364, 393; 144 NW2d 503 (1966) (opinion by T. M. KAVANAGH, C. J.), 2 McQuillin, Municipal Corporations (3d ed), § 10.31, pp 817–818.

The actions brought by Fouts with the city's assistance are intended to abate alleged nuisances which are claimed to be the scenes of illegal activity. "It cannot be doubted that the protection of the public from illegal activity is a proper purpose for the exercise of police power". *Tally v*

Detroit, 54 Mich App 328, 336; 220 NW2d 778 (1974).

The actions of a municipal legislative body enjoy a presumption of validity. *Id.* at 335, *Watnick v Detroit,* 365 Mich 600, 606; 113 NW2d 876 (1962). The courts are especially deferential toward legislative determinations of public purpose, "[f]or determination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government. Such determinations should be made by the elected representatives of the people". *Gregory Marina, Inc v Detroit,* 378 Mich 364, 394; 144 NW2d 503 (1966) (opinion by T. M. KAVANAGH, C. J.), see 2 McQuillin, *supra,* § 10.31, p 817. Justice O'HARA's opinion in *Gregory Marina* went even further: "In Michigan, constructing and operating a marina is a 'public purpose' because the legislature, whose business it is, said so". 378 Mich at 406. Long ago Justice COOLEY, in *The People ex rel The Detroit & Howell R Co v The Township Board of Salem,* 20 Mich 452, 475; 4 Am Rep 400 (1870), stated:

> "I do not understand that the word *public,* when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the Legislature from taking broad views of State interest, necessity or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statemanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." (Emphasis in original.)

Since that time the trend in Michigan and nationally has been toward an even more flexible concept of public purpose. *Gaylord v Gaylord City Clerk, supra,* at 299, 2 McQuillin, *supra,* § 10.31, p 818.

Although the nuisance abatement suits brought by Fouts are nominally the actions of a private individual, that does not in itself preclude a finding that the city's assumption of their costs serves a public purpose. So far as the record reveals, the benefits of successfully prosecuting the suits would inure to the citizens of Kalamazoo generally, not just to Fouts. If the likely benefits of an expenditure to a community outweigh its likely costs, the expenditure serves a public purpose even if private parties also profit from it. *Gaylord v Gaylord City Clerk, supra,* at 296–297. Payments made to private parties may serve a public purpose. An example is *Hays v Kalamazoo,* 316 Mich 443; 25 NW2d 787; 169 ALR 1218 (1947), where the Supreme Court held that it served a public purpose for the City of Kalamazoo to join and pay dues to the Michigan Municipal League, a private association set up to lobby for municipal interests. Even closer to the situation at hand is *Meehan v Parsons,* 271 Ill 546; 111 NE 529 (1916), cited approvingly in *Hays, supra,* at 463, in which a city reimbursed its mayor for expenses incurred in traveling to Washington to seek Federal aid for the construction of levees. There, as here, a city properly reimbursed an employee for expenses incurred in presenting the city's case to a decision-maker on a matter of undoubted interest to the city but offering no apparent prospect of personal benefit to the employee himself.

On appeal, plaintiff advances for the first time the argument that the nuisance abatement suits were not brought in the name of the real party in

interest, contrary to MCLA 600.2041; MSA 27A.2041 and GCR 1963, 201.2. We do not pass on that issue because it is untimely raised. *Cook v Casualty Ass'n of America,* 246 Mich 278, 280–281; 224 NW 341 (1929), *American Electrical Steel Co v Scarpace,* 399 Mich 306, 309; 249 NW2d 70 (1976), *Three Lakes Association v Whiting,* 75 Mich App 564, 575; 255 NW2d 686 (1977).

Affirmed.

PEOPLE v McCLAIN

CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL OF PLEA—LIBERALITY —ABUSE OF DISCRETION.

A trial court should construe with great liberality the request of a defendant to withdraw his plea of guilty prior to sentencing where the defendant advises the court that he is not guilty; refusal of a trial court to allow a defendant to withdraw his guilty plea was an abuse of discretion where the defendant explained that he pled guilty only because of the influence of his counsel, that he did not commit the crime, and that he wanted the police to investigate the crime and discover the perpetrator.

Appeal from Recorder's Court of Detroit, Clarence Laster, Jr., J. Submitted February 11, 1977, at Detroit. (Docket No. 28551.) Decided April 5, 1977.

James J. McClain was convicted, on his plea of guilty, of second-degree murder. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Research, Training & Appeals, and *Arthur N. Bishop,* Assistant Prosecuting Attorney, for the people.

Lawrence S. Strauss, for defendant on appeal.

REFERENCES FOR POINTS IN HEADNOTE

21 Am Jur 2d, Criminal Law §§ 491, 503–506.

Comment note.—Right to withdraw guilty plea in state criminal proceeding where court refuses to grant concession contemplated by plea bargain. 66 ALR3d 902.

Before: M. J. KELLY, P. J., and J. H. GILLIS and R. M. MAHER, JJ.

PER CURIAM. Defendant, charged with first-degree murder, MCLA 750.316; MSA 28.548, pled guilty on January 22, 1976, before the late Judge Donald S. Leonard to the offense of second-degree murder, MCLA 750.317; MSA 28.549, pursuant to a plea bargain. On February 6, 1976, defendant was brought before Judge Clarence Laster for sentence. Defendant was advised that Judge Leonard was ill and that Judge Laster was going to pronounce sentence. Defendant and his counsel then asked that defendant be allowed to withdraw his plea of guilty and proceed to trial. It is rather obvious from a reading of the transcript that defendant and his counsel were displeased with the fact that defendant was not going to be sentenced by Judge Leonard whom they considered to be a lenient sentencer. Defendant then went on to explain to the court that the only reason that he pled guilty was because of the influence of his counsel; that he did not commit the crime; and that he wanted the police department to investigate the crime and "see who did it". The trial court declined to allow defendant to withdraw the plea and proceeded to sentence him.

No authority need be cited for the proposition that the trial court should construe with great liberality the request of the defendant to withdraw his plea prior to sentence when the defendant advises the court that he is not guilty. It was an abuse of discretion on the part of the trial court to refuse the withdrawal of this plea.

Reversed and remanded for trial on the original charge of first-degree murder.

PEOPLE v LEONARD

1. CRIMINAL LAW—CRUELTY TO CHILDREN—EVIDENCE—WEIGHT OF EVIDENCE.

   A verdict of guilty of cruelty to children was not against the great weight of the evidence where the defendant and the child's mother both testified that the defendant had spanked his own two children with a belt, medical and photographic evidence showed that the spanking in this instance was more like a beating, and the defendant testified that he had spanked the child the same as he did his own children, but for a longer period of time.

2. CRIMINAL LAW—CRUELTY TO CHILDREN—EVIDENCE—PHOTOGRAPHS—PROBATIVE VALUE.

   Photographs showing the extent of a beating of a child in a trial for cruelty to children were properly admitted into evidence where the photographs were not gruesome and where they were of probative value because the extent of a "spanking" administered by the defendant was strongly contested.

3. CRIMINAL LAW—STATUTES—CRUELTY TO CHILDREN—CONSTITUTIONAL LAW—EQUAL PROTECTION—CUSTODIANSHIP.

   A statute which provides for the posting of bond in exchange for a suspended sentence for a person convicted of cruelty to children and which creates classifications based upon permanent versus temporary custodianship of a child is rational, reasonable, and is constitutional (MCLA 750.136; MSA 28.331).

4. CRIMINAL LAW—EVIDENCE—STATEMENTS OF DEFENDANT—WALKER HEARING—WITNESSES—REVERSIBLE ERROR.

   It is error for a trial court to refuse to hold a *Walker* hearing to determine the admissability of statements made by a defendant where the defendant moves for such a hearing before trial; however, a trial court's refusal to hold a hearing which was

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REFERENCES FOR POINTS IN HEADNOTES

[1] 30 Am Jur 2d, Evidence §§ 1080–1090.
[2] 30 Am Jur 2d, Evidence § 1105.
[3] [No reference]
[4] 5 Am Jur 2d, Appeal and Error § 800.

requested on the day before trial was not reversible error where testimony of police witnesses regarding the defendant's statements was merely cumulative of the defendant's testimony, the police testimony was brief, did not refer to defendant's statements as confessions, the witnesses were cautioned not to mention statements by a former codefendant, and the defendant's testimony elaborated upon the statements testified to by the witnesses.

Appeal from Livingston, Bert M. Hensick, J. Submitted January 10, 1978, at Lansing. (Docket No. 77-1322.) Decided January 30, 1978.

Gary G. Leonard was convicted of cruelty to children. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Frank R. DelVero,* Prosecuting Attorney (by *Mark I. Leach,* Assistant Attorney General, Prosecuting Attorneys Appellate Service), for the people.

David M. Hartsook, for defendant on appeal.

Before: BRONSON, P. J., and R. B. BURNS and R. E. A. BOYLE,* JJ.

PER CURIAM. Defendant was convicted by a jury of cruelty to children, MCLA 750.136; MSA 28.331. He appeals and we affirm.

Defendant raises four issues, which we deal with *seriatim.*

Defendant phrases his first argument in terms of sufficiency of the evidence, but argues it in terms of weight of the evidence.

The evidence clearly meets the sufficiency test. As for the weight of the evidence, defendant admitted spanking the three-year-old child he was

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

babysitting for, but suggests that the child's mother may have herself administered the beating which resulted in severe bruises, after she had returned home with the child. There wasn't any testimony that the mother had administered any beating. Although both defendant and the mother testified that the mother had seen defendant spank his own children with a belt and had told defendant to spank her child if the child behaved badly, medical and photographic evidence in the present case showed that the spanking was more like a beating. Defendant testified that he had spanked the child the same as his own children, except for a longer period of time. The beating itself may bespeak the intent, see *People v Green,* 155 Mich 524, 533; 119 NW 1087, 1090 (1909). The verdict of guilty was not against the great weight of the evidence.

Defendant's second argument is that the photographs of the child's injuries were erroneously admitted, because the photographs were gruesome and there was no dispute that the child was spanked, spanked on the buttocks, and spanked with a belt.

The photographs, while showing the extent of a rather severe beating, were not gruesome. They were of probative value because the extent of the spanking administered by defendant was strongly contested.

Third, defendant argues that the statute violates constitutional rights of due process and equal protection under the law. The argument is essentially one of equal protection, and is based on the following language:

"* * * Provided, however, If, after such conviction and before sentence, in case the child has not been deformed or maimed, he or she shall appear before the

clerk of the court in which said conviction shall have taken place, and with good and sufficient surety, to be approved by said clerk enter into bond to the people of the state of Michigan in the penal sum of $1,000.00 conditioned that he or she will furnish such child or children with necessary and proper home, care, food, shelter, protection and clothing, the said court may suspend sentence therein. * * * ." MCLA 750.136; MSA 28.331.

Before the trial court, defendant argued that the statute created unconstitutional classifications based on wealth and on permanent versus temporary custodians, and also argued that defendant did not have the $1,000 in order to post bond. On appeal defendant does not argue the wealth classification. It is questionable whether defendant has standing to argue the custodian issue on appeal since on the record he would have been unable to post the bond in any case. However, dealing with the issue on the merits, we find that the classification based on type of custodianship is rational and reasonable and is constitutional.

The last issue is based upon the trial court's denial of a motion, made the day before trial, for a Walker[1] hearing on the admissibility of statements made by defendant. The trial court based its ruling on the untimeliness of defendant's motion. The trial court erred because such a hearing must be held if the defendant moves for it before trial, *People v Childers,* 20 Mich App 639, 646; 174 NW2d 565, 569 (1969). *Childers* applies to involuntary confession cases, see *People v Mitchell,* 44 Mich App 679, 683; 205 NW2d 876, 878 (1973).

However, just as in *Childers,* the error was not a reversible error. The testimony of the police wit-

[1] *People v Walker (On Rehearing),* 374 Mich 331; 132 NW2d 87 (1965).

nesses regarding the statements did not contradict, and was merely cumulative of, defendant's own testimony. We also note that the police testimony as to the contents of the statements was brief, the statements were never referred to as confessions, the trial court cautioned the witnesses about even mentioning statements by defendant's wife (a former codefendant), and defendant's testimony elaborated upon the statements testified to by the witnesses.

Affirmed.

ADAMS v THE GREAT ATLANTIC & PACIFIC TEA COMPANY

OPINION OF THE COURT

1. WORKMEN'S COMPENSATION—BUREAU OF WORKMEN'S COMPENSATION—JURISDICTION—STATUTES.

   A dispute or controversy within the meaning of the Workers' Disability Compensation Act is a jurisdictional element and its existence at the time a claim is properly filed with the Workmen's Compensation Bureau vests the bureau with jurisdiction over the claim which cannot be unilaterally divested by either party to the dispute (MCLA 418.847; MSA 17.237[847]).

2. ACTION—FORUM—JURISDICTION—VOLUNTARY DISMISSALS—ADVERSARY PROCEEDINGS—RESOLUTION OF CONTROVERSIES.

   Restrictions upon voluntary dismissals require that a forum with jurisdiction over a controversy be permitted to proceed to a final resolution and that resolution may derive from a full adversary proceeding on the merits, stipulation by the parties to a determination, or summary resolution where a party is entitled to prevail as a matter of law, but whatever mode is employed, the purpose, which is a final resolution of the controversy, is the same (GCR 1963, 504.1).

3. ACTION—FORUM—JURISDICTION.

   The forum must be permitted to render an ultimate resolution, once an adjudicatory proceeding has properly commenced.

4. WORKMEN'S COMPENSATION—EMPLOYERS—REFEREE'S AUTHORITY—FINAL ORDERS—PARTIES' RIGHTS.

   An employer cannot, by an agreement to pay worker's compensation, divest the hearing referee of authority to render a final order settling the rights of the parties.

REFERENCES FOR POINTS IN HEADNOTES

[1, 5–8, 10, 11] 82 Am Jur 2d, Workmen's Compensation §§ 399, 472, 545.

[2] 82 Am Jur 2d, Workmen's Compensation §§ 459–468.

[3] 82 Am Jur 2d, Workmen's Compensation §§ 472, 545.

[4] 82 Am Jur 2d, Workmen's Compensation §§ 459–468, 540.

[9] 82 Am Jur 2d, Workmen's Compensation §§ 613–616, 630–637.

CONCURRENCE BY P. R. MAHINSKE, J.

5. WORKMEN'S COMPENSATION—EMPLOYERS—VOLUNTARY PAYMENT OF BENEFITS—DISPUTE OR CONTROVERSY—PARTIES' RIGHTS.

A dispute or controversy within the meaning of the Workers' Disability Compensation Act exists even though an employer offers to begin voluntary payment of compensation benefits where all of the worker's proofs have been submitted and where there still is a genuine dispute between the parties regarding rate of compensation and date of injury.

6. WORKMEN'S COMPENSATION—DISPUTE OR CONTROVERSY—DETERMINATION OF RIGHTS—STATUTES.

The Worker's Disability Compensation Act clearly indicates that any dispute or controversy can be submitted for a determination of rights (MCLA 418.841, 418.847; MSA 17.237[841], 17.237[847]).

7. WORKMEN'S COMPENSATION—EMPLOYERS—VOLUNTARY PAYMENT OF BENEFITS—DETERMINATION OF RIGHTS—STATUTES.

The simple expedient of voluntary payment of compensation benefits by an employer determines nothing in the absence of an admission or stipulation as to all the conditions of liability; neither the payment of compensation nor the accepting of the same by an employee or his dependents shall be considered as a determination of the rights of the parties under the Worker's Disability Compensation Act (MCLA 418.831; MSA 17.237[831]).

8. WORKMEN'S COMPENSATION—EMPLOYERS—VOLUNTARY PAYMENT OF BENEFITS—DETERMINATION OF RIGHTS.

The payment of workmen's compensation by an employer under an award, order, or proper stipulation determines the rights of the parties and such compensation cannot be discontinued or reduced without a further order or award.

9. WORKMEN'S COMPENSATION—APPEAL AND ERROR—APPEAL BOARD —FINDING OF FACT.

The Workmen's Compensation Appeal Board is the final fact finder in the cases before it, but if the board interprets the Workers' Disability Compensation Act erroneously in reaching its decision appellate courts have the duty and authority to correct any such erroneous construction.

10. WORKMEN'S COMPENSATION—EMPLOYEES—WORKERS' DISABILITY COMPENSATION ACT—COMPENSATION PROCEEDINGS—VOLUNTARY PAYMENT OF BENEFITS.

Neither the Workers' Disability Compensation Act nor the gen-

eral court rules contain any express provision which would allow an employer to unilaterally force an end to proceedings by offering voluntarily to pay compensation benefits; furthermore, such an offer does not deny a claimant the right to proceed further to have the rights of the parties determined.

11. WORKMEN'S COMPENSATION—DUE PROCESS HEARINGS—BUREAU OF COMPENSATION—OVERLOAD OF LITIGATION.

Due process requires that a workmen's compensation plaintiff is entitled to a full and impartial determination of his claim even though voluntary payments of benefits are offered by an employer.

Appeal from Workmen's Compensation Appeal Board. Submitted June 21, 1977, at Detroit. (Docket No. 27709.) Decided February 6, 1978.

Claim by Kermie Adams against The Great Atlantic & Pacific Tea Company for workmen's compensation. Benefits granted. Defendant appealed to the Workmen's Compensation Appeal Board, which reversed the referee's decision and award of benefits. Plaintiff appeals by leave granted. Reversed.

Ripple & Chambers, P. C. (by *Sanford L. Steiner),* for plaintiff.

Lacey & Jones (by *John L. Salter),* for defendant.

Before: D. C. RILEY, P. J., and BASHARA and P. R. MAHINSKE,* JJ.

BASHARA, J. The pertinent facts of this case are delineated in Judge MAHINSKE's concurring opinion. We conclude that procedural policy mandates reversal of the Workmen's Compensation Appeal Board determination and reinstatement of the referee's order.

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

Whether a dispute or controversy persists after an employer agrees to make voluntary payments, is an issue that exceeds the scope of inquiry required for the resolution of this case. A dispute or controversy within the meaning of MCLA 418.847; MSA 17.237(847) is a jurisdictional element. Its existence at the time a claim is properly filed with the Workmen's Compensation Bureau vests the bureau with jurisdiction over the claim. That jurisdiction cannot be unilaterally divested by either party to the dispute.

Policy considerations congruent to those underlying the restrictions upon voluntary dismissals embodied in GCR 1963, 504.1, require that a forum with jurisdiction over a controversy be permitted to proceed to a final resolution. See, *e.g., African Methodist Episcopal Church v Shoulders,* 38 Mich App 210; 196 NW2d 16 (1972). That resolution may derive from a full adversary proceeding on the merits, stipulation by the parties to a determination, or summary resolution where a party is entitled to prevail as a matter of law. Whatever mode is employed, the purpose is the same—a final resolution of the controversy.

A contrary result would leave the litigants susceptible to multiple commencements and terminations of the same proceedings depending upon the vagaries of an opponent inclined to frustrate final resolution of the case. The adverse consequences to the administration of justice are evident. Therefore, once an adjudicatory proceeding has properly commenced, the forum must be permitted to render an ultimate resolution.

In the case under review, the proceedings were commenced by plaintiff to determine his disputed right to compensation payments from defendant. Defendant cannot, by an agreement to pay com-

pensation, divest the referee of authority to render a final order settling the rights of the parties.

Reversed, and the order of the referee is reinstated. Costs to plaintiff.

D. C. RILEY, P. J., concurred.

P. R. MAHINSKE, J. *(concurring).* This appeal involves the question of whether there is a "dispute or controversy" within the meaning of the Workers' Disability Compensation Act once the employer offers to begin voluntary payments after all of plaintiff's proofs have been submitted, and where there still exists a genuine dispute between the parties regarding rate of compensation and date of injury. We find that under these circumstances there is a dispute or controversy.

Plaintiff-appellant filed a petition for a hearing seeking workmen's compensation benefits on May 2, 1972. Injuries were claimed to have been sustained on January 5, 1968, during a welding accident. Compensation was voluntarily paid by the defendant-appellee until November 27, 1968, when plaintiff returned to work. Plaintiff's last day of work was October 4, 1971, and he was paid compensation until April 1, 1972, when defendant claims he was released from care and should have returned to work.

Testimony was taken and a medical deposition presented before the hearing referee. Plaintiff's petition claimed an aggravation of a preexisting condition created by work activity on October 4, 1971.

After all the proofs of plaintiff were in, defendant offered to pay compensation and maintained the matter was closed and therefore out of the hands of the referee. Plaintiff contended that unless a stipulated award was entered, including the

1971 compensation rate, the hearing referee should enter a formal award. Subsequent to argument of the law the referee entered a formal award. On appeal the Workers' Compensation Appeal Board (WCAB) set aside the award and ruled that the offer of voluntary payment took the matter from the referee. Stated otherwise, the WCAB ruled that there is no dispute or controversy after voluntary payment is offered.

In the matter now before this Court on appeal we have a situation where the claimant has gone to the expense, trouble, and effort to present his entire claim to the referee before voluntary payment was offered by the employer. Such fact situation in and of itself clearly distinguishes this case from the fact situation in *Arnett v Chrysler Corp,* 395 Mich 796 (1975). In *Arnett* the plaintiff was denied a hearing after the claim was filed and before the hearing was begun because the employer began voluntary payments. In addition, in the present case the record made below clearly indicates that after plaintiff's proofs were in and the offer of voluntary payments was tendered, there still remained a dispute between the parties regarding date of injury and rate of compensation.

The precise issue raised in the instant case is one of first impression in this Court.

The Workers' Disability Compensation Act clearly indicates that any dispute or controversy can be submitted for a determination of rights. See MCLA 418.841; MSA 17.237(841), and MCLA 418.847; MSA 17.237(847). The act is clear regarding the rights of the parties when there is a voluntary payment situation. MCLA 418.831; MSA 17.237(831) states:

"Neither the payment of compensation or the accept-

ing of the same by the employee or his dependents shall be considered as a determination of the rights of the parties under this act."

1964–65 AACS, R 408.40, Rule 10, p 3283, provides in part:

"When compensation is being paid under an order or award of the hearing referee or appeal board, compensation shall not be discontinued or reduced without a further order or award, * * * ."

The above clearly indicates that the simple expedient of voluntary payment determines nothing in the absence of an admission or stipulation as to all of the conditions of liability. The above also indicates that once compensation is being made under an award, order, or proper stipulation, the rights of the parties are determined, and such compensation cannot be discontinued or reduced without a further order or award. This implies a right to a hearing.

While it is true that the WCAB is the final fact finder in the cases before it, *Miller v Sullivan Milk Products, Inc,* 385 Mich 659, 669; 189 NW2d 304 (1971), it is also true that if the WCAB interprets the act erroneously in reaching its decision the appellate court has the duty and authority to correct any such erroneous construction. *DeGeer v DeGeer Farm Equipment Co,* 391 Mich 96, 100; 214 NW2d 794 (1974). Therefore, the instant case is properly before the Court to determine whether or not such an erroneous interpretation of the Workmen's Compensation Act has been made by the WCAB in reversing the award of the referee.

In its holding below the WCAB in effect held that an employer can unilaterally force an end to the proceedings by offering voluntarily to pay

benefits, and that such an offer denies the claimant any right to proceed further and have the rights of the parties determined. This Court disagrees with the board's interpretation of the Workers' Disability Compensation Act.

The act contains no express provision for doing what defendant and the WCAB urge as the proper procedure in cases like the instant one, *i.e.,* halting of proceedings automatically upon an offer to make voluntary payments on plaintiff's claim. Neither is there support for such a procedure under the General Court Rules.

It appears that plaintiff was afforded no more than his due process right to a full and fair determination of his claim when the referee granted an award in spite of defendant's offer to make voluntary payments. This would render improper the reversal of the referee's award by the WCAB.

It has been urged on this Court that there are overriding considerations which lend legitimacy to the ruling of the WCAB, *i.e.,* that the purpose of the act to encourage voluntary compliance is served and that to do otherwise would open a floodgate of litigation to overload the Bureau of Workers' Compensation. Weighed against the import of depriving plaintiff of his right to a full and impartial determination of his claim, such a remote possibility of encouraging litigation must lose. The suggestion was made by the Supreme Court in *Arnett, supra,* that on remand, administrative procedures could be adopted to deal with the issue. Administrative procedure may well be the answer to check the possible encouragement of litigation in future cases.

The decision of the WCAB is reversed and the order of the referee reinstated. Costs to appellant.

WESTERN MICHIGAN UNIVERSITY BOARD OF TRUSTEES v BRINK

1. ZONING—PARTIES—STANDING—AGGRIEVED PARTY—STATUTES.

An owner of land located within 300 feet of premises which are the subject of a decision of a zoning board of appeals is a proper party to any review of that decision instituted in the circuit court and is entitled to notice of the circuit court proceedings; however, such a landowner does not have standing to institute the circuit court review unless he is an "aggrieved party" (MCLA 125.590, 125.591; MSA 5.2940, 5.2941).

2. ZONING—PARTIES—STANDING—PLEADING—FACTS.

The facts upon which a plaintiff in a zoning case relies to establish his standing must be alleged and proven; it is not necessary to decide whether an allegation of ownership of contiguous land would be sufficient to establish standing to institute circuit court review of a decision of a zoning board of review where a plaintiff did not allege that he owned land contiguous to the land which is the subject of the zoning board's actions.

3. ZONING—PLEADING—SPECIAL DAMAGES—COST OF PROPERTY ACQUISITION.

A plaintiff must allege and prove that he has suffered some special damages not common to other property owners similarly situated in order to have any status to challenge in court the actions of a zoning board of appeals; an allegation that the action of the board may result in a higher cost to the plaintiff in the event the plaintiff is able to acquire the subject property in the future is not an allegation of special damages sufficient to confer standing.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 82 Am Jur 2d, Zoning and Planning §§ 299, 301, 343-345.

[1, 2, 4] Standing of lot owner to challenge validity or regularity of zoning changes dealing with neighboring property, 37 ALR 2d 1143.

[3] 82 Am Jur 2d, Zoning and Planning § 340.

[4] 82 Am Jur 2d, Zoning and Planning §§ 334-337.

4. PLEADING—ZONING—APPEAL AND ERROR—FACTS—STANDING.

Failure of a plaintiff to properly plead and present for proof in the lower court the facts upon which it relies to establish its standing in a case for the review of a decision of a zoning board prevents the plaintiff from relying on such facts on appeal.

Appeal from Kalamazoo, Raymond W. Fox, J. Submitted June 16, 1977, at Grand Rapids. (Docket No. 29839.) Decided February 6, 1978.

Complaint by the Western Michigan University Board of Trustees against Robert H. Brink, Harm Meyer, The American National Bank and Trust Company of Michigan, Janis Ulps, and the Zoning Board of Appeals of the City of Kalamazoo for an order of superintending control to set aside a decision of the zoning board of appeals. Complaint dismissed. Plaintiff appeals. Affirmed.

Ford, Kriekard, Staton, Allen & Decker, P. C., for plaintiff.

Don M. Schmidt, Deputy City Attorney, for defendant Zoning Board of Appeals of the City of Kalamazoo.

Thomas T. Huff, for defendant Robert H. Brink.

Before: M. J. KELLY, P. J., and M. F. CAVANAGH and J. R. ROOD,* JJ.

M. F. CAVANAGH, J. Defendant Kalamazoo Zoning Board of Appeals granted defendant Brink's petition for expansion of a nonconforming use and for variances to accomodate the expansion. Plaintiff sought an order of superintending control from circuit court to set aside the board's decision. See

* Former circuit judge, sitting on the Court of Appeals by assignment pursuant to Const 1963, art 6, § 23 as amended in 1968.

MCLA 125.590; MSA 5.2940. This statute limits the right to institute a suit for review of the board's decision to parties thereby "aggrieved". The court *sua sponte* raised the issue of whether plaintiff had alleged facts sufficient to show that it was an aggrieved party. The court found that plaintiff had not made sufficient averments, and ruled that plaintiff's complaint would therefore be dismissed. Plaintiff sought and was granted a rehearing on this issue, and the matter was submitted on briefs. After considering the briefs the court reaffirmed its prior decision and entered an order dismissing plaintiff's complaint. It appears that plaintiff at no time amended or sought leave to amend its complaint. Plaintiff appeals as of right.

I

Plaintiff sought review under § 10 of the city and village zoning act, which provides, in pertinent part, as follows:

"Sec. 10. Any party aggrieved by any order, determination or decision of any officer, agency, board, commission, board of appeals, or the legislative body of any city or village, made pursuant to the provisions of section 3a of this act may obtain a review thereof both on the facts and the law, in the circuit court for the county wherein the property involved or some part thereof, is situated * * * ." MCLA 125.590; MSA 5.2940.

Section 11 of that act further provides that:

"Sec. 11. Any person required to be given notice under the provisions of subsection (d) of section 5, shall be a proper and necessary party to any action for review instituted under the provisions of section 10 and shall be given due notice personally or by registered or certified mail of any such proceedings in the same

manner as provided in subsection (d) of section 5." MCLA 125.591; MSA 5.2941.

Plaintiff, as an owner of land located within 300 feet of defendant Brink's premises, was entitled to and did receive notice of the proceedings before the Zoning Board of Appeals, pursuant to § 5 of the act. MCLA 125.585; MSA 5.2935. Hence, plaintiff was, under § 11, a proper party to any review instituted under § 10.

However, plaintiff argues that § 11 not only made plaintiff a proper party to any appeal taken by an aggrieved party, but also gave plaintiff itself standing to institute such an appeal, regardless of whether it was an aggrieved party.

Plaintiff cites no authority for this construction of statute, and we do not find it persuasive. The "aggrieved party" requirement is a standard limitation in state zoning acts providing for review of zoning board of appeals decisions. See Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement,* 64 Mich L Rev 1070 (1966). This requirement has repeatedly been recognized and applied in the decisions of this Court. See *Unger v Forest Home Twp,* 65 Mich App 614; 237 NW2d 582 (1975), *Joseph v Grand Blanc Twp,* 5 Mich App 566; 147 NW2d 458 (1967), *Marcus v Busch,* 1 Mich App 134; 134 NW2d 498 (1965). Had the Legislature meant to unshoulder this burden from parties in plaintiff's status it could have done so in simple terms. However, § 11 does not speak in terms of standing to seek review, but only of notice and a right to appear in "any action for review instituted". We do not read this language as broadening the class of parties privileged to begin such reviews. Such a reading would tend to clog our courts with suits by parties who

could allege no legally cognizable interest in the outcome. For this reason we will not strain to reach plaintiff's reading of this statute.

II

Plaintiff next contends that it has standing to bring this suit because it owns property adjoining that of defendant Brink.

The facts upon which a plaintiff relies to establish his standing must be alleged and proven. *Joseph v Grand Blanc Twp, supra,* at 570–571; 147 NW2d at 460, 4 Anderson, *American Law of Zoning* (2d ed), § 25.23, pp 248–250.

However, though plaintiff's briefs here and before the lower court state that plaintiff owned land contiguous to Brink's, this fact is not alleged in plaintiff's complaint. Instead, plaintiff alleged only that it was "the owner of land lying within 300 feet of * * * [Brink's] premises and its campus is within close proximity to the said premises". Therefore, the issue here raised is not properly before this Court, and will not be decided.[1]

[1] Even if this issue were preserved for review we would be little impressed by plaintiff's argument. Our research has revealed no Michigan case on point; foreign jurisdictions split on the question. *See* Comment, *Standing to Appeal Zoning Determinations: The "Aggrieved Person" Requirement,* 64 Mich L Rev 1070, 1079 (1966), and cases therein cited; 4 Anderson, *American Law of Zoning* (2d ed), § 25.18, pp 231–237; 2 Rathkopf, *The Law of Zoning and Planning* (3d ed), pp 63–21 to 63–23. *See also* 1 Yokley, *Zoning Law and Practice* (2d ed), § 172, pp 427–434. We see little reason for abandoning the general rule that "[t]hird parties will be permitted to appeal to the courts as persons aggrieved if they can 'show that * * * their property will suffer some special damages as a result of the decision of the board complained of, which is not common to other property owners similarly situated' ". Comment, 64 Mich L Rev, *supra,* at 1078–1079. (Footnotes and citation omitted.) If adjoining landowners could suffer such special damages, then they can easily plead them. If the board's decision does not pose a threat of unique harm to the neighbor, then the courts would be ill-served by a rule allowing his suit.

III

Plaintiff's third contention is that its complaint satisfies the general rule as stated in *Unger v Forest Home Twp, supra,* at 617; 237 NW2d at 584:

"In order to have any status in court to challenge the actions of a zoning board of appeals, a party must be 'aggrieved'. * * * The plaintiff must allege and prove that he has suffered some special damages not common to other property owners similarly situated * * * ." (Citations omitted.)

In support of this contention, plaintiff here argues the merits of several "facts" not alleged in its complaint. Again, the failure to properly plead and present for proof in the lower court the facts upon which it relies to establish its standing prevents plaintiff from relying on those facts on appeal.

Plaintiff's complaint did allege that it had been negotiating with defendant Brink for the purchase of his property, and that the parties had been unable to agree upon a price. Plaintiff further alleged that, pursuant to a Campus Development Plan, it intended to acquire Brink's land for construction of a new building for plaintiff's College of Business. Plaintiff also made the general allegation that Brink's planned construction on his property would cause plaintiff irreparable injury.

As stated in the trial court's opinion:

"What seems to bother the plaintiff more than anything else is that if this variance is allowed and defendant Brink enlarges his premises, as he was authorized to do by the Zoning Board of Appeals, the plaintiff will have to pay a higher price to purchase the land or an award on condemnation proceedings would be higher than at the present time."

Plaintiff advanced this argument in its brief in support of the motion for rehearing.[2]

We agree with the trial court that this is not an allegation of special damages sufficient to confer standing. Although the board's order may indeed result in higher acquisition costs to plaintiff, this in no way interferes with plaintiff's beneficial use or enjoyment of its own land. Plaintiff's financial interest in throttling the development of neighboring properties is not the kind of legally protectable property right or privilege, the threatened interference with which grants standing to seek review.

Plaintiff's other arguments have been considered and found meritless.

Affirmed. Costs to appellees.

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[2] "Brink's non-conforming tavern use lies in the middle of WMU's campus partially as it exists and completely as it is planned. If the City's and WMU's plans are not to be frustrated, all or in substantial part WMU must ultimately acquire Brink's property by purchase or by condemnation. The immediate effect of the ZBA expansion order was to increase, dramatically, this acquisition cost, whether acquisition was acquired by purchase or condemnation and whether Brink's construction is commenced, is completed, or whether it is not." Plaintiff's brief in support of motion for rehearing, p 5.

GEORGE v TRAVELERS INDEMNITY COMPANY

1. INSURANCE—ARSON—BURDEN OF PROOF—INSURERS.

The burden is placed on the insurer who raises an arson defense to prove by a preponderance of the evidence that the plaintiff set fire to the building or caused it to be set on fire.

2. ARSON—ELEMENTS—CIRCUMSTANTIAL EVIDENCE—MOTIVE—OPPORTUNITY—INCENDIARY ORIGINS.

The elements of arson may be established by circumstantial evidence; Michigan courts have affirmed arson convictions based on circumstantial evidence of motive, such as insurance coupled with business difficulties, plus opportunity, such as access to the building where there is independent evidence of the incendiary origins of the fire.

3. INSURANCE—ARSON—DIRECT EVIDENCE—CIRCUMSTANTIAL EVIDENCE—MOTIVE—OPPORTUNITY—INCENDIARY ORIGINS.

There was enough direct and circumstantial evidence of motive, opportunity and incendiary cause for a jury to find that an arson defense was established by defendant insurers, in an action for damages for the alleged failure of the insurers to honor the terms of policies covering the plaintiff's property and business, where it was undisputed that the fire resulted from arson, the plaintiffs were heavily insured, the plaintiffs had easy access to the building, and there was evidence from which the jury could conclude that the plaintiffs' corporation was heavily in debt as well as evidence suggesting that community hostility against the plaintiffs had made it unprofitable, if not impossible, to carry on business.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Arson and Related Offenses §§ 42, 46–53.
[2] 5 Am Jur 2d, Arson and Related Offenses §§ 47, 52, 53.
[3] 5 Am Jur 2d, Arson and Related Offenses §§ 42, 47, 52, 53.
[4] 5 Am Jur 2d, Arson and Related Offenses §§ 46–58.
[5–7] 75 Am Jur 2d, Trial §§ 283–285, 1012.
[7] 5 Am Jur 2d, Appeal and Error §§ 624, 722.
[8] 5 Am Jur 2d, Appeal and Error §§ 600, 835.

4. EVIDENCE—INFERENCES—FACTS—CIRCUMSTANTIAL EVIDENCE—DIRECT EVIDENCE.

A conclusion cannot be inferred from a fact which was itself derived inferentially from circumstantial evidence; however, where two distinct lines of argument, each based on an inference from different direct evidence converge on the same conclusion, it is not necessary to base an inference on an inference for either argument.

5. TRIAL—APPEALS TO PREJUDICE—RACE—RELIGION—NATIONALITY.

The law is blind to differences in race, religion, and nationality; appeals to prejudice, whether overt or covert, have no place in the administration of justice.

6. TRIAL—APPEALS TO PREJUDICE—ETHNIC ALLUSIONS—APPEAL AND ERROR.

It is reversible error to deny the opposing party a fair trial by making irrelevant and inflammatory ethnic allusions.

7. APPEAL AND ERROR—APPEALS TO PREJUDICE—NATIONAL ORIGINS—RELEVANCE—OVERKILL.

The Court of Appeals, in evaluating the possible prejudice resulting from a defense counsel's protracted inquiry on cross-examination into the plaintiffs' national origins, looks to whether the questions were relevant to the issues and, if not, whether they were calculated to arouse prejudice; the Court will look to see if defense counsel indulged in unnecessary overkill instead of pursuing a limited, focused inquiry into areas relevant to the issues.

8. APPEAL AND ERROR—EVIDENCE—FAILURE TO OBJECT—REASONS FOR OBJECTION—MANIFEST INJUSTICE—CURATIVE INSTRUCTIONS.

Failure to object specifically and for proper reasons to the admission of evidence precludes appellate review unless there is manifest injustice; failure to request a curative instruction forecloses appellate review unless the remarks of counsel are so prejudicial as to be irreparable by a cautionary instruction.

Appeal from Wayne, John R. Kirwan, J. Submitted December 12, 1977, at Detroit. (Docket No. 30158.) Decided February 6, 1978. Leave to appeal applied for.

Complaint by Harry George and Bahjat M. Yaldoo, individually and as corporate officers in behalf of True Value Supermarket, Inc., and True Value

Supermarket, Inc., against Travelers Indemnity Company, American Home Assurance Company, Allstar Insurance Corporation, and Jefferson Insurance Company of New York for damages based on the alleged failure of defendants to honor the terms of policies covering the value of the supermarket, its contents, and for business interruption after the supermarket was destroyed by fire. Judgment for defendants. Plaintiffs appeal. Affirmed.

Costello & Barkey, P. C., for plaintiffs.

Ross, Soloy & Kochansky, for American Home Assurance Company and Jefferson Insurance Company of New York.

Denenberg, Tuffley & Thorpe (by *Charles R. Tuffley* and *Ilene Gordon),* for Travelers Indemnity Company.

Before: N. J. KAUFMAN, P. J., and BRONSON and D. E. HOLBROOK, JJ.

N. J. KAUFMAN, P. J. This appeal arises out of an action for damages based on the alleged failure of defendant insurance companies to honor the terms of policies covering plaintiffs for the value of a True Value Supermarket, for the contents therein, and for business interruption, after the supermarket burned down on October 31, 1971. At the time of the fire, plaintiff Harry George, the president and sole stockholder of True Value Supermarket, Inc., owed $15,000 to plaintiff Bahjat Yaldoo. Yaldoo was vice-president and director and also managed the store until September 1971. Plaintiffs appeal from a jury verdict of no cause of action as to all claims, which was returned on June 15, 1976, after a lengthy trial.

There was considerable testimony, including admissions by plaintiffs themselves, tending to show that there had been serious trouble with residents of the local community in the period immediately preceding the fire. Yaldoo had an armed confrontation with local youths which led to the circulation of leaflets accusing him of racism and proposing a boycott of the store. The store was picketed and its windows were smashed, as were the windows of Yaldoo's car. Yaldoo was forced to give up his position as manager. He was replaced by Edward George, Harry George's son.

The captain of the arson section of the Detroit Fire Department, Michael Buschbacher, testified without objection that when he questioned Edward George after the fire, Edward George told him that he had received threats ranging from "beating him up to burning the building", and that because the store had been "harassed by picketing" it had closed earlier than it used to. At trial, Edward George denied saying this. The president of the company which serviced the store's burglar alarm system testified that he had to make frequent service calls throughout October, 1971, to repair the system because it was connected to store windows which were repeatedly broken. His statement that the store was closed for two weeks in October was denied by both Harry and Edward George.

Captain Buschbacher, who investigated the blaze, testified that in his opinion it had been deliberately set. Indeed, Lhevinne Pickett, a defense witness, testified that he set the fire at the store. He explained he was hired by one Hazim Saeegh, who gave him detailed instructions as to when to arrive at the store, how to get in and hide until closing time, where to find the charcoal lighter fluid needed to start the fire, and where to

find an axe with which to break out and get away afterwards. There was no objection to any of this testimony. The trial court did sustain an objection to a question as to what Saeegh told Pickett with respect to the burglar alarm. However, Pickett did testify without objection that he asked Saeegh if the burglar alarm would be on, and he also testified that when he left the store, the alarm did not go off. Over a general objection that the matter was inadmissible and prejudicial, Pickett answered affirmatively the question of whether Saeegh told him why the store was being burned. An objection to a question asking what Saeegh told Pickett was sustained.

Hazim Saeegh was not called as a witness. Harry George and Bahjat Yaldoo denied knowing either Saeegh or Pickett. Pickett said he did not know either of the plaintiffs and did not know who owned the store he burned. Pickett did testify, though, that the day after the setting of the fire, Saeegh drove him to the parking lot of a Food Farm Market; Saeegh went inside and returned with $1,600 or $2,000 for Pickett. Harry George admitted that he owned a 30% interest in the Food Farm store.

During cross-examination of the plaintiffs and another of their witnesses, defense counsel repeatedly asked questions relating to the Chaldean national origins of George and Yaldoo. Counsel asked if the previous owners of the True Value Supermarket were Chaldean. He also asked: "What is a Kaldean *[sic]?*" There were no objections to these questions. When there was objection to additional inquiry about Chaldean markets, defense counsel justified the questioning as relevant to the witness's credibility because he derived a great deal of business from Chaldean clients.

There was no contrary argument and the trial court permitted defense counsel to elicit the fact that the witness's agency derived about $10,000 in income from Chaldean markets in 1970–1971.

On cross-examination, Edward George was asked if his new wholesale business sold mainly to Chaldean markets. There was no objection.

On cross-examination, Harry George was questioned at great length about his Chaldean nationality, the size of the Detroit Chaldean community, whether the community is "closeknit", whether Chaldeans attend a particular church, whether there is a Detroit-area Chaldean telephone directory, and whether Harry George had sponsored or assisted Chaldean immigrants to the United States. The only objection was to the question whether the Chaldean community was closeknit. Counsel for Harry George objected that "the Kaldean *[sic]* community here has nothing to do with this trial. It is immaterial and irrelevant". Defense counsel responded that "we intend to prove in this case that there was a—that the individual who was hired to set this particular fire was in fact hired by a gentleman who was Kaldean *[sic],* as opposed to the theory of the Plaintiff in this case, which I think is obvious". He suggested that inquiry would be relevant if the Chaldean community was very small, and the trial judge allowed him to ask about that.

There was never any testimony to the effect that Saeegh was a Chaldean. In proceedings out of the presence of the jury, the trial court sustained an objection by the plaintiffs when defense counsel asked Pickett whether Saeegh was a Chaldean. The only source of Pickett's knowledge of Saeegh's nationality was hearsay, which was not allowed into evidence.

On appeal, plaintiffs raise several issues; only the one regarding the questioning of plaintiffs and their witnesses merits extended discussion.

Initially, however, it is necessary to review the evidence presented at trial as it relates to the legal defense offered by defendant to build the proper foundation from which to dispose of plaintiffs' major contention.

Where an arson defense is raised by an insurer, the burden is on the insurer to prove by a preponderance of the evidence that the plaintiff set fire to the building or caused it to be set on fire. *Walz v Peninsular Fire Insurance Co,* 221 Mich 326, 343; 191 NW 230 (1922). The elements of arson may be established by circumstantial evidence. *People v Porter,* 269 Mich 284, 292; 257 NW 705 (1934), *Peterson v Oceana Circuit Judge,* 243 Mich 215, 217; 219 NW 934 (1928). Where there is independent evidence of the incendiary origins of a fire, Michigan courts have affirmed arson convictions based on circumstantial evidence of motive (such as insurance coupled with business difficulties) plus opportunity (such as access to the building). *People v Dorrikas,* 354 Mich 303, 307–308; 92 NW2d 305 (1958), *People v Bailey,* 42 Mich App 359, 361–363; 202 NW2d 557 (1972), *People v Horowitz,* 37 Mich App 151, 153–158; 194 NW2d 375 (1971), *lv den,* 387 Mich 753 (1972).

In this case, it was undisputed that the fire resulted from arson. The plaintiffs were heavily insured and there was evidence from which the jury could conclude that the corporation was heavily in debt as well as evidence suggesting that community hostility had made it unprofitable, if not impossible, to carry on the business. Plaintiffs presented contrary evidence, but it was for the jury to decide what to believe and what to disbe-

lieve. *People v Fuller,* 395 Mich 451, 453; 236 NW2d 58 (1975), *People v Chamblis,* 395 Mich 408, 420–421; 236 NW2d 473 (1975). Of course, the plaintiffs had easy access to their own store. George owned the corporation and had keys to the store, and Yaldoo had managed the store until a few weeks before the fire. The jury could believe that one or the other of these men was sufficiently familiar with the store to furnish the detailed instructions successfully followed by the arsonist Pickett. There was enough direct and circumstantial evidence of motive, opportunity and incendiary cause for the jury to find that the arson defense was established.

Plaintiffs contend, however, that on these facts the conclusion that they are responsible for starting the fire stems from the impermissible pyramiding of inferences. A conclusion cannot be inferred from a fact which was itself derived inferentially from circumstantial evidence. *People v Atley,* 392 Mich 298, 314–316; 220 NW2d 465 (1974), *People v Jacobson,* 72 Mich App 489, 497; 250 NW2d 105 (1976), *People v Little,* 58 Mich App 12, 16; 226 NW2d 735 (1975). Plaintiffs stress the fact that, though Pickett admitted burning the store for Saeegh, there was no evidence linking Saeegh to the plaintiffs. But this criticism has nothing to do with the pyramiding of inferences. The evidence that Saeegh hired Pickett to burn the store is direct, not circumstantial. From the direct evidence furnished by Pickett's testimony the jury might reasonably infer that Saeegh was acting at the behest of someone who had a motive for the burning of the store. We have already seen that, even if Pickett had never testified, there was circumstantial evidence of plaintiffs' responsibility for the fire. The conclusion that plaintiffs insti-

gated the fire was strengthened, not weakened, by Pickett's testimony. Two distinct lines of argument, each based on an inference from different direct evidence, converged on the same conclusion. For neither argument was it necessary to base an inference on an inference.

As noted earlier, the issue which arouses our greatest concern in this case is the possible prejudice resulting from defense counsel's protracted inquiry into the plaintiffs' Chaldean ethnic affiliation during cross-examination.[1] Even in the occasional case where racial, ethnic, or religious matters are relevant to the issues,[2] there is always the risk of incidentally arousing prejudice—and this Court abhors injecting the poison of prejudice into any legal proceeding. The law is blind to differences in race, religion, and nationality. Appeals to prejudice—overt or covert—have no place in the administration of justice. It is reversible error to deny the opposing party a fair trial by making irrelevant and inflammatory ethnic allusions. *Nemet v Friedland,* 273 Mich 692, 697; 263 NW 889 (1935), *Solomon v Stewart,* 184 Mich 506, 511; 151 NW 716; Am Ann Cas 1917A, 942 (1915), *Cluett v Rosenthal,* 100 Mich 193, 199–200; 58 NW 1009; 43 Am St 446 (1894). Any effort to arouse the prejudice of the jury "cannot be overlooked, nor can it ever, in the final analysis, prove other than detrimental to the interests of the litigant whose counsel resorts to such a course". *Solomon v Stewart, supra,* at 511. In evaluating the ethnic allusions in this case, we look to whether the questions were relevant to the issues and, if not, whether they were calculated to arouse prejudice.[3]

[1] A portion of this questioning is reproduced in the Appendix.

[2] An example would be an interracial identification situation. *See, e.g., People v Flinnon,* 78 Mich App 380; 260 NW2d 106 (1977).

[3] *See* Anno: *Statement by counsel relating to race, nationality, or religion in civil action as prejudicial,* 99 ALR2d 1249.

A few of the questions referring to Chaldeans may have been relevant but most were not. Arguably, the questions directed to the insurance broker about the amount of business he derived from Chaldeans related to his credibility by revealing bias or interest. *People v Field,* 290 Mich 173, 178; 287 NW 422 (1939), *People v Meier,* 47 Mich App 179, 196; 209 NW2d 311 (1973). But that cannot justify asking the witness what a Chaldean is or whether the previous owners of the True Value Supermarket were Chaldeans. There was likewise no justification for asking Edward George whether his new wholesale business sold mainly to Chaldean markets. But above all, the lengthy cross-examination of Harry George accentuated his national origins in an entirely unnecessary way. Where the Chaldeans originated, the number of churches they attend, and the size and cohesiveness of the Detroit Chaldean community were questions irrelevant to any issue in the case.

Defendants argue that since Hazim Saeegh is a Chaldean, these questions served to rebut the plaintiffs' theory that the store was burned down by neighborhood blacks. But there was no admissible evidence that Saeegh was a Chaldean, and even if there was, the questions asked went far beyond the scope of the supposed rationale. Instead of pursuing a limited, focused inquiry, defense counsel indulged in unnecessary overkill. *Cf., People v Biondo,* 76 Mich App 155, 157; 256 NW2d 60 (1977). We conclude that for the most part the ethnic allusions were irrelevant.

However, due to the particular circumstances of this case, the questioning was not prejudicial. There was no objection to most of the questions concerning Chaldeans, and the objections to others rested on other grounds than their prejudicial

character. Failure to object specifically and for proper reasons to the admission of evidence precludes appellate review unless there is manifest injustice. *People v Frederick Lester,* 78 Mich App 21, 32; 259 NW2d 370 (1977). Additionally, there was no request for a curative instruction. Unless the remarks of counsel are so prejudicial as to be irreparable by a cautionary instruction, the failure to request such an instruction forecloses appellate review. *Hill v Husky Briquetting, Inc,* 78 Mich App 452; 260 NW2d 131 (1977), *Smith v E R Squibb & Sons, Inc,* 69 Mich App 375, 386; 245 NW2d 52 (1976). Finally, in this case, unlike *Cluett, Solomon,* and *Nemet, supra,* there was no resort to ethnic epithets or stereotypes or other blatant appeals to prejudice. This is not to say that facially neutral ethnic references cannot be prejudicial. But, taking everything into account, including the direct and circumstantial evidence supporting defendants' claim of arson, we hold that the questioning was not so prejudicial as to deny the plaintiffs a fair trial.[4]

Affirmed.

APPENDIX

That part of the cross-examination of Harry George which focused on the Chaldean community rather than the issues in the case was conducted by counsel for defendant Travelers Indemnity Company and went as follows:

"Q. And, you are a Kaldean *[sic],* is that correct?

"A. Yes.

[4] We emphasize that our holding does not imply that we condone the tactics in question. Counsel who indulge in such argument always bear the risk that unnecessary prejudice will, in the right case, overwhelm an otherwise proper presentation of relevant evidence. This Court will not hesitate to call their bluff. *See People v Hoye,* 80 Mich App 258; 263 NW2d 343 (1977).

"Q. What is a Kaldean?

"A. Huh?

"Q. What is a Kaldean?

"A. Well, that's an old—I get these mixed up. You have heard of Bubitania or something. I cannot pronounce it. We originated from there. Butibazania, I don't—

"Q. Well, is it—

"MR. KRANSON: *[plaintiff's counsel]:* If you want some help I will tell you. He is trying to say Mesopatamia *[sic],* and he is trying to tell you that they speak the Arabic language which is the same language that Jesus Christ spoke.

"THE WITNESS: Correct.

"MR. KRANSON: And they are all from the same community in Telkeef. I have represented them for twenty-five years. I will answer your questions if you would like me to.

"MR. TUFFLEY: *[counsel for Travelers]:* Thank you, Mr. Kranson.

"Q. (By Mr. Tuffley:) Now, is there a Kaldean community in the Detroit metropolitan area?

"A. Yes

* * *

"Q. And, would it be fair to say that the Kaldean community in this Detroit area is a rather closeknit community?

"MR. KRANSON: Your Honor, the Kaldean community here has nothing to do with this trial. It is immaterial and irrelevant.

"THE COURT: Do you wish to respond, Mr. Tuffley?

"MR. TUFFLEY: Yes, Your Honor, I think it does because, as we have indicated to the Court and the jury that we intend to prove in this case that there was a—that the individual who was

hired to set this particular fire was in fact hired by a gentleman who was Kaldean, as opposed to the theory of the Plaintiff in this case, which I think is obvious.

"THE COURT: Well, even if that were true, does that mean that he hired this man. I am not sure I understand the connection.

"MR. TUFFLEY: Well, the connection was obviously, Your Honor, if there were only ten Kaldeans in the community, it would have a great deal of relevance. On the other hand, if there were a million Kaldeans in the Detroit area, there may not be.

"THE COURT: Why don't you ask him that question, how many Kaldeans are there in this area.

"Q. (By Mr. Tuffley:) Do you know how many Kaldeans there are in the metropolitan Detroit area?

* * *

"THE COURT: You say 10,000?

"THE WITNESS: Maybe that's not—I mean, how would I know? I am not—

"THE COURT: All right. Go ahead.

"Q. (By Mr. Tuffley:) This is a—the Kaldeans have their own phone book, haven't they?

"A. They do.

"Q. And that lists all the Kaldeans in the Detroit metropolitan area, and their address and their telephone number.

"A. Mostly all of them that are here.

"Q. And their businesses and so forth?

"A. Yes.

"Q. And, do you know how that came about, why that telephone book was put together?

"A. Well, the church did that.

"Q. The church?

"A. Yes.

"Q. Is there a particular church which is attended by Kaldeans?

"A. Two of them.

"Q. There are only two churches in the Detroit area?

"A. None in the Detroit area, no.

"Q. Well, where are they located?

"A. We have one in the Detroit area, I think, and one in Southfield.

"Q. There are two Kaldean churches then?

"A. Yes.

"Q. And they prepared this telephone book?

"A. I think so.

"Q. And that contains most of the names and addresses and so forth of the Kaldeans in the community?

"A. Right.

"Q. Would you say that you know, at least by name, the majority of the Kaldeans in the Detroit metropolitan area, Mr. George?

"A. Not all of them, no.

"Q. Quite a few?

"A. I know quite a few, yes.

"Q. You have probably sponsored a number of people who have immigrated to the United States, haven't you?

"A. What do you mean by sponsored?

"Q. Well, given them jobs and so forth and helped them get started when they get here.

"A. Whenever they come and ask for a job, whoever they be, I will give them a job. Not only the Kaldean people, whoever needs help, we give them help. It is not only the Kaldeans.

"Q. Not only Kaldeans?

"A. No, sir."

CONSUMERS POWER COMPANY v BIG PRAIRIE TOWNSHIP

1. TAXATION—GENERAL PROPERTY TAX ACT—WORDS AND PHRASES—TRUE CASH VALUE—ASSESSMENT.

The definition of "true cash value" supplied by the general property tax law, which is "the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained for the property at private sale, and not at forced or auction sale", is not the exclusive test for determining the value of property for tax purposes (MCLA 211.27; MSA 7.27).

2. TAXATION—ASSESSMENT—TRUE CASH VALUE—DETERMINATION OF TRUE CASH VALUE—METHODS.

There are five possible tests for determining the true cash value of property for tax assessing purposes: (1) actual cash value determined by the current selling price of the property or similar properties at private sale after negotiation, (2) adjusted reproduction cost method, (3) capitalization of income method, (4) depreciated net cost (book value), and (5) a comparison method, involving a determination of the depreciated reconstruction cost of equivalent building and facilities; it is the duty of the Tax Tribunal to adopt that method which is most appropriate to the individual case as the particular facts may indicate.

3. TAXATION—ASSESSMENT—DETERMINATION OF CASH VALUE—DISCRIMINATION.

Courts will not interfere with the assessment of property for

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4] 72 Am Jur 2d, State and Local Taxation §§ 753, 754, 759.
[3] 72 Am Jur 2d, State and Local Taxation § 787.
[5] 72 Am Jur 2d, State and Local Taxation §§ 765, 766.
[6] 31 Am Jur 2d, Expert and Opinion Evidence §§ 140, 141.
[7] 64 Am Jur 2d, Public Utilities § 301.
[8] 64 Am Jur 2d, Public Utilities § 148.
[9] 72 Am Jur 2d, State and Local Taxation §§ 761, 762.
[10] 71 Am Jur 2d, State and Local Taxation § 441.
[11] 72 Am Jur 2d, State and Local Taxation § 819.

taxation by assessing officers, or the Tax Tribunal on appeal, where it appears that any of the acceptable methods has been used for the determination of cash value and there is absent a showing of an unfair result or discrimination.

4. TAXATION—ASSESSMENT—TRUE CASH VALUE—DETERMINATION OF TRUE CASH VALUE—METHODS—WEIGHING PROCESS.

A tax assessing authority in performing an assessment might conceivably utilize any one of the five accepted methods for arriving at true cash value, however, the Tax Tribunal must weigh each method in determining the true cash value of the subject property, although it is impermissible to make the assessment through an averaging process in which all methods are utilized; the weighing process involves comparing the values determined by the application of each of the five methods and seeing which of the values so determined, in light of the assessor's experience and reasoned judgment, best approximates the cash value of the property.

5. TAXATION—ASSESSMENT—TRUE CASH VALUE—TAX TRIBUNAL—HYDROELECTRIC FACILITY—DEPRECIATED RECONSTRUCTION COST.

The Tax Tribunal's decision that adjusted depreciated reconstruction cost is the most appropriate method for determining the value of a dam utilized by a specific hydroelectric generating station owned by a public utility company was proper where the decision reflects a proper weighing of the various acceptable methods for arriving at true cash value.

6. WITNESSES—EXPERT WITNESSES—HYDROELECTRIC FACILITY—TRUE CASH VALUE—WEIGHT GIVEN TO TESTIMONY—COMPETENCE OF TESTIMONY.

The fact that an expert witness testifying as to the true cash value of a hydroelectric plant had not previously appraised a hydroelectric plant goes only to the weight to be given to his testimony, not its competence, where the expert was otherwise qualified to make such an assessment.

7. TAXATION—ASSESSMENT—HYDROELECTRIC FACILITY—LICENSES—FEDERAL POWER COMMISSION—TAX TRIBUNAL.

The Tax Tribunal's decision in an action to determine the true cash value of a hydroelectric generating facility to totally discount the possibility that the Federal Power Commission would take over the facility without compensation upon the expiration of the current license granted by the FPC was not clearly erroneous where the predominance of factors suggests the improbability of a takeover.

8. TAXATION—ASSESSMENT—TRUE CASH VALUE—TAX TRIBUNAL—HYDROELECTRIC FACILITY—UPLANDS—RECREATIONAL FACILITIES.

The Tax Tribunal in an action to determine the true cash value of a hydroelectric generating facility, including the real property within the entire project, erred in determining the value of certain uplands as having a market value by failing to take account of the effect of the inclusion of all the project uplands within a recreational use plan approved by the Federal Power Commission where no reasonable possibility was demonstrated that the government restriction on the use of the property will be changed.

9. TAXATION—ASSESSMENT—REAL PROPERTY—UTILITY COMPANY—ACTUAL INCOME—HISTORICAL COST—GOVERNMENTAL REGULATION.

Actual income that may be derived from certain land owned by a utility company must be considered for determining the value of the land for tax assessment purposes where the company's ability to allow others to use the land is greatly restricted by governmental regulation; although land does not depreciate, its value may be significantly impaired by governmental regulation.

10. TAXATION—ASSESSMENT—UTILITY COMPANY—REAL PROPERTY—NOMINAL VALUE—FEDERAL POWER COMMISSION.

A nominal value, for tax assessment purposes, should be assigned to land owned by a utility company where neither income nor return of investment can be realized therefrom unless the Federal Power Commission exercises its takeover rights, in which case it would have to pay historical cost at a maximum, and where the predominance of factors suggests the improbability of the takeover.

11. TAXATION—STATUTES—TAX TRIBUNAL COST—TAX TRIBUNAL—JURISDICTION—STATE TAX COMMISSION—ASSESSMENTS.

The Legislature, in enacting the Tax Tribunal Act, which created the Tax Tribunal and gave the Tribunal jurisdiction over tax issues which previously could be raised either before the State Tax Commission or in circuit court, intended that the Tax Tribunal would retain all of the jurisdiction formerly exercised over property tax decisions made by the STC, including the increasing of assessments (MCLA 205.701 *et seq.;* MSA 7.650[1] *et seq.).*

Appeal from the Michigan Tax Tribunal. Sub-

mitted December 7, 1977, at Lansing. (Docket Nos. 30608–30610.) Decided February 6, 1978. Leave to appeal applied for.

Petitions by Consumers Power Company to the State Tax Commission and the Tax Tribunal for a review of assessments by Big Prairie Township of certain real property and hydroelectric facilities for the years 1973, 1974, and 1975. Newaygo County was allowed to intervene as a respondent in the Tax Tribunal. Judgment for respondents. Petitioners appeal. Affirmed in part, reversed in part, and remanded to the Tax Tribunal.

Robert J. Byers; Dykema, Gossett, Spencer, Goodnow & Trigg (by *Eugene A. Gargaro, Jr.); Jack C. Radcliffe, Jr.;* and *Fraser, Trebilcock, Davis & Foster* (by *James A. Park)* for petitioner.

Miller, Canfield, Paddock & Stone (by *Samuel J. McKim III* and *James W. Goss),* and *Terrence R. Thomas,* Newaygo County Prosecuting Attorney, for respondents.

Before: R. B. BURNS, P. J., and ALLEN and R. M. MAHER, JJ.

ALLEN, J. Consumers Power Company appeals of right from an opinion and judgment entered September 30, 1976, by the Michigan Tax Tribunal, assessing the Hardy Dam, a hydroelectric generating station owned by Consumers, and the lands appurtenant thereto for the years 1973, 1974 and 1975.[1]

Despite the bulk of the record and pleadings,

[1] It appears a protest was also filed by Consumers for the tax year 1976 and will likewise be filed for 1977 unless this appeal is first resolved, although the facts and issues relating to the proper assessment for any of these years are, as to the legal principles involved, identical.

conceptually, this is not a difficult case. But within the conceptual framework, two issues of first impression are raised; (1) what is the proper method by which to determine the "true cash value" of a hydroelectric facility, and (2) may the Tax Tribunal adopt an assessed valuation greater than that set by the assessing authority and confirmed by the board of review.

BACKGROUND AND HISTORY

The dam

Construction of the Hardy Dam commenced in 1928, and was completed in 1930, and its 32.5 megawatt generating capacity was placed on line in 1931. Although the Federal Power Act, 16 USC 791a *et seq.,* requiring a license for the construction of any dam on a navigable waterway, had been in effect since June 10, 1920, Consumers Power Company did not have a Federal Power Commission license authorizing it to undertake this project.

As time passed, the FPC brought more and more unlicensed projects within its regulatory framework. *United States v Appalachian Electric Power Co,* 23 F Supp 83 (WD Va, 1938), *reversed on other grounds,* 311 US 377; 61 S Ct 291; 85 L Ed 243 (1940), *rehearing denied,* 312 US 712; 61 S Ct 548; 85 L Ed 1143 (1941), *petition denied,* 317 US 594; 63 S Ct 67; 87 L Ed 487 (1942). Accordingly, in 1962, Consumers Power Company applied for and was granted a license by the FPC for another 31 years of operation, and its current license for the Hardy Dam therefore expires in 1993. The FPC has authority to issue licenses for any period not to exceed 50 years. 16 USC 799.

Until 1973, the tax assessing authorities did not

dispute Consumers' method of evaluating the true cash value of Hardy Dam and appurtenant properties by depreciating the dam and other buildings over a 31 year useful life matching that of the FPC license granted. The land, considered not depreciable, was simply carried forward on Consumers' books at original cost. The original cost of the entire project was something over $11,000,000. By 1973, the "book value" of the dam and appurtenant land was down to $3,276,136.

However, in 1973 the Yom Kippur War between Israel and her Arab neighbors led to huge increases in fossil fuel prices, particularly for natural gas and petroleum products. It is alleged by the taxing authorities that as a result of the jump in fossil fuel prices the value of Hardy Dam underwent a sudden upward shift. With fuel prices having run amok, the efficiency of hydroelectric generators vis-a-vis equivalent fossil fuel peaking stations became striking.[2] Because of this disparity, since 1973 the assessing authorities have taken the position that Hardy Dam's increased cost efficiency makes the project far more valuable than it was previously. Consumers has disputed this assessment on the grounds that historical depreciated cost is the sole basis on which it is allowed to earn a return by the FPC and Michigan

[2] For example, in 1974 Hardy Dam produced, exclusive of plant use, 109,131,000 kilowatt hours of saleable electricity, at an average cost of .79 mills per kilowatt hour. In comparison, Consumers' Morrow Plant, a gas turbine generating station constructed in 1969, with a 35 megawatt rated capacity, generated 92,436,000 kilowatt peak hours of electricity at an average cost of 21.53 mills per kilowatt hour, while the contemporaneously constructed Straits gas turbine station, with a rated capacity of 25 megawatts, generated 90,000,025 kilowatt peak hours of electricity at an average cost of 16.26 mills per net kilowatt hour generated. Thus, while Consumers spent $1,990,241 to produce 92,000,000 kilowatt hours of saleable electricity at its Morrow Plant, and $1,464,142 to generate 90,000,000 saleable kilowatt hours at the Straits Plant, it spent only $86,213.49 at the Hardy Dam to produce 109,000,000 kilowatt hours of peak hour electricity.

Public Service Commission (MPSC), Consumers having been allowed a 7.47% rate of return for 1973 and 1974 by the MPSC, and 7.53% for the following two years. That is the crux of this litigation in a nutshell.

Rather than adopt depreciated historical cost, the taxing authorities have opted instead to use an evaluation method known as adjusted depreciated reconstruction cost. This involves calculating what it would cost to rebuild an equivalent hydroelectric facility at current construction prices, then allowing depreciation to reflect the fact that, as of 1973, Hardy Dam was 42 years old. This method was adopted and approved by the Tax Tribunal as applicable to this case. The witnesses on both sides agreed that the manner in which the depreciated reconstruction cost method is applied is through use of the Handy-Whitman Index, a publication, based on elaborate historical cost information and calculations, which allows the user to calculate present construction costs based on historical construction costs, and then to apply appropriate depreciation multipliers. To or from this figure may then be added or substracted appropriate amounts for various kinds of obsolescence (functional, historical and economic) and other factors, independent of construction costs, which affect the value of the property for ad valorem taxation purposes.

The appurtenant lands

Also in dispute is the value of the lands owned by Consumers and surrounding the Hardy Dam reservoir. The total land involved consists of 5,500 acres more or less, of which 2,250 are submerged, 2,210 are uplands within the project boundary and 1,040 are uplands outside the project boundary.

All the land is located within the confines of the Manistee National Forest.

Pursuant to FPC regulations, in conjunction with its license application, Consumers included an Exhibit R, a recreational use plan for all lands within the project boundary. FPC regulations generally require that a licensee include within the project boundary all land within 200 feet of the high water mark. In terms of nonsubmerged land, this requirement would subsume at most 381 acres of land. However, the recreational use plan submitted by Consumers and approved by the FPC includes far more land, Consumers having set aside some 780 acres for recreational development (of which 450 have been developed), such as for cabins, docks, county and township parks, club houses, etc., and the remaining 1,430 acres of land as a tree plantation. In disputing its property tax assessment as regards the land, Consumers argues that little value above historical cost can be placed thereon because the land cannot be leased or sold without FPC permission, and based on a sample consisting of all property transfer requests acted upon by the FPC in a one year time span, the chances that any land could be released for more intensive uses by private or public persons or agencies is nearly zero, and the land is so saddled with regulatory restrictions as to be of little market value.

The Tax Tribunal felt that Consumers had included within the project boundary more land than necessary for the attributed purpose of increasing its capital base for rate-making purposes, and the Tribunal held that a taxpayer could not be allowed to voluntarily restrict the uses to which its property could be put so as to decrease its liability for property taxes. *NeBoShone Associa-*

tion, Inc v State Tax Commission, 58 Mich App 324; 227 NW2d 358 (1975). The Tax Tribunal resolved to assess the nonsubmerged lands within the project at 50% of the value of similar land open to unrestricted use, or $500 per acre.

Proceedings

For 1973 and 1974, Consumers' appeal was addressed to the State Tax Commission, but in 1975, pursuant to the provisions of the Tax Tribunal Act, MCLA 205.701 *et seq.;* MSA 7.650(1) *et seq.,* the matter was transferred to the Tax Tribunal. The 1975 appeal was filed with the Tax Tribunal. In rendering its judgment, the Tax Tribunal assessed the subject property at a higher value than that originally set by the township and approved by the county board of review. Big Prairie Township had originally assessed the property for all three tax years in question at an assessed value of $5,669,100 (one-half of true cash value reduced by the appropriate equalization factor). Once the matter was before the Tax Tribunal, however, Newaygo County petitioned to intervene and permission to do so was granted. The county then sought to assess the property at $12,000,000 for each of the three tax years. Ultimately, the Tax Tribunal adopted an assessed value of $8,190,637 for 1973, $8,483,332 for 1974, and $9,315,574 for 1975. Not surprisingly, Consumers feels aggrieved at having ended up 2-1/2 to 3-1/2 million dollars of assessed value worse off than it was before it undertook this expansive litigation. Three basic issues are presented:

I. *Did the Tax Tribunal err in utilizing the adjusted depreciated reconstruction*

cost method in assessing the hydroelectric generating facility itself?

II. *Did the Tax Tribunal err in its assessment of the real estate involved, considered separately from the assessment of the generating facility?*

III. *Did the Tax Tribunal exceed its jurisdiction in adopting an assessed valuation greater than that originally set by appellee Big Prairie Township and confirmed by the board of review?*

ASSESSMENT OF THE HYDROELECTRIC FACILITY (ISSUE I)

It was the duty of the Tax Tribunal, as the Legislature's designated agent for that purpose, to determine the true cash value of Hardy Dam and appurtenant property, following which it was bound to apply ministerially the requisite equalization factor. Const 1963, art 9, § 3; see also art 9, § 5. Although the legislatively supplied definition of "true cash value" is "the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained for the property at private sale, and not at forced or auction sale", MCLA 211.27; MSA 7.27, the legislative test has been held not to be exclusive. For example, evidence of actual sales price at a private sale, following an arm's length transaction, has been held not binding on the State Tax Commission in determining the true cash value of certain property, which, by virtue of its unique economic use, has no ready market. *Cleveland-Cliffs Iron Co v Republic Twp,* 196 Mich 189; 163 NW 90 (1917). Where the prop-

erty is, by size and potential use, unusual, different assessing methods must be applied, involving the application of experienced and reasoned judgment to the evaluation process. Thus, the Tax Tribunal correctly rejected Consumers' arguments as to what other public utility companies might pay, have paid, would pay, or would consider paying for a generating station property whose value is affected by the authorized rate of return set by the Public Service Commission.

This Court has identified three acceptable tests for determining true cash value:

> "It is the opinion of this Court until the legislature establishes other methods for determining true cash value, three acceptable tests have been and are recognized for such determination, namely: actual cash value determined by current selling price of the property or similar properties at private sale after negotiation; adjusted reproduction cost method; and capitalization of income method." *Pantlind Hotel Co v State Tax Commission,* 3 Mich App 170, 176; 141 NW2d 699 (1966), *aff'd,* 380 Mich 390; 157 NW2d 293 (1968). Accord, *Alger-Delta Co-operative Electric Association v Bay De Noc Twp,* 13 Mich App 41; 163 NW2d 714 (1968).

Two other possibilities should also be noted:

(4) Depreciated net cost (book value), the approach advocated by Consumers Power Company; and

(5) A comparison method, involving a determination of the depreciated reconstruction cost of equivalent alternate power stations (fossil or nuclear fuel).

The choice of which method to use is by no means unfettered; it is the duty of the Tax Tribunal to adopt that method which is most appropriate to the individual case as the particular facts may indicate.

"Which method is most appropriate in an individual case is to be determined by the assessing officer or State tax commission on appeal, from the facts of that case and absent a showing of unfair result or discrimination, courts will not interfere with that judgment." *Pantlind Hotel v State Tax Commission, supra,* at 176.

It is an overriding principle that, no matter the seeming appropriateness of the method adopted, the result must be checked for unfairness or discrimination, a rule which appears to have motivated the Tax Tribunal in its comments purportedly indicating that equitable considerations underlie its decision. Whether right or wrong in its views thus expressed, the Tax Tribunal nonetheless properly considered the fairness of the method for which it opted, and in so doing did not violate the rule that the operation of a tax law is not a proper subject for equitable consideration. *Cf. Thoman v City of Lansing,* 315 Mich 566; 24 NW2d 213 (1946), *Consumers Power Co v County of Muskegon,* 346 Mich 243, 247; 78 NW2d 223 (1956), *Langford v Auditor General,* 325 Mich 585; 39 NW2d 82 (1949).

In performing an assessment, the assessing authority might conceivably utilize any one of the five enumerated methods. While it is impermissible to make the assessment through an averaging process in which all methods are utilized, it is agreed by the parties that the Tax Tribunal must weigh each method in determining the true cash value of the subject property. The weighing process involves comparing the values determined by the application of each of the five methods and seeing which of the values so determined, in light of the assessor's experience and reasoned judgment, best approximates the cash value of the property on a cosmic scale of truth. *Seriatim,* we

now weigh the respective merits of the five valuation methods.

1. *Depreciated Net Cost Method.* This method, so vigorously propounded by Consumers, cannot be reasonably applied. In 1974 (the only year for which a copy of Consumers' annual report to the FPC is available), Hardy Dam generated some 109,000,000 kilowatt hours (kwh) of electricity, exclusive of plant use, at a cost of $86,213.49. The average sales price of one kwh was $.0256094. Thus, Hardy Dam produced net income of $2.7 million.

Alternatively, Consumers paid an average of two cents per kwh for electricity it purchased from other utilities. Without Hardy Dam, Consumers' expenses would have been $2.2 million higher. A facility with a remaining useful life of not less than 20 years, which produces annual income of $2.7 million while saving $2.2 million in expenses must be worth more than its "book value" of $3.4 million.

Consumers argues that income cannot be attributed to Hardy Dam in this fashion, because the PSC added the depreciated net cost of Hardy Dam to the depreciated net cost of the remainder of Consumers' generating facilities and multiplied by 7.47% to determine Consumers' allowed profit for 1974. By complex accounting procedures the PSC set rates by adding permitted profits to anticipated expenses. If Hardy Dam is viewed as producing a $2.7 million profit, Consumers argues, some other facility must show a corresponding loss, since the income "pie" to be divided contains only so many slices.

This argument underlines the importance of Consumers' insistent suggestion that another public utility, contemplating purchasing the dam,

would pay no more than Consumers' depreciated net cost because that is the basis on which the buyer would be allowed to earn a profit by the regulatory agencies involved. Much argument and evidence dealt with whether the PSC or FPC would permit a potential buyer to include more than depreciated net cost in its rate base if a higher sales price were agreed upon. It may be assumed that a regulated utility would probably not pay significantly more than depreciated net cost for Hardy Dam, since due to the effect of regulation a utility has little direct economic stake in reducing its expenses per electric unit sold, while it is vitally interested in having the highest possible capital base against which to apply its permitted profit margin. But aside from regulated public utilities, there are two categories of potential buyers for an electric generating facility: municipal power companies, whose rates are generally not regulated by either the PSC or FPC, and large industrial concerns with high electric power demands. To such a prospective buyer, depreciated net cost is irrelevant. What is relevant is remaining useful life and potential income or savings after expenses, and the maximum price such a buyer would pay for Hardy Dam can be better determined by the capitalization of income method.

2. *Capitalization of Income Method.* This requires determining the present value of the amount of income the facility is expected to generate over its remaining useful life. This is somewhat complicated by the fact that while the actual mechanical generator may have a useful life of only 100 years or less and the present FPC license expires in 1993, the remaining parts of the dam have an essentially infinite life, and the mechani-

cal generator could be replaced at a fraction of the cost of building an entirely new dam. Nevertheless, given the figures involved, it is enough to estimate the remaining useful life of Hardy Dam in terms of the remaining life of Consumers' FPC license, or 20 years. Present value is calculated from the following formula:

$$P = \frac{R_1}{(1 + i_1)^1} + \frac{R_2}{(1 + i_2)^2} + * * * + \frac{R_n}{(1 + i_n)^n}$$

See 1 Encylopedia Britannica (1970 ed), Annuity, p 1010.

In this formula, i is the discount factor, n is the number of years for which income will be produced, and R_n is the income to be generated in the year n. Assuming that i approximates the 1973–74 rate of return (7.47%), that R remains constant (it is more likely to increase), that R is based on $.0256094 average selling price per kilowatt hour, average generation of 109,131,000 kilowatt hours, and expenses of $86,213.49, Hardy Dam has a capitalized value in excess of $27,000,000. This figure is higher than the depreciated reconstruction cost figure adopted by the Tax Tribunal.

Even though, in terms of the income it could generate for a municipal power system or the expenses it could save an industrial user of electricity, Hardy Dam is worth more than its depreciated reconstruction cost, it is highly unlikely that a buyer could be found willing to pay more than that latter value, since in theory the potential buyer could build its own dam. This is another example of what it means to "weigh but not average" the methods of valuation vis-a-vis one another. In weighing the capitalization of income approach, however, it must be recognized that

depreciated reconstruction cost does not represent the full value of the dam, because the owner of the dam enjoys a lawful monopoly and there may be no other place to build an equivalent dam, or permission from the Federal Power Commission to do so may not be forthcoming.

3. *Actual Selling Price.* In the instant case this method has been shown to be of no relevance, and no party has urged that such a value can be determined.

4. *Adjusted Depreciated Reconstruction Cost.* This method is described *supra.*

5. *Comparative Depreciated Reconstruction Cost.* The assessment value as determined by the reconstruction cost method may, however, be limited by the fifth valuation method, which is that of comparing the depreciated reconstruction cost of Hardy Dam with the depreciated reconstruction cost of an equivalent alternate power source with a similar remaining useful life. Although it is far more expensive per kilowatt of installed capacity to build a dam as compared to a fossil fuel plant—and perhaps even as compared to a nuclear plant—expenses for operational purposes gradually consume the capital expenditure savings. We again note that, to a regulated public utility, the high costs of operation merit little consideration because the regulatory authority will allow the utility to recapture all its expenditures for such purposes. However, to a nonregulated user, such as a municipal power system or industrial user, expenses are quite relevant because they come right out of that user's pocket. Thus, the fact that Consumers Power Company's Straits facility was built in 1969 at a cost of $1,911,044 does not make it an acceptable substitute for Hardy Dam, because the Straits facility's expenses of operation in

1974 were $1,464,142. With fuel costs increasing, the overall 20-year cost of the Straits facility will far exceed the depreciated reconstruction cost of Hardy Dam, and every year beyond 1993 the dam operates is a bonus to its owner.

Comparing the valuation of the dam, as determined by the five methods, this Court concludes that the Tax Tribunal's decision that adjusted depreciated reconstruction cost is the most appropriate method for determining the value of Hardy Dam reflects a proper weighing of the various methods. *Parsons v Detroit & Canada Tunnel Co,* 15 F Supp 986 (ED Mich, 1936), *CAF Investment Co v State Tax Commission,* 392 Mich 442; 221 NW2d 588 (1974). By comparing the assessment value determined by the capitalization method with that resulting from the adjusted depreciated reconstruction cost method, it is seen that Hardy Dam does not suffer from any "economic obsolescence" nor for that matter from any functional obsolescence. As fuel costs continue to predictably increase, Hardy Dam will continue to appreciate in value rather than depreciate.

Likewise, the evidence offered by Consumers Power Company concerning whether the dam would be reconstructed by Consumers if it were damaged or destroyed may be rejected as irrelevant. A single witness testified that Consumers would not rebuild Hardy Dam if it did not exist today or if it were damaged or destroyed. That may be true, because to a regulated utility little weight may be placed on expenses of operation in considering what facilities to construct for power generation. But the argument ignores the true economic value of Hardy Dam to an unregulated utility or an ultimate user of electricity as to whom it achieves its maximum economic benefit.

To such a potential owner, whether the dam would in fact be reconstructed is a function of simple economics. So long as reconstruction cost is less than capitalized income it would be worthwhile to repair or rebuild the dam, unless some alternate power source could supply the missing electricity at lower total cost over its lifetime, which is not possible given present production expense parameters.

So far, our analysis has been economic in nature. Let us turn now to the law. Decisions from other jurisdictions almost unanimously support our economic conclusion that the adjusted depreciated reproduction cost method is the most appropriate method for determining the value of hydroelectric projects. *Public Service Co of New Hampshire v New Hampton,* 101 NH 142; 136 A2d 591 (1957), *Alfred J. Sweet, Inc v City of Auburn,* 134 Me 28; 180 A 803; 104 ALR 784 (1935), *New Haven Water Co v Board of Tax Review of the City of New Haven,* 166 Conn 232; 348 A2d 641 (1974), *Boston Gas Co v Assessors of Boston,* 334 Mass 549; 137 NE2d 462 (1956), *Maine Consolidated Power Co v Town of Farmington,* 219 A2d 748 (Maine, 1966), *People ex rel Lehigh Valley R Co v Harris,* 168 Misc 685; 6 NY2d 794 (1938), *aff'd,* 281 NY 786; 24 NE2d 476 (1939), *Independent School District No 99 v Commissioner of Taxation,* 297 Minn 378; 211 NW2d 886 (1973). In so holding, those Courts have recognized that the value of property for ad valorem tax purposes and its value for ratemaking purposes "have been uniformally recognized as different". *Kittery Electric Light Co v Assessors of the Town of Kittery,* 219 A2d 728 (Maine, 1966), *Public Service Co v New Hampton, supra, Town of Barnet v New England Power Co,* 130 Vt 407; 296 A2d 228 (1972), *Northwest Light &*

Water Co v Alexander, 29 Idaho 557; 160 P 1106 (1916), *Missouri Rate Cases,* 230 US 474; 33 S Ct 975; 57 L Ed 1571 (1913), *Willcox v Consolidated Gas Co,* 212 US 19; 29 S Ct 192; 53 L Ed 382 (1909). Contra, *Spokane & Inland Empire Co v Spokane County,* 75 Wash 72; 134 P 688 (1913) (based on peculiar statute, legislatively overruled).

The Newaygo County Equalization Director, Mr. Johnson, was the only witness who gave a dollar value as calculated by the adjusted depreciated reproduction cost method, and his testimony was given over vigorous objection by Consumers. The grounds for the objection were (1) that there was no evidence that Mr. Johnson considered, prior to application of the reproduction cost method of appraisal, whether or not the dam would be reconstructed if it were destroyed, damaged, or rendered inoperable, and (2) that Mr. Johnson was not qualified to make the appraisal because he had never previously appraised a hydroelectric project.

As to the first objection, we have already noted that whether or not Consumers would choose to reconstruct or reproduce the Hardy Dam is immaterial, provided that a potential user can be identified for whom reconstruction would be an economically viable undertaking. As to Johnson's qualifications as an expert witness, Johnson testified he was certified at assessor level III by the State Tax Commission, a certification representing a high level of experience. Although Johnson had never previously appraised a hydroelectric dam, he testified that prior to making his appraisal he consulted with appellees' other expert witnesses and familiarized himself thereby with the use of the Handy-Whitman Index, and further that he studied a number of publications written for the purpose of providing guidance to assessors. It seems

obvious that, at some point, every expert does something within his field for the first time. An expert is qualified as such either through experience, such as by having made numerous prior appraisals of hydroelectric projects, or through generalized training and experience plus specialized study warranting branching out into a new but related area, a category into which Mr. Johnson fits. The fact Johnson had not previously appraised a hydoelectric project goes only to the weight to be given his testimony, not to its competence.

Consumers next claims that the Tribunal's evaluation of Hardy Dam is excessive by reason of the Tribunal's failure to sufficiently consider the negative impact of the possibility of a Federal takeover because the Hardy Dam lies astraddle a navigable water course. 16 USC 807(a) provides, in pertinent part:

"Upon not less than two years notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project * * * covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license * * * upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the

project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the value as allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided,* that the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved."

Consumers maintains that the FPC takeover rights must be considered in appraising the dam project and a reduction in appraised value must result, although Consumers concedes that to some extent the amount of reduction to be attributed to the takeover rights is within the discretion of the Tax Tribunal. Consumers charges, however, that the Tax Tribunal essentially ignored the effect of the FPC takeover rights in establishing true cash value of the Hardy Dam project.

Indeed, the Tax Tribunal, placing the burden of proof on Consumers, found no evidence that takeover is more than a mere possibility, speculative at best, and therefore "unworthy of substantive consideration in these proceedings". In so holding, the Tax Tribunal relied on *Nantahala Power & Light Co v Federal Power Commission,* 384 F2d 200, 212 (CA 4, 1967), where the Court held:

"There is absolutely no basis for a reasoned prediction that the Commission will attempt to invoke the recapture provisions upon expiration of the licenses to be issued for these seven developments. Neither can one

predict with any measure of assurance that if recapture is sought, the fair value at the time of recapture will exceed the net investment. Also * * * the developments may thereby become subject to what even Nantahala acknowledges as the government's limited right of recapture at less than fair value. Thus, not only the possibility of recapture, but the possibility of recapture upon terms raising Fifth Amendment questions, is so speculative that the constitutional question is obviously not ripe for decision."

We recognize that a constitutional question is "ripening", by virtue of the FPC's current refusal to renew expired licenses for longer than a few years at a time, while it formulates a policy concerning the exercise of takeover rights. See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Federal Power Commission,* 166 US App DC 245; 510 F2d 198, 200 (1975). In light of the FPC's status as Congress' designated agent for control of navigable waters, see *Gibbons v Ogden,* 22 US (9 Wheat) 1; 6 L Ed 23 (1824), *Willson v The Black Bird Creek Marsh Co,* 27 US (2 Pet) 245; 7 L Ed 412 (1829), a court squarely faced with the constitutional issue might well find no uncompensated taking of property in the event of a takeover. The FPC could undeniably, upon expiration of a license, refuse to renew the dam owner's permission to convert the stored potential energy of the restrained waters into electricity, or direct the owner to remove its obstruction to the flow of the navigable waters, since the licensee could claim no vested right to use of the water for any purpose. *United States v Appalachian Electric Power Co,* 311 US 377; 61 S Ct 291; 85 L Ed 243 (1940).

Nonetheless, takeover remains highly improbable. None has ever occurred. The FPC has never initiated takeover proceedings. And takeover can only be accomplished through Congressional, not

administrative, action—the FPC merely makes recommendations to the national legislature. 16 USC 800(a), 807(b). Exercise of the takeover rights is thus contingent on the concurrence of the President and a majority of both Houses of Congress, or on Congressional override of a Presidential veto.

Because the Tax Tribunal could not assign a percentage probability to Federal takeover without picking a number out of thin air (which this Court would inevitably have to reject as unsupported by competent, material, or substantial evidence on the whole record) it had to choose, in effect, between treating takeover as either 0% or 100% probable. Given the predominance of factors suggesting the improbability of a takeover, the Tribunal's decision to discount the possibility cannot be deemed clearly erroneous. This method avoids arbitrary assignment of probabilities and adequately protects Consumers' interests.

Consequently, the judgment of the Tax Tribunal, insofar as it establishes the true cash value of the generating facility itself, should be affirmed, while recognizing that if economic conditions affecting the power generation industry undergo material change a new appraisal will have to be made in accordance with the foregoing principles.

ASSESSMENT OF THE APPURTENANT LANDS (ISSUE II)

The Tax Tribunal chose to appraise the overall project by valuing the dam and other structures separately from the real estate involved. The total land involved consists of approximately 5,500 acres located entirely within Newaygo County and Big Prairie Township. Of this acreage, some 1,040 acres lie without the boundary of the project as defined by the FPC license, while of the lands

within the project, 2,250 acres are submerged and 2,210 are uplands or dry lands. The land is registered in 39 separate parcels, each identified with the prefix "BP" followed by the parcel number. Two of these parcels, BP-357 and BP-367, are the site of the dam and all related improvements.

The dam site

For the three assessment years in question, the Tax Tribunal fixed a true cash value in the aggregate of $1,744,446 for the land. Parcels BP-357 and BP-367 were assessed at $1,000 per acre, for an actual dollar total of $34,522. Since these parcels are the site of a valuable income producing improvement, and as the adjusted reproduction cost value of the dam itself added to the appraised value of the dam site real estate does not exceed the capitalized value of the dam, the Tax Tribunal's evaluation must be upheld.

Submerged lands

With respect to the submerged lands, the Tax Tribunal adopted an assessed value of $25 per acre, an essentially nominal sum. As this is substantially less than historical cost, appellant has raised no objection thereto.

Uplands

Concerning the remaining lands, both within and without the project boundary, the Tax Tribunal judged that such prime waterfront property, and even that not fronting on Hardy Pond, by virtue of its right of access to the pond, would, if unencumbered with any restrictions whatsoever, be worth $1,000 per acre. The Tribunal rejected Consumers' argument that because all the dry

land within the project boundaries is included in the FPC approved recreational use map and subject to FPC restrictions, it has no value beyond historical value because unusable for any purpose. The Tribunal simply estimated that restrictions which would be required following any sale by Consumers to private purchasers would reduce the value of the land by 50%, and accordingly assessed such lands at $500 per acre. The Tax Tribunal did acknowledge that the land within 200 feet of the high water mark, comprising only some 300 to 400 acres, plus that specifically set aside for recreational use (total 780), would have to be given a lesser value, based upon its income producing value (Consumers leases 450 of these 780 acres specifically reserved for recreational uses).

Uplands within the project boundary

Restrictive provisions, pursuant to the mandate of 16 USC 803(a), are included within Articles 19 and 20 of Consumers' license:

"*Article 19.* So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and recreational purposes, including fishing and hunting, and shall allow to a reasonable extent for such purposes the construction of access roads, wharves, landings, and other facilities on its lands the occupancy of which may in appropriate circumstances be subject to payment of rent to the Licensee in a reasonable amount: *Provided, that* the Licensee may reserve from public access, such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property and *Provided, further,* that the Licensee's consent to the construction of access roads,

wharves, landings, and other facilities shall not, without its express agreement, place upon the Licensee any obligation to construct or maintain such facilities. These facilities are in addition to the facilities that the Licensee may construct and maintain as required by the license.

"*Article 20.* The Licensee shall be responsible for and shall take reasonable measures to prevent soil erosion on lands adjacent to the stream and to prevent stream siltation or pollution resulting from construction, operation or maintenance of the project. The Commission upon request, or upon its own motion, may order the Licensee to construct and maintain such preventive works to accomplish these purposes and to revegetate exposed soil surface as the Commission may find to be necessary after notice and opportunity for hearing."

Moreover, the FPC has adopted administrative regulations which further underline the primacy accorded recreational interests. 18 CFR, Chapter I, Subchapter A, Part 2, § 2.7 declares:

"The Commission expects the licensee to assume the following responsibilities: (a) to acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by the project. To the extent consistent with the other objectives of the license, such lands to be acquired in fee for recreational purposes shall include the lands adjacent to the exterior margin of any project reservoir plus all other project lands specified in any approved recreational use plan for the project."

The FPC in Order No. 313 states:

"(C) The Commission will not grant any authorization for a licensee to dispose of any interest in project lands, unless a showing is made that such disposal is not inconsistent with any approved recreational plan or in the absence of such a plan, that the lands do not have recreational value. Pending a determination by the

Commission that such lands are not needed for public recreational purposes, all project lands, buildings or other property will be considered to be required to achieve the purposes of the license within the meaning of any article in the license relating to the leasing of such lands, buildings, or other property. The licensee, in the absence of specific Commission exemption from these requirements, shall include in the instrument of conveyance a covenant running with the land adequate to insure that, unless the Commission subsequently authorizes a different use as consistent with the comprehensive plan for improving or developing the waterway, the use of the lands conveyed will not endanger health, create a nuisance, or otherwise be incompatible with over all project recreational use." 34 FPC 1546, 1549–1550.

Appellees and the Tax Tribunal make a number of arguments concerning the effect of these restrictions on the ad valorem taxable valuation of appellant's uplands.

First, the Tribunal relied on *NeBoShone Association, Inc v State Tax Commission,* 58 Mich App 324; 227 NW2d 358 (1975), in holding that appellant had included within the project boundary more land than required by Commission rules and regulations, specifically FPC Regulation 18 CFR 4.41 *Exhibit K* (1)(iii), which provides:

"Except with respect to lands necessary or appropriate for recreational purposes, for which it is recognized that additional project area will generally be required, the project boundary shall be no more than 200 feet (horizontal measurement) from the exterior margin (in general, highwater level) of reservoirs."

It said that Consumers could not reduce the taxable evaluation of its property by voluntarily submitting it to use restrictions.

NeBoShone Association, Inc v STC, supra, is

distinguishable and inapposite. In that case, private landowners banded together to form an association, and agreed that no association member would sell his property without approval by the association. The entire scheme was a virtual conspiracy to avoid property taxes, by placing so many restrictions on property the association members had no intention of selling anyway as to render it without appreciable market value. The present case does not involve restrictions self-imposed by a coalition of private landowners, but instead use limitations imposed by governmental authority, an authority which has jurisdiction to do so and whose actions are controlling by virtue of the supremacy clause of the Federal Constitution.

Noting that FPC rules and regulations provide means by which lands included within project boundaries may be released from license restrictions and sold or leased to third parties, the Tax Tribunal concluded that aside from those 780 acres specifically reserved for recreational uses, the FPC would, upon request, grant such releases. In so holding the Tribunal relied on an exhibit (admitted over Consumers' objection), being a letter from an FPC staff member indicating that the FPC would, in general, consider removing license restrictions on project lands for purposes of sale or lease to third persons, although the staffer declined to render any opinion as to whether amendment of the license would be allowed with respect to any of the lands involved in this project.

Ignoring the hearsay character of the letter, it is clear it added nothing to the case against Consumers. As Consumers acknowledges that FPC rules and regulations allow for license amendments for such purposes, the staff member's letter merely

establishes that the Commission lives by its own rules and regulations.

The issue is not whether the restrictions *could* be lifted by the FPC, but rather *whether* they will be lifted. The only evidence on this point is Consumers' Exhibit Q, copies of every FPC order in a one year period involving land transfer requests by hydroelectric project licensees. Although appellees have argued that the total of 25 cases included in this Exhibit is not a representative sample, and although during the trial counsel for appellees suggested that decisions more favorable to appellees' viewpoint could be found after a short search and if found would be introduced into the record, there is no evidence in the record that the exhibit is unrepresentative and indeed no contrary sample of FPC cases was ever offered or introduced by appellees.

Construed together, the cases included within Exhibit Q permit a number of conclusions: (1) even when transfers are approved, significant easements must be retained by the licensee and significant use restrictions must be placed on the land; (2) or the land must be found to have no recreational value whatsoever. With the exception of a few minor land transfers of not more than an acre or two to persons who were already fee owners of adjacent lands and who required the transfer to make their remaining lands economically accessible, all transferees approved by the FPC were public agencies except for the Veterans of Foreign Wars, which in a single case obtained a 4.5 acre parcel.

In each case, before approving a transfer (and in many of the cases transfers were refused), the FPC first consulted and required approval by state departments of natural resources and water re-

sources commissions, and by the Federal Forest Service, Agriculture Department, National Historical Commission, Interior Department, Fisheries and Wildlife Service, and Corps of Engineers. By no means did the FPC treat a request for the transfer of even less than one acre parcels as a mere formality, but in each case a full investigation was conducted and a formal order entered after due consideration.

The Tax Tribunal made much of the fact that the FPC regulations regarding land transfers require a finding that the land has no recreational value only if there is no approved recreational use plan. That is true; and Consumers has never disputed that the 1,040 acres outside the project boundary could be sold to anyone without prior approval by the FPC. However, lands within the approved recreational use area will not be approved for transfer by the FPC without first amending the license.

It might be argued that of the uplands within the project area, only the 780 acres reserved specifically for recreational uses are subject to these restrictions. But remaining lands were set aside by Consumers as a tree plantation, and only hunting and fishing are allowed. The FPC approved this plan in issuing a license. While a tree plantation is not a recreational use in the sense of a boat dock or park, as a scenic area it has the simple recreational use of natural beauty. The Tax Tribunal ignored the fact that in approving a recreational use plan the FPC must consider scenic beauty and make provisions therefor. *Scenic Hudson Preservation Conference v Federal Power Commission,* 354 F2d 608 (CA 2, 1965), *cert den,* 384 US 941; 86 S Ct 1462; 16 L Ed 2d 540 (1966), *cert den,* 407 US 926; 92 S Ct 2453; 32 L Ed 2d 813 (1972). The

conclusion is inexorable that all the land within the project boundary has been "designated for recreational use".

Appellees rely upon *Georgia Power Co, Project No. 2413,* 42 FPC 356 (1969), where the FPC approved a request that less than 200 feet of land on either side of a reservoir be included within the project boundary, because to include more would be prohibitively expensive given the acreage involved. Although the FPC in an individual case might relax its 200-foot requirement, it has not done so in this case, and its policy is exactly to the contrary. FPC Order No. 313 declares:

> "By separate order we are amending Section 4.41 of the regulations to make clear that we expect the licensees to extend their project boundaries beyond the 200 feet from the exterior margin of reservoirs presently specified whenever appropriate to effectuate a comprehensive recreational plan." 34 FPC 1546, 1547 (1965).

Likewise, appellees erroneously rely on *State Highway Commissioner v Eilender,* 362 Mich 697; 108 NW2d 755 (1961), for the proposition that, if there is a reasonable possibility that a government restriction on the use of property will be changed, that possibility must be considered in determining the true cash value of the property. See also Stanley & Tunstall, *State and Local Taxation,* 16 Wayne L Rev 657 (1970).

The problem is, no "reasonable possibility" has been demonstrated in this case. The evidence is all to the contrary, and accordingly we hold the Tax Tribunal erred in failing to take account of the effect of inclusion of all project uplands within the recreational use plan in determining the value of the property under consideration. *Lochmoor Club v Grosse Pointe Woods,* 3 Mich App 524; 143

NW2d 177 (1966), *Kensington Hills Development Co v Milford Twp & Milford Village,* 10 Mich App 368; 159 NW2d 330 (1968), *Helin v Grosse Pointe Twp,* 329 Mich 396, 407; 45 NW2d 338 (1951).

As to the 2,210 acres of land above the high water mark and within the project boundary, Consumers' ability to realize value from the land through sale or lease is restricted by the terms of the license and applicable statutes and regulations so as to render the market value approach used by the Tax Tribunal completely inapposite. More than a question of mere restrictions on use is involved, as the ability of Consumers to grant permission to third parties to use the land has been severely circumscribed. As to the 780 acres for which actual recreational use leases are in effect or planned, the capitalization method should be the starting point for appraisal. The capitalization method is the most appropriate because the FPC has specifically indicated in the license that leases of the recreational acreage are to be at minimum fees. In light of that restriction, actual income must be considered for determining the value of the land, at least as a starting point, even though this may be less than historical cost, for, although land does not depreciate, its value may be significantly impaired, as in this case, by governmental regulation.

As to those lands constituting the tree plantation, little more than nominal value can be assigned, for neither income nor return of investment can be realized therefrom unless the FPC exercises its takeover rights, in which case it would have to pay historical cost at a maximum. However, if value is assigned to this land based on historical cost, because that is the minimum value an eventual transferee will have to pay, then the

value of the dam itself must be accordingly reduced to account for the takeover possibility, for otherwise the taxing authorities would be reaping the benefits of an inconsistent position on the probability of takeover.

Uplands outside the project boundary

As to the 1,040 acres outside the project boundary, the Tax Tribunal accorded increased value because of the right of access to Hardy Pond. The record fails to establish that this presumed right of access has any economic value, given the FPC restrictions. Accordingly, that acreage should be valued the same as other land in the area, and ignoring the possibility of access to Hardy Pond or other ephemeral riparian rights.

Accordingly, for the purpose of reappraising the lands in question, except for Parcels BP-357 and 367 and the submerged lands, this matter is remanded to the Tax Tribunal.

TAX TRIBUNAL'S JURISDICTION TO INCREASE ASSESSMENTS
(ISSUE III)

Consumers contends that the Tax Tribunal has no statutory authority or jurisdiction, in a proceeding initiated by a taxpayer seeking a reduction of its assessment, to increase the assessment beyond that determined by the local assessing officer and confirmed by the local board of review, where the alleged under-assessment was first raised by taxing units of government as an affirmative defense in their answer filed as intervening respondents before the Tax Tribunal. As in the case of issues I and II, this issue is better understood in relation to

historical background. The Tax Tribunal was established as the reviewing authority for real property assessment disputes by the Tax Tribunal Act, being 1973 PA 186, which became effective July 1, 1974. MCLA 205.701 *et seq.;* MSA 7.650 (1) *et seq.* Prior to that time, review of contested assessments was governed by certain provisions of the general property tax act. MCLA 211.148 *et seq.;* MSA 7.206 *et seq.* Under that act a taxpayer feeling aggrieved by reason of an alleged over-assessment had two remedies. Under § 152, MCLA 211.152; MSA 7.210, he could appeal to the State Tax Commission (STC); or, alternatively, under § 53, MCLA 211.53; MSA 7.97, he could pay the tax under protest and sue in circuit court. As a practical matter, most contests were brought to the STC which, upon review, had the power to either increase or decrease the assessment. *Fruehauf Trailer Co v Detroit,* 321 Mich 11; 31 NW2d 848 (1948). But under a § 53 appeal, the circuit court was without power to increase the assessment. This dual statutory scheme not infrequently led to decisions by the circuit court which conflicted with those of the STC. As was stated in *Mohawk Data Sciences Corp v Detroit,* 63 Mich App 102; 234 NW2d 420 (1975):

"The Legislature presently provides a taxpayer two methods of challenging the assessment of a personal property tax. First the taxpayer may pay the tax under protest and then sue the township or city in accordance with MCLA 211.53; MSA 7.97, and recover 'if the tax or special assessment is shown to be illegal for the reason shown in such protest'. MCLA 211.53, *supra.*

"The alternative method of attacking a property tax assessment is by seeking administrative review in the State Tax Commission, MCLA 209.101, *et seq.;* MSA 7.631, *et seq.*"

* * *

"[R]eview of a property tax assessment in circuit

court, under § 53, and appeals to the STC are separate and distinct methods of challenging a tax assessment. Both avenues of relief may be pursued simultaneously, see *Moran v Grosse Pointe Twp,* 317 Mich 248, 253; 26 NW2d 763 (1947), and where the STC has made a final decision the subsequent circuit court (§ 53) action is in the nature of a retrial of issues previously decided by the STC. *Cf. Fisher-New Center Co v Detroit,* 38 Mich App 750; 197 NW2d 272 (1972). Therefore, the statutory scheme permits circuit court decisions which conflict with those of the STC." 63 Mich App, *supra,* at 104–106.

However, following enactment and the July 1, 1974, effective date of the Tax Tribunal Act establishing the Tax Tribunal, the Tribunal took over the actions which were theretofore reviewable by the STC or by the circuit court.

It was under § 152 that Consumers sought administrative review by the State Tax Commission (STC) in both 1973 and 1974. In each of those years, the state equalized value as determined by the Supervisor of Big Prairie Township and as approved by the local board of review over protest by Consumers, was $5,669,100. In 1975, the Tax Tribunal Act had taken effect and thus it was that when the dam and lands were again assessed at $5,669,100, Consumers appealed to the Tax Tribunal. And, pursuant to § 71 of the Tax Tribunal Act, MCLA 205.771; MSA 7.650(71), the 1973 and 1974 pending appeals were duly transferred to the Tax Tribunal. Consumers now argues that because the Tax Tribunal Act does not spell out in clear and unequivocal language the power of the Tax Tribunal to increase assessments when acting in its appellate capacity on reviewing contested assessments, it has no power to increase any one of the three-year assessments.[3] Consumers contends

[3] As indicated earlier in this opinion, the Tax Tribunal increased the assessment for 1973 to $8,190,629; the 1974 assessment to $8,483,-

that for the Tax Tribunal to have the same authority to increase assessments as was possessed by the STC, the same must clearly appear from the statute. For the reasons set forth below we totally disagree on this issue of first impression.[4]

To begin with, we do not agree that the Tax Tribunal Act is as restrictive as Consumers contends. To us, § 32 of the statute, MCLA 205.732; MSA 7.650(32), is sufficiently broad and encompassing to grant jurisdiction to either increase or decrease an assessment.

"The tribunal's powers include, but are not limited to:

"(a) Affirming, reversing, *modifying,* or remanding a final decision, finding, ruling, determination, or order of agency.

"(b) Ordering the *payment* or refund of taxes in a matter of which it may acquire jurisdiction.

"(c) *Granting other relief* or issuing writs, orders, or directives which it deems necessary or appropriate in the process of disposition of a matter of which it may acquire jurisdiction." (Emphasis supplied.)

We particularly call attention to subsection 32(b) cited above which empowers the Tribunal to order "the *payment* or refund of taxes". If the Tribunal had no power to increase assessments, it would have been unnecessary for the Legislature to expressly confer upon it the power to order payment. This is so because § 43 of the statute, MCLA 205.743; MSA 7.650(43), then stated: "In the event

332, and the 1975 assessment to $9,315,574. This compares with the request of Newaygo County as intervening petitioner to assess at $12,000,000.

[4] Although *Emmet County v State Tax Commission,* 397 Mich 550, 555; 244 NW2d 909 (1976), contains language suggesting that the Tribunal assumed all the powers of decision on tax appeals formerly possessed by the STC, that decision was limited to the power of the Tax Tribunal to equalize.

the date set by law for the payment of taxes has passed, no final decision on the entire proceeding shall be made by the tribunal until the taxes have been paid".[5] In other words, the statute as first enacted did not permit the Tax Tribunal to enter a decision until the taxes in dispute had first been paid. If the taxes have been paid prior to the Tribunal's decision, and if the Tribunal was without authority to increase the assessment, there would be no purpose in the legislative language of § 43 that the Tribunal is empowered to order the payment of taxes.

But, assuming, *arguendo,* that the statute is ambiguous or imprecise as to the Tribunal's power to increase assessments when rendering a final decision, let us turn to legislative intent. We have already noted that under the former procedure the STC was clearly empowered to increase assessments and circuit courts were not. After the Tax Tribunal Act has passed in the Senate and was referred to the House of Representatives, a bill analysis of the proposed House substitute (the same being the bill which was finally adopted) was prepared for legislative guidance by the bill analysis section of the House of Representatives.[6] We quote its pertinent provisions:

"*The Apparent Problem to Which the Bill Addresses Itself:*

"Under the present law, State residents protesting their property taxes or assessments file their initial complaints with the State Tax Commission or, in some cases, with circuit courts.

* * *

[5] In 1976, § 43 was amended to permit waiver of payment "at the discretion of the tribunal".

[6] Analysis Section, House of Representatives, Committee: Taxation. Senate Bill 176 (proposed House substitute).

"Some contend tax cases involving similar legal principles and issues are being given contradictory rulings by the various circuit courts around the State. They contend the absence of a lower level State judicial or administrative body capable of setting property tax precedents results in a proliferation of cases being contested, and a waste of time and resources due to redundant contested legal issues.

"*The Manner in Which the Bill Addresses Itself to the Problem:*

"The bill establishes a quasi-judicial agency, known as the Tax Tribunal, *which would assume the State Tax Commission's task* of hearing appeals of property tax determinations. (The Tax Commission would continue to exist and perform its other functions.)

"*Jurisdiction of the Tribunal would include property tax decisions now made by the State Tax Commission,* including direct review of assessment valuation and equalization under property tax laws and proceedings for refunds *or tax redeterminations.* Tribunal decisions would be made by all members, but cases could be heard by one or more members." (Emphasis supplied.)

In determining legislative intent the court may properly refer to the statutes' pre-enactment history as evidenced by extrinsic aids showing the circumstances under which the statute was passed, the mischief at which it was aimed, and the object sought to be achieved. 2A Sutherland Statutory Construction (4th ed), p 191. *Bailey v United States,* 511 F2d 540, 546–548 (Ct of Claims, 1975). The portions italicized in the foregoing bill analysis make it clear that the Legislature intended that the Tax Tribunal would retain all of the jurisdiction formerly exercised over "property tax decisions" made by the STC. Likewise, the cited analysis expresses a legislative recognition of the distinction between refunds (lowering an assessment) and tax redeterminations (increasing an assessment). Our construction of the Tax Tribunal

statute is reinforced by the Supreme Court's decision in *Emmet County v State Tax Commission,* 397 Mich 550; 244 NW2d 909 (1976). The narrow issue presented in that case was whether the STC or the Tax Tribunal had jurisdiction over state (intercounty) equalization. But in the course of holding that such jurisdiction remained with the STC, the Court had occasion to review the legislative intent in creating the Tax Tribunal, saying:

> "Section 41 of the same act * * * [Tax Tribunal Act], endows the tribunal with jurisdiction over actions which were heretofore reviewable by the State Tax Commission or by a circuit court.
>
> * * *
>
> "In § 41 of the Tax Tribunal Act, the Legislature made it clear that it was vesting jurisdiction in the Tax Tribunal over matters previously heard by the State Tax Commission as an *appellate* body. Formerly, the State Tax Commission was the appellate body over individual assessments, allocation disputes and *intra-county equalization matters."* 397 Mich, *supra,* at 554–555.

However, Consumers argues that even if the Tax Tribunal had both the power and jurisdiction to increase protested assessments in general, it had no power to do so in this particular case. The claim is multi-faceted. First, it is contended that since the appellee did not ask for an increase in the assessment at the township board of review, appellees are precluded from raising the issue later. The only provision in the Tax Tribunal Act pertaining to the board of review is § 35(1), MCLA 205.735(1); MSA 7.650(35)(1), which mandates that the valuation in question must be protested at the board of review level. This provision was met when Consumers protested at the board of review for each of the three years involved.

Second, it is claimed that the issue of under-assessment was first raised by an intervenor, Newaygo County, who it is claimed had no rights to seek to raise the assessments—at least for 1973 and 1974. We reject this argument by virtue of § 44, MCLA 205.744; MSA 7.650(44), which allows the intervention or impleading by a local governmental unit upon a showing of monetary interest in the proceedings. Obviously, Newaygo County, which levels its county millage on the basis of total county valuation, had a direct monetary interest in the dispute. No time limitations on the date of intervention are set forth in § 44.

Third, it is argued that Consumers is materially prejudiced by lack of notice that some three years later intervenor, Newaygo County, would for the first time raise the question of under-assessment. As Consumers points out, had notice of the under-assessment claim been duly given, Consumers might have elected to pursue its claim for 1973 only. In that event, no forum would exist for Newaygo County to raise the issue for 1974 and 1975. In equitable respects Consumers' argument has merit. Realistically, it may well not have appealed in 1974 or 1975 had it believed a local governmental unit would raise the claim of under-assessment. Even more realistically, the probabilities of a determination of under-assessment by the Tax Tribunal would be less had no one appeared in the 1973 appeal to champion such cause. Nevertheless, from a statutory and strictly legal point of view, the potential for a finding of under-assessment came into being the instant Consumers took its § 152 appeal to the Tax Tribunal. From that moment on, the Tax Tribunal had the jurisdiction and power to increase the contested assessment even if no one had appeared in opposition. *Frue-*

hauf Trailer Co, supra. Under § 37(1), MCLA 205.737; MSA 7.650(37), the Tax Tribunal is mandated to find "true cash value".[7] To us, this means full cash value, as determined by whichever of the five methods of valuation heretofore discussed, is most appropriate. Since this Court cannot assume that the Tax Tribunal would not have followed the statutory mandate, even if the intervenor had not raised the issue, we find no prejudice to plaintiff.

Finally, Consumers argues that a "new" issue was raised and further that it was raised by an intervenor who, according to established rules of pleading and practice governing intervention, may not broaden the issues subject to litigation between the principal parties. The answer to this argument is that the issue of under-assessment was not new. From the time that appeal was taken to the Tax Tribunal, the issue was "true cash value". Determination of "true cash value" and in turn "lawful property assessment" was the statutorily prescribed duty of the Tax Tribunal. In effect Consumers' argument amounts to a claim that the Tax Tribunal might legally determine something less than true cash value. Clearly that is not the law. Clearly, also, the question of potential under-assessment was implicit from the beginning. *Fisher-New Center Co v Detroit,* 38 Mich App 750; 197 NW2d 272 (1972), is inapplicable.[8]

[7] "In arriving at its determination of a lawful property assessment, the tribunal shall determine the amount by multiplying its finding of true cash value by a percentage equal to the ratio of the average level of assessment in relation to true cash values in the assessment district."

[8] Plaintiff cites *Fisher, supra,* as holding that the taxing authority may not use the Tax Tribunal as a forum to raise the question of under-assessment. But in *Fisher,* the taxing authority having first lost in a § 152 determination by the then STC sought to raise the issue all over again in a § 53 circuit court suit brought by the taxpayer. The Court held that a § 53 action was a remedy solely granted to the taxpayer.

Affirmed in part, reversed in part and remanded to the Tax Tribunal in accordance with this opinion. No costs, neither party having prevailed in full.

PEOPLE v TORRENCE

OPINION OF THE COURT

1. CRIMINAL LAW—PLEA OF GUILTY—VOLUNTARINESS OF PLEA—EMOTIONAL PRESSURE.

A defendant's plea of guilty should be vacated and the case remanded for trial where the defendant claims that her plea was not freely, understandingly, and voluntarily made and where it is clear from the record that at the time of the plea and sentencing the defendant was experiencing considerable emotional pressure because of her pregnancy and her attempts to obtain an abortion.

DISSENT BY DANHOF, C. J.

2. CRIMINAL LAW—PLEA OF GUILTY—REVERSAL OF CONVICTION.

Reversal of a conviction based on a defendant's plea of guilty is not warranted where the record discloses no error in the plea-taking, the defendant does not assert her innocence and the defendant has not moved the lower court for withdrawal of her guilty plea, and the defendant's claim that her plea was involuntarily made is not supported by the record.

Appeal from Berrien, Julian E. Hughes, J. Submitted December 6, 1977, at Lansing. (Docket No. 30791.) Decided February 6, 1978. In lieu of leave to appeal the Court of Appeals is reversed and the judgment and sentence of the trial court is hereby reinstated, 402 Mich 937.

Dianne Torrence was convicted, on her plea of guilty, of second-degree murder. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A.*

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 485.

[2] 21 Am Jur 2d, Criminal Law §§ 495, 506.

Derengoski, Solicitor General, *John A. Smietanka,* Prosecuting Attorney, and *Chris W. Dunfield,* Assistant Prosecuting Attorney, for the people.

James K. Jesse, for defendant on appeal.

Before: DANHOF, C. J., and T. M. BURNS and M. J. Kelly, JJ.

M. J. KELLY, J. Defendant appeals from her July 6, 1976, plea-based conviction for second-degree murder, MCLA 750.317; MSA 28.549. Defendant contends that her plea was not freely, understandingly, and voluntarily made as required by MCLA 768.35; MSA 28.1058. We reverse because the record below indicates that the guilty plea was the product of a compelling but extraneous consideration.

It is clear from the record that the defendant, four and one-half months pregnant at the time of the plea, was consumed with getting an abortion. Defendant had been incarcerated for 60 days at the time of sentencing. The plea was taken the day before. Her attorney requested bond so she could "exercise her constitutional right to an abortion". A writ of mandamus was denied. Bond was denied. She already had five young children. The record indicates that she had less than six days, according to the Department of Social Services, to abort, otherwise no clinic would accept her. In fact, at one point in the plea proceedings defense counsel claimed she would have to be transported on the very day of the plea. The issue was avoided by sentencing her at 3 p.m. the next day thus passing the buck to the Department of Corrections. The record does not indicate whether she ultimately obtained the abortion. A suicide attempt later in the Detroit House of Correction may or

may not have had something to do with the pregnancy. There is no record, however, on that subject.

The record is permeated with indicia that defendant was experiencing considerable emotional pressure. The plea of guilty is vacated and the case remanded for trial.

T. M. BURNS, J., concurred.

DANHOF, C. J. *(dissenting).* I dissent. The reason for reversal set forth by the majority consists of sheer speculation not borne out by the record. The record does show that the lower court took a recess during the plea proceeding to allow the defendant to recompose herself. This is not unusual. The record discloses no error in the plea taking; the majority relies on the allegations of the defendant. The defendant does not assert her innocence nor has she moved the lower court for withdrawal of her guilty plea and consequently, since the present record does not support defendant's claims, reversal is not warranted.

STRACHAN v MUTUAL AID AND NEIGHBORHOOD CLUB, INC.

OPINION OF THE COURT

1. JUDGMENT—RES JUDICATA—CONTESTED ISSUE.

Res judicata is a jurisprudential doctrine founded upon the premise that litigation of a controversy must have a termination point; the doctrine becomes applicable when an adjudicatory proceeding on a contested issue has progressed to a final determination and all available courses of appeal have been exhausted or not pursued within the prescribed time limits.

2. JUDGMENT—ADMINISTRATIVE LAW—RES JUDICATA—FINAL JUDGMENT.

Res judicata is applicable to administrative proceedings that are adjudicatory in nature and from which an appeal is provided, where the Legislature intends that the tribunal's judgment is to be final absent an appeal.

3. APPEAL AND ERROR—ADMINISTRATIVE LAW—CIVIL RIGHTS COMMISSION.

A plaintiff who has failed to appeal from a final order of the Civil

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur 2d, Judgments § 457.

Judgment as res judicata pending appeal or motion for a new trial, or during the time allowed therefor. 9 ALR2d 984.

[3, 12] 2 Am Jur 2d, Administrative Law §§ 551, 552.

[4] 15 Am Jur 2d, Civil Rights §§ 499–513.

Validity and construction of labor legislation prohibiting discrimination on account of age. 29 ALR3d 1407.

[5] 46 Am Jur 2d, Judgments § 404.

[6–10] 46 Am Jur 2d, Judgments §§ 446, 452, 495, 500, 501.

[6–10] Res judicata effect of judgment dismissing action, or otherwise denying relief, for lack of jurisdiction or venue. 49 ALR2d 1036.

Res judicata as affected by limitation of jurisdiction of court which rendered judgment. 83 ALR2d 977.

Dismissal of civil action for want of prosecution as res judicata. 54 ALR3d 473.

Judicial qualification of provision of Rule 41(b) of Federal Rules of Civil Procedure that dismissal for failure to prosecute or to comply with federal rules or court order, and certain other dismissals operate as adjudication upon merits. 5 ALR Fed 897.

[8, 11] 2 Am Jur 2d, Administrative Law § 595.

Rights Commission is precluded from further litigation of the issues determined by that order.

DISSENT BY P. R. MAHINSKE, J.

4. CIVIL RIGHTS—EMPLOYMENT—AGE DISCRIMINATION—CIVIL RIGHTS COMMISSION—CIRCUIT COURTS—JURISDICTION.

The right to obtain and retain employment without discrimination on the basis of age is a civil right which is enforceable concurrently before the Civil Rights Commission and in the circuit court.

5. JUDGMENT—RES JUDICATA—REQUIREMENTS.

Three requirements must be satisfied in order for a former judgment to be a bar to a subsequent action: (1) identity of subject matter, (2) identity of parties or their privies, and (3) a judgment on the merits.

6. JUDGMENT—RES JUDICATA—DISMISSAL—LACK OF JURISDICTION—COURT RULES.

An involuntary dismissal which is not for lack of jurisdiction operates as an adjudication on the merits and bars a plaintiff from bringing a second action unless it is specified that the dismissal is without prejudice; the corollary to this rule is that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits (GCR 1963, 504.2).

7. JUDGMENT—DISMISSAL—ADMINISTRATIVE LAW—JURISDICTION—COURT RULES.

The dismissal of a case on the basis of a plaintiff's failure to exhaust his administrative remedies, and not on the merits of the plaintiff's allegations, was a dismissal for "lack of jurisdiction" within the meaning of a court rule governing the effect of an involuntary dismissal upon a subsequent action between the same parties (GCR 1963, 504.2).

8. ADMINISTRATIVE LAW—EXHAUSTION OF REMEDIES—CIRCUIT COURT—JURISDICTION.

Failure of a plaintiff to exhaust his administrative remedies deprives a circuit court of subject matter jurisdiction.

9. JUDGMENT—JURISDICTION—RES JUDICATA.

A judgment made on the grounds that the court lacks jurisdiction, while not on the merits and not conclusive on the merits, is conclusive as to the jurisdictional question presented and the jurisdictional issue may not be relitigated.

10. JUDGMENT—JURISDICTION—RES JUDICATA—ERRONEOUS JUDGMENT.
Generally, a decision of a court that it is without jurisdiction to hear a matter acts as a bar to the bringing of another action even if that decision is erroneous; this rule is, however, subject to exceptions under proper circumstances.

11. JUDGMENT—RES JUDICATA—ADMINISTRATIVE LAW—EXHAUSTION OF REMEDIES—JURISDICTION—CIRCUMSTANCES.
A dismissal by a circuit court on the basis that the plaintiff had not exhausted her administrative remedies where she had also filed a complaint to the Civil Rights Commission which had not yet been adjudicated when the plaintiff filed her complaint in circuit court is not res judicata as to a second complaint filed after the commission dismissed the matter where the jurisdictional question and the circumstances were different at the time of filing the second complaint.

12. ADMINISTRATIVE LAW—REVIEW—CIVIL RIGHTS COMMISSION—EXHAUSTION OF REMEDIES—STATUTES—RULES.
A final decision or order of the Civil Rights Commission is subject to direct review by the courts; the filing of a motion or application for reconsideration or rehearing is not required prior to seeking a consideration of the matter by a circuit court (MCLA 24.301; MSA 3.560[201], 1970–1971 AACS, R37.7[a], 1967 AACS, R37.18[a]).

Appeal from Wayne, Peter B. Spivak, J. Submitted June 21, 1977, at Detroit. (Docket No. 31118.) Decided February 6, 1978. Leave to appeal applied for.

Charlotte Strachan filed a complaint with the Michigan Civil Rights Commission alleging that her employment with Mutual Aid and Neighborhood Club, Inc., was wrongfully terminated. While this action was pending, she filed a complaint in circuit court seeking declaratory and injunctive relief for the same alleged unlawful discrimination. The circuit court granted a summary judgment for defendant. The Civil Rights Commission dismissed plaintiff's complaint. Plaintiff did not appeal from that order but instead filed a second complaint in circuit court based upon the same

allegations. Accelerated judgment for defendant. Plaintiff appeals. Affirmed.

Haynes & Donnelly, P. C., for plaintiff.

Keller, Thoma, Toppin & Schwarze, P. C. (by *Michael L. Smith),* for defendant.

Before: D. C. RILEY, P. J., and BASHARA and P. R. MAHINSKE,* JJ.

BASHARA, J. Plaintiff appeals a circuit court order granting defendant's motion for an accelerated judgment.

After being discharged from her employment with defendant, plaintiff filed a complaint with the Michigan Civil Rights Commission claiming that her termination constituted an unlawful employment discrimination on account of age and sex. While the proceedings were pending with the commission, plaintiff instituted suit in the circuit court seeking relief for the same alleged unlawful discrimination. This action was dismissed "with prejudice" on defendant's motion for accelerated judgment, which contended that plaintiff failed to first exhaust her administrative remedies before the commission. No appeal of the circuit court's order of dismissal was taken by plaintiff.

Subsequently, the commission dismissed plaintiff's action due to insufficient evidence to sustain the charge. Review of this determination was not pursued by plaintiff. Instead, she filed a second suit in the circuit court. This proceeding was dismissed on defendant's motion for accelerated judgment, which was based on the claim that plaintiff's suit was barred under the doctrine of *res judicata.* Plaintiff thereafter perfected this appeal.

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

Resolution of this controversy does not require us to review or pass upon the propriety of the first circuit court order of dismissal. Rather, it is apparent from the proceedings below that plaintiff had an opportunity to completely litigate the merits of her claim before the commission. Having failed to appeal its decision, the plaintiff is barred from collaterally attacking that determination by another proceeding. Accordingly, the order granting defendant's motion is affirmed.

Res judicata is a jurisprudential doctrine founded upon the premise that litigation of a controversy must have a termination point. Otherwise, judicial resources would be unnecessarily expended, and the rights of litigants would be subjected to interminable contest.

The doctrine of res judicata becomes applicable when an adjudicatory proceeding on a contested issue has progressed to a final determination, and all available courses of appeal have been exhausted or not pursued within the prescribed time limitations. Thereafter, that issue becomes settled and may not be relitigated between the same parties in a collateral proceeding, absent some compelling equity not here pertinent. See *Howell v Vito's Trucking & Excavating Co,* 386 Mich 37; 191 NW2d 313 (1971), *Gursten v Kenney,* 375 Mich 330; 134 NW2d 764 (1965). Further, this doctrine is applicable to administrative proceedings that are adjudicatory in nature and from which an appeal is provided, where the Legislature intends that the tribunal's judgment is to be final absent an appeal. *Senior Accountants, Analysts & Appraisers Assoc v City of Detroit,* 399 Mich 449, 457–458; 249 NW2d 121, 124–125 (1976).

All proceedings initiated by plaintiff had the purpose of seeking relief for an alleged unfair

employment practice, as provided in § 3a[1] of the Michigan State Fair Employment Practices Act, MCLA 423.301 *et seq.;* MSA 17.458(1) *et seq.* Any relief to which the plaintiff could establish legal entitlement was obtainable from the commission pursuant to its legislatively created powers. MCLA 37.5(h); MSA 3.548(5)(h).[2] However, the commission, after hearing witnesses and reviewing other

[1] The applicable portion provides as follows:

"It is an unfair employment practice:

(a) For any employer, because any individual is between the ages of 18 and 60, or because of the sex of any individual, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment. Any such refusal to hire or discrimination shall not be an unfair employment practice if based on law, regulation, the requirements of any federal or state training or employment program or on a bona fide occupational qualification. It shall not be an unfair employment practice to refuse to select an individual over the age of 35 because of his age for an apprenticeship or an on-the-job training program intended to have a duration of more than 4 months." MCLA 423.303a; MSA 17.458(3a).

It should be noted that at the time of the plaintiff's discharge she was 58 years of age.

[2] Since repealed by 1976 PA 453, effective March 31, 1977.

That section provided that the commission is empowered:

"'To hold hearings, administer oaths, issue preliminary notices to witnesses to appear, compel through court authorization the attendance of witnesses and the production for examination of any books, papers or other records relating to matters under investigation or in question before the commission, take the testimony of any person under oath, and issue appropriate orders. The commission may make rules as to the issuance by individual commissioners of preliminary notices to appear."

We construe the term "appropriate orders" to include any monetary recompense to which a complainant may be entitled as a result of the unfair employment practice. Our conclusion is aided in substantial part from insight provided by § 605 of the new Michigan Civil Rights Act, which delineates the permissible scope of commission orders. That section states in pertinent part:

"(2) Action ordered under this section may include, but is not limited to: * * * (i) Payment to the complainant of damages for an injury or loss caused by a violation of this act, including a reasonable attorney's fee." MCLA 37.2605(2)(i); MSA 3.548(605)(2)(i). Additionally, our Supreme Court has held that jurisdiction of actions for violations of the act rests concurrently with the commission and circuit courts and that civil damage remedies may be pursued in the courts "in addition to the remedial machinery provided by statute". *Pompey v General Motors Corp,* 385 Mich 537, 560; 189 NW2d 243, 255 (1971).

evidence, issued an order dismissing plaintiff's complaint; an order from which no appeal was perfected.

MCLA 37.4; MSA 3.548(4) provided as follows:

"The commission shall investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by the constitution of this state, and shall secure the equal protection of such civil rights without such discrimination. A complaint alleging an unlawful discriminatory practice is subject to the same procedure as a complaint alleging an unfair employment practice under Act No. 251 of the Public Acts of 1955, being sections 423.301 to 423.311 of the Compiled Laws of 1948. Appeals from final orders of the commission, *including* cease and desist orders and *refusals to issue complaints,* shall be tried de novo before the circuit court for the county of Ingham, the circuit court for the county wherein the alleged unlawful discriminatory practice is alleged to have occurred or where the person, firm or corporation against whom the complaint was filed, resides or has his principal place of business. If an appeal is not taken within 30 days after the service of an appealable order of the commission, the commission may obtain a decree for the enforcement of the order from the circuit court which would have had jurisdiction of the appeal."[3] (Emphasis added.)

Evident from the language used is a legislative intent that an unappealed order of the commission becomes final. After 30 days from receipt of the commission's order, if no appeal has been taken, enforcement of the order may be obtained merely

[3] Notwithstanding the statutory term "tried de novo", this provision has been held to limit review by the circuit courts to an appeal in the nature of certiorari of the record developed from the commission's proceedings. Accordingly, the circuit court's review is limited to ascertaining if the commission's determination is based upon legal error or arbitrary action. *Ross v Taylor Township School Board,* 377 Mich 15; 138 NW2d 402 (1965), *Lesniak v Fair Employment Practices Commission,* 364 Mich 495, 505–506; 111 NW2d 790, 796 (1961).

by showing service of a regularly entered order and the jurisdiction of the commission and circuit court. *Id.*

Accordingly, we conclude that the commission's order of dismissal became final when plaintiff failed to seek review within the prescribed time period. The circuit court order granting an accelerated judgment was a proper resolution of this case, albeit based upon the res judicata effect of a prior circuit court order on which we express no opinion as to propriety. Nevertheless, since the commission's order is final, plaintiff is precluded from further litigation of the issues determined by that order.[4]

Affirmed.

D. C. RILEY, P. J., concurred.

P. R. MAHINSKE, J. *(dissenting).* This case presents questions dealing with the concurrent jurisdiction of the Michigan Civil Rights Commission and the circuit courts, and the application of the doctrine of res judicata following an erroneous dismissal "with prejudice" by the circuit court.

Plaintiff was employed by defendant as a secretary. She was fired in February, 1974, after work-

[4] We recognize that the decision in *Pompey v General Motors Corp,* 385 Mich 537; 189 NW2d 243 (1971), permitted maintenance of a circuit court action subsequent to an unappealed commission order of dismissal. However, that case is distinguishable from the facts in the case at bar. In *Pompey* the commission's order dismissed the action because commenced after the statute of limitations had expired. Such dismissals are not on the merits for res judicata purposes, since the running of the statute of limitations merely bars access to the forum and is not a determination of the merits of the claim. *See Malesev v Garavaglia,* 12 Mich App 282; 162 NW2d 844 (1968).

Further, where two or more forums have concurrent jurisdiction over the subject matter of a controversy, a judgment by one forum is conclusive as to all other forums with concurrent jurisdiction. *Theisen v City of Dearborn,* 5 Mich App 607; 147 NW2d 720 (1967), *remanded on other grounds,* 380 Mich 621; 158 NW2d 483 (1968).

ing 17 years for defendant. On April 23, 1974, she filed a complaint with the Michigan Civil Rights Commission (CRC), alleging that she had been unlawfully discharged because of her age and sex. Plaintiff was 58 years old at the time of her discharge. Three days after filing with the CRC, on April 26, 1974, plaintiff filed a complaint in circuit court in which she alleged that the discharge was arbitrary, capricious, and without cause. She asserted two theories of recovery: (1) breach of implied contract, and (2) unlawful discharge on the basis of age in violation of the Michigan State Fair Employment Practices Act (FEPA), MCLA 423.301 *et seq;* MSA 17.458(1) *et seq.*[1]

In response to plaintiff's complaint defendant filed a motion for summary judgment. GCR 1963, 117.2(1) and 117.2(3). The asserted basis for defendant's motion was that plaintiff had failed to exhaust her administrative remedies. The circuit court agreed with defendant's position, and issued an opinion stating in part, "Plaintiff must first exhaust her administrative remedies before seeking redress in circuit court". On the basis of this finding the court dismissed plaintiff's complaint by order dated February 21, 1975. The order specified that the complaint was dismissed "with prejudice", and was signed by both parties' attorneys below the words, "Approved as to content and form".

Plaintiff did not appeal from the February, 1975, circuit court dismissal, but instead awaited the CRC's decision on whether to issue a charge. On May 14, 1975, the CRC decided not to issue a charge and dismissed plaintiff's petition on the basis of insufficient evidence. Plaintiff did not seek a reconsideration of this determination by the

[1] Repealed by 1976 PA 453, § 804. The provisions of the FEPA have been incorporated into the new Michigan Civil Rights Act, MCLA 37.2101 *et seq.;* MSA 3.548(101) *et seq.,* effective March 31, 1977.

administrative agency, nor did she seek circuit court review of the agency's dismissal.

On September 17, 1975, plaintiff filed a second action in the circuit court, based on her discharge from defendant's employ and alleging age discrimination and breach of implied contract. Plaintiff asserted that the court now had jurisdiction because plaintiff had exhausted her administrative remedies as the court had instructed her to do. Defendant responded with a motion for accelerated judgment, on the grounds that (1) plaintiff had failed to exhaust her administrative remedies, because she had failed to seek reconsideration by the CRC and/or to appeal to circuit court, and (2) plaintiff's suit was barred by the doctrine of res judicata. Again the circuit court agreed with defendant, and on November 15, 1976, entered an order dismissing the second complaint on both of the above grounds. It is from this second dismissal that plaintiff appeals as of right. I would reverse.

I—CONCURRENT JURISDICTION OF CIVIL RIGHTS COMMISSION AND CIRCUIT COURT

Plaintiff's first contention is that the circuit court erred in dismissing her first complaint. I agree. The right to obtain and retain employment without discrimination on the basis of age is a civil right. MCLA 423.301; MSA 17.458(1);[2] *Holmes v Haughton Elevator Co,* 75 Mich App 198, 200; 255

[2] Now MCLA 37.2102; MSA 3.548(102). The Michigan Civil Rights Act specifically allows a civil action in circuit court for violation of its provisions. MCLA 37.2801; MSA 3.548(801). It also provides in MCLA 37.2803; MSA 3.548(803), "This act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state." The Court in *Pompey v General Motors Corporation, infra,* based its decision largely on a similar provision in Const 1963, art 5, § 29. Both the FEPA and the Michigan Civil Rights Act forbid discrimination on the basis of age.

NW2d 6 (1977). In *Pompey v General Motors Corporation,* 385 Mich 537, 559–560; 189 NW2d 243 (1971), the Court held that statutory civil rights are enforceable concurrently in the Civil Rights Commission and the circuit court. The *Pompey* Court stated as follows:

"Since *Bolden [Bolden v Grand Rapids Operating Corp,* 239 Mich 318; 214 NW 241; 53 ALR 183 (1927)] and *St. John [St John v General Motors Corp,* 308 Mich 333; 13 NW2d 840 (1944)] clearly affirm the existence of a cause of action for damages under a civil rights statute, and since the judicial remedies provision in § 29 of Article 5 clearly intended no *displacement* of judicial remedies, defendant's argument as to the 'exclusive' jurisdiction of the Civil Rights Commission is without merit.

"We hold that plaintiff can maintain a civil damage action for redress of his statutorily created right to be free from discrimination in private employment, and that this remedy may be pursued in addition to the remedial machinery provided by statute." (Footnote omitted.)

Pompey dealt with race discrimination; this Court in *Holmes, supra,* held that that decision by its terms also applied to age discrimination.

In dismissing plaintiff's first suit, the trial court relied upon *Michigan Civil Rights Commission v Clark,* 390 Mich 717; 212 NW2d 912 (1973), for the proposition that plaintiff was required to exhaust her administrative remedies before filing a complaint in circuit court. *Clark* provides no support for this proposition. *Clark* dealt with the question of whether a person against whom a complaint has been lodged by the CRC may, by seeking a judicial remedy, oust the CRC from consideration of a complaint against him. In the case at bar the question is whether or not a plaintiff asserting a

violation of a statutory civil right, such as the right to be free from age discrimination, is entitled to seek concurrently administrative and judicial relief. This question was answered in the affirmative by the Supreme Court in *Pompey, supra.* It is of no consequence that plaintiff had already filed with the Civil Rights Commission at the time she began her circuit court action. Plaintiff was entitled to seek redress for the alleged discrimination in the Civil Rights Commission alone, in the circuit court alone, or in both forums at the same time or in whatever order plaintiff chose. This was the clear holding in *Pompey, supra,* and for this reason the circuit court erred in dismissing plaintiff's first complaint.

II—RES JUDICATA

Plaintiff did not appeal from the first circuit court dismissal. Instead, she waited until the CRC decided not to issue a charge, and then returned to the circuit court saying she had exhausted her administrative remedies. The circuit court again dismissed, this time on the basis of res judicata as well as failure to exhaust administrative remedies. On appeal plaintiff urges that this dismissal was also erroneous, and I would agree.

A. *General Principles of Res Judicata*

The policy considerations behind the rule of res judicata are well known. In *Johnson v Haley,* 357 Mich 411, 418; 98 NW2d 555 (1959), our Supreme Court quoted as follows from *Baldwin v Iowa State Traveling Men's Association,* 283 US 522, 525; 51 S Ct 517; 75 L Ed 1244 (1931):

" 'Public policy dictates that there be an end of

litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.' "

By application of the doctrine of res judicata the courts seek to avoid the time and expense of repetitive litigation and the problem of inconsistent verdicts on the same cause of action. See *Rose v Rose,* 10 Mich App 233, 236; 157 NW2d 16 (1968). In order for a former judgment to be a bar, three requirements must be satisfied: (1) identity of subject matter, (2) identity of parties or their privies, and (3) a judgment on the merits. *Tucker v Rohrback,* 13 Mich 73, 75 (1864); *Curry v Detroit,* 394 Mich 327, 331; 231 NW2d 57 (1975).

In the present case it is undisputed that the parties and the subject matter are the same. What is disputed is whether the original dismissal was, or should be given the effect of, a judgment "on the merits". I would answer this difficult and many-faceted question in the negative.

B. *Dismissals not for "Lack of Jurisdiction"*

GCR 1963, 504.2 provides in pertinent part:

"For failure of the plaintiff to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.

* * *

"*Unless the court in its order for dismissal otherwise specifies,* a dismissal under this subdivision and *any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.*" (Emphasis added.)

The type of dismissal provided for in this subrule, *i.e.,* any involuntary dismissal not for lack of

jurisdiction, where the court fails to specify that the dismissal is without prejudice, is given res judicata effect. *Rose v Rose, supra; Irwin v Via,* 2 Mich App 375, 378; 139 NW2d 893 (1966); *Dalton v Mertz,* 197 Mich 390, 394; 163 NW 912 (1917). The Authors' Comments to Rule 504 point out this res judicata effect:

> "In general, a voluntary dismissal under sub-rule 504.1, is without prejudice, and thus does not prohibit subsequent prosecution of the same action, unless the order of dismissal specifically states that it is with prejudice. Conversely, *an involuntary dismissal under sub-rule 504.2 operates as an adjudication on the merits —that is, with prejudice—thereby proscribing subsequent prosecution of the same claim, unless the order of dismissal specifies otherwise."* 2 Honigman and Hawkins, Michigan Court Rules Annotated, Authors' Comments, Rule 504, p 333. (Emphasis added.)

Thus, in the case of an involuntary dismissal which is not for lack of jurisdiction, the plaintiff is barred from bringing a second action unless the order of dismissal specifies that the dismissal is "without prejudice". However, the corollary of the rule that any dismissal other than a dismissal for lack of jurisdiction operates as an adjudication on the merits is that a dismissal for lack of jurisdiction *does not* operate as an adjudication on the merits. Such a dismissal is by its nature "without prejudice". Indeed, in construing a virtually identical provision in FR Civ P, 41(b), the Federal courts have so held. In *Miller v Saxbe,* 396 F Supp 1260, 1261 (DDC, 1975), the first suit was dismissed for lack of "subject matter jurisdiction" because plaintiff had failed to comply with a 30-day filing requirement of the Equal Employment Opportunity Act. The court stated that res judicata was inapplicable:

"Such a dismissal on jurisdictional grounds is not 'on the merits' for res judicata purposes and consequently is 'without prejudice' to a subsequent action raising the same or similar underlying facts if different grounds for jurisdiction are claimed. *See* F.R.Civ.P. Rule 41(b); 1B J. Moore, *Federal Practice* (2d ed. 1974) ¶ 0.405[5] at 659–61 and n. 15–19; 5 *id.* ¶ 41.14[1] at 1173–74 * * * ."

Also stating that according to FR Civ P, 41(b) a dismissal for lack of jurisdiction did not operate as a dismissal on the merits were the Federal courts in *Williams v Minnesota Mining & Manufacturing Co,* 14 FRD 1, 8 (SD Cal, 1953), and *Loucke v United States,* 21 FRD 305, 309 (SD NY, 1957). Therefore, if in the present case the first dismissal was for "lack of jurisdiction", it need not necessarily be given res judicata effect.

C. *"Lack of Jurisdiction": Failure to Exhaust Administrative Remedies*

The question here, of course, is whether the first dismissal on the basis of failure to exhaust administrative remedies was a "dismissal for lack of jurisdiction", within the meaning of Rule 504.2. I would answer this question in the affirmative. The Federal courts construe "lack of jurisdiction" dismissals broadly, so as to include most of the situations which in Michigan are grounds for accelerated judgment.[3] See *Sharp v Two Point Associates, Ltd,* 78 Mich App 180, 188; 259 NW2d 416 (1977). In *Costello v United States,* 365 US 265, 285; 81 S Ct 534; 5 L Ed 2d 551 (1961), the Supreme Court discussed the Rule 41(b) lack of jurisdiction exception as follows:

[3] Accelerated judgment, not summary judgment, is the proper ground for disposing of a case on the basis of failure to exhaust administrative remedies. *See Baker v Detroit,* 73 Mich App 67, 71; 250 NW2d 543 (1976).

"We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41(b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category."

The *Costello* Court went on to read "lack of jurisdiction" to mean any ground which did not go to the merits of the lawsuit, in accord with common law principles of res judicata.

In the case at bar, defendant argues that *Costello* applies only to nonspecifying dismissals, *i.e.,* those in which the lower court has not specified whether the dismissal is with or without prejudice, as was the case in *Costello.* The Court in *Weissinger v United States,* 423 F2d 795, 799 (CA 5, 1970), so read *Costello.* However, I do not agree that *Costello* must necessarily be so limited, and would choose not to so limit it here. In the first place, the *Weissinger* Court stated that the "with prejudice" order which it was considering was "entered after full trial on all issues and with complete findings and conclusions". 423 F2d at 800. This is clearly not the situation in the present lawsuit, where defendant moved for summary judgment in the first suit, and never defended on the merits. Secondly, the *Costello* language itself belies defendant's construction. In *Costello,* the Court specified that it spoke to "the scope of this

exception from the dismissals under Rule 41(b) which operate as adjudications on the merits unless the court specifies otherwise." When this language is read together with that in Rule 41(b) (or GCR 1963, 504.2), it is clear that what the lack of jurisdiction exception refers to is *all* involuntary dismissals which do not specify that they are "without prejudice". The dismissal in the case at bar, on the basis of failure to exhaust administrative remedies, was obviously not on the merits of the age discrimination and breach of implied contract claims, and was indeed based on plaintiff's "failure to comply with a precondition requisite to the Court's going forward to determine the merits of [her] substantive claim". *Costello, supra,* 285. Thus, it was a dismissal for "lack of jurisdiction" within the meaning of GCR 1963, 504.2.

Also in support of this conclusion is the language from Michigan cases dealing with exhaustion of remedies. The Administrative Procedures Act (APA), MCLA 24.301; MSA 3.560(201), provides that when a person has exhausted his administrative remedies and is aggrieved by a final decision in a contested case, the decision is subject to direct review in the courts. Michigan Courts have construed this provision as meaning that the circuit court lacks subject matter jurisdiction until a person has exhausted his or her administrative remedies:

" * * * the statute [MCLA 24.301; MSA 3.560(201)] makes it clear that the circuit court's subject matter jurisdiction in this case depends upon exhaustion of administrative remedies." *International Business Machines Corp v Department of Treasury,* 75 Mich App 604, 609; 255 NW2d 702 (1977).

"We conclude that plaintiff National Bank had an adequate administrative remedy in this case and that

therefore, the circuit court lacked jurisdiction." *Farmers State Bank of Concord v Department of Commerce, Financial Institutions Bureau,* 77 Mich App 313, 322; 258 NW2d 496 (1977).

See also, *St Paul Fire & Marine Insurance Co v Littky,* 60 Mich App 375, 378; 230 NW2d 440 (1975); *Hooper v United States,* 326 F2d 982, 984–985 (Ct Cl, 1964), *cert den,* 377 US 977; 84 S Ct 1882; 12 L Ed 2d 746 (1964).

Thus, under the view expressed in the above cases, failure to exhaust administrative remedies is viewed as so serious that the court is deprived of subject matter jurisdiction. For this reason I do not hesitate to say that failure to exhaust is at least serious enough to come within the "lack of jurisdiction" exception of GCR 1963, 504.2. However, that does not end the inquiry.

D. *Res Judicata Effect: Jurisdictional Rulings on Jurisdictional Issue Decided*

Even though a judgment made on the grounds that the court lacks jurisdiction is not on the merits and is not conclusive as to the merits, it *is* conclusive as to what it did actually decide, *i.e.,* the jurisdictional question presented. Restatement, Judgments, § 49, p 195. In *Citizen's Mortgage Corp v Second Avenue Limited Dividend Housing Association,* 72 Mich App 1, 4; 248 NW2d 699 (1976), this Court quoted as follows from the Restatement, *supra:*

" 'b. *Effect of judgment as to issues decided.* Although, where the judgment for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated in the prior action.' "

This rule has been applied in many cases to rulings on jurisdiction. Some courts term its effect res judicata, *Ripperger v A C Allyn & Co,* 113 F2d 332 (CA 2, 1940), *cert den,* 311 US 695; 61 S Ct 136; 85 L Ed 450 (1940); *Loucke v United States, supra,* while others state that the first dismissal is conclusive as a direct estoppel on jurisdictional issues actually decided, *Miller v Saxbe, supra.* Whatever theory is used, the result is the same: the party may not relitigate the jurisdictional issue already litigated and decided in the first lawsuit. *Barzin v Selective Service Local Board No. 14,* 446 F2d 1382, 1383 (CA 3, 1971); *Acree v Air Line Pilots Association,* 390 F2d 199, 203 (CA 5, 1968); *Davis v Saab-Scania of America, Inc,* 133 Vt 317; 339 A2d 456 (1975).

In the conflict of laws area, Michigan cases also hold that the erroneous decision of a court that it has jurisdiction is res judicata. *McDonald v McDonald,* 74 Mich App 119, 123, fn 2; 253 NW2d 678 (1977); *Johnson v Haley, supra,* p 416. But what happens when the court which actually has jurisdiction erroneously decides that it lacks jurisdiction? This question is answered in Anno: *Res judicata effect of judgment dismissing action, or otherwise denying relief, for lack of jurisdiction or venue,* 49 ALR2d 1036, 1039:

"Since a judgment based on lack of jurisdiction of the court over the subject matter or over the defendant or on improper venue is not on the merits, it is obvious that such a judgment does not extinguish the cause of action and does not bar the plaintiff from maintaining another action on the same cause in a court having jurisdiction or in the proper district or county. Where a judgment dismissing an action for lack of jurisdiction is erroneous in that the court, in fact, had jurisdiction, the authorities are divided as to whether the judgment bars the plaintiff from maintaining a second action in an

appropriate forum. The better view seems to be that, if another appropriate forum is available,[20] the former judgment does not preclude the plaintiff from maintaining an action in that forum.

* * *

"[20] Of course, *if the only available forum has denied relief for lack of jurisdiction of the subject matter, the question is res judicata, even though the judgment is erroneous*". (Emphasis added; footnotes 17–19 omitted.)

Many cases are cited to support the proposition of footnote 20 in the above annotation. These cases include *In re Quinney's Estate,* 287 Mich 329; 283 NW 599 (1939), where the Court stated at pp 338–339:

"While *a dismissal on the ground the court has no jurisdiction of the subject-matter is a conclusive determination of want of jurisdiction,* it is no adjudication of the merits and will not bar another action for the same cause. 34 C.J. p 795." (Emphasis added.)

The *Quinney* Court went on to decide that, despite the rule set forth therein, the probate court's erroneous ruling that it did not have jurisdiction did not bar the plaintiff from bringing another action in the probate court. I would find that the circumstances in the case at bar are peculiar enough to require a similar holding on our part.

E. *Administrative Remedies Exhausted: A Different Jurisdictional Question*

The rule that res judicata applies to questions of jurisdiction is inapplicable in several situations. One such situation is where the precise jurisdictional question is different in the second lawsuit than it was in the first. Annot., 49 ALR2d 1036, § 6(b). In *United States v Reid,* 104 F Supp 260,

263 (ED Ark, 1952), for example, the Court held that its first dismissal based on invalid service of process was not res judicata on the question of its jurisdiction in the second action, where there *was* valid service on the defendant:

> "With respect to res judicata it is to be pointed out that our order of April 4, 1951 merely quashed the original service on the defendant, which was admittedly invalid; we passed on nothing except the validity of that particular service, and, as indicated, the Government is now relying upon an entirely different service; our holding that the original service was invalid is in no sense res judicata of the validity of the present service or of the jurisdiction of this Court in the present proceeding."

See also *In re Kammerer's Estate,* 8 Wis 2d 494; 99 NW2d 841 (1959). In the case at bar this first exception is applicable because the first dismissal occurred when plaintiff's case was still pending in the CRC. The jurisdictional question then was whether the court could take cognizance of plaintiff's claim while plaintiff was at the same time pursuing her administrative remedies. But when plaintiff returned in September, 1975, and filed her second complaint, the jurisdictional question had changed to one of whether or not the circuit court could entertain her claim when the CRC had refused to issue a charge. Because these questions are far from identical, the first determination was not res judicata as to the second complaint.

A second related exception to the application of res judicata is where there has been a change of circumstances, *i.e.,* where "subsequent events occur which create a new legal situation or alter the legal rights or relations of the litigants". Annot., 49 ALR2d 1036, § 6(c), p 1058. In *In re Raseman Estate,* 18 Mich App 91, 104–105; 170 NW2d 503

(1969), *lv den,* 385 Mich 780 (1971), this Court applied this exception in a case dealing with maintenance of an insane person:

"Plaintiff has asserted that the order of the probate court dated November 24, 1944, which was not appealed from is *res judicata* and therefore conclusive on this appeal. The doctrine of *res judicata* is not immutable. It reflects a policy of law which seeks to end litigation, but it is only a policy, not an absolute rule, and it need not be and has not been applied rigidly without regard to disparate factual situations. Just because the 1944 probate court order was not appealed from and the petition for modification was not filed until 1964 does not mean that unpaid arrearages are not subject to modification. Indeed, the fact that a petition for modification can be entertained at all establishes that the doctrine of *res judicata* does not apply—if the doctrine applied, no court could modify the 1944 order. The reason why it is subject to modification is the reason why it can be modified as to arrearages, because it operates *in futuro* as to facts that had not occurred when the order was entered. It is a general rule that *res judicata* applies only where there has been an adjudication on the merits. The 1944 probate court adjudication on the merits did not constitute an adjudication on the merits of the 1945 or later facts and, hence, did not operate in the nature of *res judicata* as to later facts which have never been the subject of adjudication so as to prevent modification of the 1944 order as to accrued and unpaid arrearages."

In the case at bar, as in *Raseman,* the jurisdictional facts existing when plaintiff filed her second complaint had never been litigated. Just as the statute involved in *Raseman* permitted modification and was thus antithetical to res judicata, so here the exhaustion doctrine inherently recognizes that at some future time, when plaintiff has exhausted his or her administrative remedies, the

court will have jurisdiction. The change in circumstances exception has also been applied in cases where the fact existing at the time of the second complaint but not at the time of the first was diversity of citizenship, *Ripperger v A C Allyn & Co,* 37 F Supp 373, 374 (SD NY, 1940), *aff'd,* 113 F2d 332 (CA 2, 1940); *Gilmer v Grand Rapids,* 16 F 708 (WD Mich, 1883), sufficient contacts with the forum state, *Myers Motors, Inc v Kaiser-Frazer Sales Corp,* 80 F Supp 18, 22 (D Minn, 1948), and residency, *Chiotte v Chiotte,* 279 SW2d 296, 297 (Ark, 1955). In the case at bar I would find that a change in circumstances took place between the filing of the first and second lawsuits and made the doctrine of res judicata inapplicable.

Defendant argues that plaintiff had not satisfied the trial court's precondition to the assumption of jurisdiction, because plaintiff had not really exhausted her administrative remedies. There is no support in law or logic for this position. MCLA 24.301; MSA 3.560(201), provides as follows:

> "*When a person has exhausted all administrative remedies available within an agency,* and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, *the decision* or order *is subject to direct review,* by the courts as provided by law. *Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought.* A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy." (Emphasis added.)

The Civil Rights Commission rules do *not* require

filing of a motion or application for reconsideration or rehearing:

"Rule 7. (a) *A claimant may request of the commission a reconsideration of its refusal to issue a charge.* Any party may request a reconsideration of the terms of conciliation. Any such request shall be in writing, state specifically the grounds upon which it is based, and be filed within 30 days after the date of mailing of the notice of disposition of which reconsideration is requested. It shall be filed at any office of the commission by personal delivery or by registered or certified mail, return receipt requested." Administrative Code, 1970–1971 AACS, R 37.7(a), p 5351. (Emphasis added.)

"Rule 18.(a) Any party or intervener claiming to be aggrieved by *a final order* of the commission, *including without limitation a refusal to issue a charge,* may appeal to the circuit court of the state of Michigan having jurisdiction provided by law." Administrative Code, 1967 AACS, R 37.18(a), p 4084. (Emphasis added.)

Thus, if plaintiff had been required to exhaust any administrative remedies, as the circuit court told her she was, her task was complete when the commission refused to issue a charge. The circuit court could not incorporate into its decision a requirement of exhaustion that the law does not recognize. As for defendant's contention that "exhaustion of administrative remedies" includes appeal to circuit court, this is answered by the statute itself, which begins, "When a person has exhausted all administrative remedies available within an agency * * * ." I am not aware that the circuit court is within the Civil Rights Commission. Plaintiff did all that she was "required" to do, and the circuit court erred in dismissing her second complaint on grounds of res judicata and failure to exhaust administrative remedies.

Finally, as to the notation "with prejudice",

there is no magic in these words sufficient to turn this ruling—one inherently without prejudice ("Plaintiff must first exhaust her administrative remedies before seeking redress in the Circuit Court")—into one which bars forever plaintiff's cause of action. Such a result would be unjust and illogical. See *Laude v Cossins,* 334 Mich 622; 55 NW2d 123 (1952), where two "with prejudice" dismissals on grounds of lack of probate court jurisdiction were held no bar to the bringing of plaintiff's action in the appropriate forum, the circuit court. See also *Miami Super Cold Co, Inc v Giffin Industries, Inc,* 178 So 2d 604, 605 (Fla App, 1965). Presented with a "with prejudice" dismissal on a different set of facts, my decision might well be different. But in the case at bar, where plaintiff merely did what the court told her to do, where defendant was never put to the time and expense of defending against plaintiff's substantive claims, and where plaintiff's exhaustion of her administrative remedies meant that the only bar which the court saw to its assumption of jurisdiction had been removed, I would refuse to deny to plaintiff the day in court that she never had.

PEOPLE v JESSE SMITH

1. CRIMINAL LAW—DISCOVERY—EXCLUSION OF DISCOVERY—COURT RULES.

The application of discovery rules is expressly excluded in criminal cases by court rule (GCR 1963, 785.1[2]).

2. CRIMINAL LAW—DISCOVERY—JUDGE'S DISCRETION—BURDEN OF SHOWING SPECIFIC FACTS—FISHING EXPEDITION.

Discovery will be ordered in a criminal case, when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression; the burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party.

3. CRIMINAL LAW—DISCOVERY—JUDGE'S DISCRETION—OPPORTUNITY OF CROSS-EXAMINATION.

Generally, a trial court's denial of criminal discovery is not reversible error if the defendant is afforded full opportunity of cross-examination.

REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur 2d, Deposition and Discovery § 307 *et. seq.*

[2] 23 Am Jur 2d, Depositions and Discovery §§ 314–324.

[3] 23 Am Jur 2d, Depositions and Discovery §§ 308, 313.

[4] 40 Am Jur 2d, Homicide §§ 470–472, 479.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 92 ALR2d 1435.

[5, 7] 40 Am Jur 2d, Homicide §§ 263–269.

Inference of malice or intent to kill where killing is by blow without weapon. 22 ALR2d 854.

Homicide: presumption of deliberation or premeditation from the fact of killing. 86 ALR2d 611.

Homicide: presumption of deliberation or premeditation from the circumstances attending the killing. 96 ALR2d 1435.

[6] 30 Am Jur 2d, Evidence §§ 1080–1088.

Credibility of witness giving uncontradicted testimony as matter for court or jury. 62 ALR2d 1191.

4. HOMICIDE—DEGREE OF GUILT—QUESTIONS OF FACT.

A determination of the degree of guilt of one accused of homicide is a fact question for the trier of fact under established principles: (1) premeditation can be reasonably inferred from the circumstances surrounding the killing, (2) a defendant may not be found guilty of first-degree murder if he did not have an opportunity to subject the nature of his response to a second look or reflection, *i.e.,* one cannot instantaneously premeditate a murder, (3) a sufficient time lapse to provide an opportunity for a "second look" may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing, and (4) where it is factually clear that there is no evidence of premeditation, the trier of fact may not consider a charge of first-degree murder.

5. HOMICIDE—FIRST-DEGREE MURDER—PREMEDITATION—CIRCUMSTANCES—INFERENCES.

Premeditation can be inferred from various kinds of evidence, such as the prior relationships between the parties, whether the murder weapon had been acquired or positioned in preparation for the homicide, the immediate circumstances of the killing, and the defendant's post-homicide conduct.

6. JURY—WITNESSES—EVIDENCE—WEIGHT.

A jury is not obligated to believe a witness's testimony *in toto,* they may give whatever weight to any particular testimony they desire.

7. CRIMINAL LAW—EVIDENCE—FIRST-DEGREE MURDER—PREMEDITATION—PROOF OF GUILT—REASONABLE DOUBT—JURY—VERDICT OF GUILTY.

A jury's verdict of guilty of first-degree murder should not be disturbed where there was sufficient evidence on the homicide and also evidence to allow a reasonable man to infer premeditation beyond a reasonable doubt.

Appeal from Oakland, Frederick C. Ziem, J. Submitted January 3, 1978, at Lansing. (Docket No. 31393.) Decided February 6, 1978.

Jesse R. Smith was convicted of first-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,*

Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *James L. McCarthy,* Assistant Appellate Counsel, for the people.

Monash & Moss, P. C., for defendant on appeal.

Before: V. J. BRENNAN, P. J., and D. E. HOLBROOK and R. B. MARTIN,* JJ.

D. E. HOLBROOK, J. Defendant was charged with open murder in the homicide of one Freelin Miller, contrary to MCLA 750.316; MSA 28.548. The homicide was the result of a shooting that took place in an automobile in Oakland County on November 27, 1975. On August 6, 1976, a jury found defendant guilty of first-degree murder and he was subsequently sentenced to life imprisonment. On appeal defendant raises two issues.

Because of its bearing on the issues raised in this appeal, an extended recitation of the facts is necessary.

Oliver Honchel[1] and Freelin Miller were serving time for manslaughter at a prison parole camp. The two men were very good friends and on Thanksgiving Day, November 27, 1975, they began drinking some vodka that had been smuggled into the prison camp. They started drinking around 7 a.m. and by 2 p.m. had consumed two pints of vodka. On the spur of the moment, they decided to take a camp truck and escape from the prison camp.

They drove to Detroit where they abandoned the vehicle and went to a bar in order to call Oliver's

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

[1] At the time of this escape Oliver was serving a sentence for manslaughter wherein he bludgeoned his brother Orville to death in 1967 and had also served time for attempted jail break, armed robbery, and breaking and entering.

brother Calvin.[2] Calvin was home watching a football game when he received his brother's call around 4 or 5 p.m. Oliver told him that he and a friend had run away from the prison camp and wanted Calvin to help them. While waiting for Calvin to pick them up, Oliver and Freelin had a drink and when Calvin arrived, the three of them had a couple more drinks.

Oliver and Freelin needed some money so Calvin agreed to drive them to Pontiac where Freelin could get some money. However, Calvin did not have enough money for gas so he went to see Jesse Smith, a very good friend of his, in order to inquire if he could borrow some money. Calvin explained to Jesse that Oliver and Freelin had escaped and they needed some money for gasoline. The men sat down in Jesse's apartment and had a few drinks. Because Oliver and Freelin were still wearing their prison clothes, Jesse gave them a change of clothing.

Calvin asked Jesse if he wanted to go along with them on the ride to Pontiac. Both Jesse and his wife decided to go. Calvin's Pinto was too small for the group so they took Jesse's Cadillac. As they were leaving the apartment, Calvin asked Jesse if he was carrying his gun. Jesse said, "no", and then told Calvin that the gun was in his bedroom. Calvin went into Jesse's bedroom and, taking the gun, placed it in the waistband of his pants. Calvin testified that he wanted the gun for security in case they were stopped by the police. Everyone then got into the car and they left for Pontiac. Calvin drove because Jesse did not have a driver's license.

Before entering the I-75 freeway, they stopped

[2] Calvin had two previous felonies, second-degree murder and aggravated assault for shooting one of his brothers in the leg.

and Jesse's wife bought a six-pack of beer. After they left the store, Jesse's wife sat between Calvin and Jesse in the front seat and Freelin sat behind Calvin in the back seat and Oliver sat behind Jesse in the back seat. As they drove down I-75, Calvin testified that Freelin began to get shaky. By this he meant that Freelin was worried about who was going to take responsibility for stealing the vehicle that they used in their escape. Freelin did not know whether he or Oliver should take the blame. Calvin stated that listening to Freelin and Oliver argue made him very nervous.

Calvin pulled the car off the freeway at Adams Road so the men could get out of the car and relieve themselves. Jesse and Calvin stood on the driver's side toward the back of the car and Oliver and Freelin stood on the other side of the car. They were outside the car for approximately five minutes.

Calvin testified that as he and Jesse stood there, Calvin told Jesse that he felt like killing Freelin. Calvin stated that he was thinking out loud and made the statement because Freelin was getting on his nerves. Calvin testified that Jesse told him not to worry about it and Calvin thought that Jesse was merely trying to calm him down. Calvin said that he did not actually intend to kill Freelin.

The men got back into the car and sat in the same places that they had been sitting in previously. Calvin testified that he proceeded to turn the car around and as he was doing this, Jesse reached around his wife and motioned for the gun. Calvin stated that he raised up and Jesse took the gun from Calvin's waistband. Calvin testified that within one or two seconds from the time Jesse took the gun from his waistband, he heard an explosion. At this time Calvin looked over at Jesse

and saw the gun in Jesse's hand pointed toward the floor of the car. Calvin stopped the car and Jesse requested that he help him get the body out of the back seat. Jesse opened the car door and dragged Freelin out of the car and into a ditch where he was left. Calvin stated at trial that he thought Jesse took the gun from him to prevent Calvin from using it.

Oliver testified that because of all the liquor he had drunk, he was unable to remember leaving Jesse's apartment, riding in the car or relieving himself. All he remembered was hearing an explosion and feeling Freelin fall on his knee. The next thing he recalled was waking up the following morning.

Jesse's wife testified for the defense and stated that after the men relieved themselves they got back into the car and Calvin drove a short distance and stopped. She stated that she was pushed forward and heard a shot. She thought the shot occurred within one or two minutes after the car came to a stop. She also testified that it was a matter of seconds between when she went forward and when she heard the shot. Immediately after the shot was fired she looked in the back seat. She then looked at her husband and saw that he had a gun in his hand. Contrary to Calvin's testimony, she stated that her husband did not reach in front of her and that nothing passed between Calvin and her husband. She testified that as to any motive her husband had to shoot Freelin was, "the only possible reason was to protect myself, and the rest, because he was afraid of something happening to me".

After the body was dumped into the ditch, Calvin drove the group to Detroit where they stopped at three different bars. Later, Jesse's wife drove

Calvin and Oliver back to Calvin's car. She testified that Calvin told her that she better not say anything or "he would dig a new well".

Jesse Smith[3] took the stand in his own behalf and testified that as they were relieving themselves, Calvin said, " 'We got to get rid of this guy.' " Jesse said, " 'We can leave him at the bar.' " Calvin said, " 'No, we got to get rid of him.' " After the men relieved themselves, Jesse said that Calvin drove down the road about 200 feet and pulled into a driveway where he then backed out onto the road and started to drive down it. Jesse said that the headlights went out on the car and he turned toward Calvin and noticed that Calvin was stopping the car. He also saw that Calvin was turning toward the back seat with a gun in his hand. Jesse testified that he grabbed his wife and pushed her down and with his other hand went to grab the gun. Jesse stated that the gun went off just as he was about to grab it and the gun ended up in his hand.

The next day Jesse was arrested and the gun was seized from him. The arresting officer stated that Jesse pulled the gun on him, but Jesse denied this and said the policeman was lying. When the police questioned Jesse about whether or not he had seen Calvin within the last few weeks, Jesse stated that he had not. Jesse admitted at trial that he had lied to the officers when they questioned him because Calvin was such a good friend and he wanted to protect him.

The next day after the homicide Calvin left for California where he was arrested and extradited back to Michigan. Calvin's murder charge was reduced to harbouring a fugitive in return for his testimony at trial.

[3] He had prior convictions for possession of a firearm and larceny from a person.

On appeal, defendant brings two allegations of error. We deal with them in order.

The first issue raised by defendant is that the trial court abused its discretion in denying the defendant's motion for discovery of a pretrial statement made to the prosecutor by defendant's wife, a res gestae witness. In support of this issue, defendant contends that the trial court's refusal to order discovery of the statement resulted in a failure of justice because defendant needed to review the statement in order to determine whether to invoke his privilege and bar defendant's wife from testifying.

GCR 1963, 785.1(2) expressly excludes the application of discovery rules in criminal cases. In *People v Maranian,* 359 Mich 361, 368; 102 NW2d 568 (1960), the Michigan Supreme Court stated the rule of discovery in criminal cases as follows:

> "Discovery will be ordered in all criminal cases, when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression. The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party."

Defendant, in his motion for discovery, stated:

> "3. That the Prosecution has indicated that there are three (3) potential Res Gestae Witnesses, including the defendant's wife, who could possibly give testimony at the time of trial and further, the defendant believes that said Witnesses have given statements to the investigating law enforcement agency prior to this time.
>
> "4. That the defendant desires to obtain copies of any handwritten, typed or taped statements obtained during the investigation of this matter."

The Michigan Supreme Court has stated that the defense carries the burden of showing to the trial court *specific facts* " 'indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition'. *Maranian, supra,* at 368." *People v Nkomo,* 75 Mich App 71, 76; 254 NW2d 657 (1977). Defendant in his motion for discovery did not set forth any specific facts or information which it expected to glean from the statement.

In addition, this Court does not feel that the denial by the trial court of defendant's motion resulted in prejudicial error. Generally, a trial court's denial of criminal discovery is not reversible if, as in the instant case, defendant is afforded full opportunity of cross-examination. *People v Bell,* 74 Mich App 270, 275; 253 NW2d 726 (1977). During the trial of the case at bar, defense counsel was given a copy of defendant's wife's statement to police. The judge granted a recess to allow defense counsel an opportunity to study and review the statement. Defense counsel then used the statement in his cross-examination of the police officer who had taken the statement from defendant's wife. Defense counsel also used the statement in his direct and redirect examination of defendant's wife. Defendant's argument that he needed the statement in order to decide whether or not to bar his wife from testifying is without merit in light of the fact that defendant called his wife to testify after having the opportunity to review the statement.

After an examination of the facts, we hold that the trial judge did not abuse his discretion in denying defendant's pretrial discovery motion.

Next, defendant contends that the trial court

record lacks sufficient evidence of a "second look" from which premeditation and deliberation could have been properly inferred. In dealing with this issue, we turn to our opinion in *People v Meier,* 47 Mich App 179, 191–192; 209 NW2d 311 (1973).

"Our own answer to the question of the appropriate rule to follow as to what constitutes premeditation in a first-degree murder case is not a definition. Rather, it is a reaffirmation of the role of the trier of fact in deciding the degree of guilt of an accused under the following established principles:

"(1) Premeditation can be reasonably inferred from the circumstances surrounding the killing;

"(2) A defendant may not be found guilty of first-degree murder if he did not have an opportunity to subject the nature of his response to a second look or refelction, *i.e.,* one cannot instantaneously premeditate a murder;

"(3) A sufficient time lapse to provide an opportunity for a 'second look' may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing;

"(4) Where it is factually clear that there is *no* evidence of premeditation, the trier of fact may not consider a charge of first-degree murder.

Attempting to further clarify this 'definition' in the past has, we believe, led to an invasion by the appellate courts into areas rightfully left to the trial court in its fact-finding processes." (Emphasis in original.)

See also, *People v Rappuhn,* 55 Mich App 52, 58–59; 222 NW2d 30 (1974), *People v Berthiaume,* 59 Mich App 451, 456; 229 NW2d 497 (1975), *People v Page,* 63 Mich App 177, 181; 234 NW2d 440 (1975), *lv den* 399 Mich 850 (1977).

Premeditation can be inferred from various kinds of evidence, such as the prior relationships between the parties, whether the murder weapon had been acquired or positioned in preparation for

the homicide, the immediate circumstances of the killing, and the defendant's post-homicide conduct. *People v Morrin,* 31 Mich App 301, 331–332; 187 NW2d 434 (1971), *lv den* 385 Mich 775 (1971), *People v Oster,* 67 Mich App 490, 497; 241 NW2d 260 (1976).

Keeping the foregoing principles in mind, we review some of the evidence. The defendant had his own exculpatory explanation for this entire chain of circumstances; but a jury is not obligated to believe a witness's testimony *in toto. Berthiaume, supra,* at 457. "[T]hey may give whatever weight to any particular testimony they desire." *People v Renno,* 392 Mich 45, 60; 219 NW2d 422 (1974). The jury in this case chose to disbelieve defendant's claim that the gun went off before he was able to grab Calvin Honchel's hand.

Calvin Honchel testified that as he and the defendant were relieving themselves along the roadside, he told defendant that he felt like killing Freelin Miller because he thought Freelin might implicate him in the escape. The defendant told Calvin "not to worry about it". Approximately five minutes after defendant told Miller "not to worry about it", Calvin testified that the defendant motioned to him that he wanted the gun and then reached into Calvin's waistband and removed the gun. Within one or two seconds, Calvin heard the gun discharge and saw defendant with the gun in his hand. The prosecutor argues that there was ample time between the defendant's statement "not to worry about it" and the shooting for defendant to have taken a "second look". We agree. The testimony of defendant's wife also indicates that defendant had time for a "second look". Her testimony that nothing passed between Jesse and Calvin points to the fact that defendant had the

gun prior to the car coming to a stop. She stated that the shot was fired within one or two minutes after the car came to a stop. This one or two minutes was sufficient time in which to take a "second look". There was sufficient time lapse where defendant had the opportunity for that cool, dispassionate reflection which is premeditation. *Berthiaume, supra,* at 460.

Additionally, defendant's post-homicide conduct indicates a premeditated plan. Immediately after the shooting, defendant got out of the car and told Calvin to help him get rid of the body. Defendant dragged Freelin out of the car and into a ditch where he was left. They then fled to Detroit.

Also, this Court notes that the murder weapon was a pistol and not a "tool of defendant's trade" as in *Morrin.* The pistol was owned by defendant, although Calvin had been carrying it in the waistband of his pants. Earlier, Calvin had asked defendant if he had his gun and defendant said that it was in the bedroom. Calvin went into the bedroom, got the gun, put it in his waistband and joined the others in the car. Calvin testified that defendant motioned for the gun and then reached into Calvin's waistband and removed it. Shortly thereafter, the gun was discharged and Freelin Miller was no longer able to "squeal" on anyone.

After a review of the evidence, we are persuaded that sufficient evidence was produced to support a reasonable inference of premeditation and that, therefore, the jury's finding of this fact should not be disturbed. There was sufficient evidence to allow a reasonable man to infer premeditation beyond a reasonable doubt. *People v Atley,* 392 Mich 298; 220 NW2d 465 (1974).

Affirmed.

PEOPLE v WALKER

1. CRIMINAL LAW—CRIMINAL SEXUAL CONDUCT—EVIDENCE—ADMISSIBILITY—STATUTES.

   The criminal sexual conduct statute by its own terms excludes evidence of past sexual experiences in prosecutions for criminal sexual conduct and assault with intent to commit criminal sexual conduct; the statute and the exclusion rules do not apply to a charge of breaking and entering an occupied dwelling with an intent to commit a felony, even though the felony attempted is criminal sexual conduct in the third degree (MCLA 750.520b, 750.520g; MSA 28.788[2], 28.788[7]).

2. HOMICIDE—REPUTATION OF DECEASED—SELF-DEFENSE.

   A decedent's reputation for ferocity, brutality and the like, if known by the defendant, may be shown in a prosecution for homicide to support his claim that he acted in self-defense with the reasonable belief that he was in imminent danger of death or great bodily harm.

3. RAPE—PROSECUTING WITNESS—REPUTATION FOR CHASTITY—EVIDENCE—ADMISSIBILITY.

   A complaining witness's reputation for lack of chastity might be

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REFERENCES FOR POINTS IN HEADNOTES

[1, 4, 6–8] 29 Am Jur 2d, Evidence § 321.

Admissibility,in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.

[2] 40 Am Jur 2d, Homicide §§ 301–309.

Admissibility of evidence as to other's character or reputation for turbulence on question of self-defense by one charged with assault or homicide. 1 ALR3d 571.

[3] 65 Am Jur 2d, Rape §§ 82–85.

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity. 35 ALR2d 1452.

Mistake or lack of information as to victim's chastity as defense to statutory rape. 44 ALR3d 1434.

[5] 75 Am Jur 2d, Trial §§ 651, 652.

[9] 76 Am Jur 2d, Trial § 1160.

Inconsistency of criminal verdict with verdict on another indictment or information tried at same time. 16 ALR3d 866.

Inconsistency of criminal verdict as between different counts of indictment or information. 18 ALR3d 259.

admissible in a rape prosecution if the defendant can show that he knew of that reputation and the evidence is necessary to support the defendant's claim that he had no intent to force himself on her.

4. CRIMINAL LAW—CRIMINAL SEXUAL CONDUCT—EVIDENCE—STATE OF MIND.

Evidence of the complainant's reputation for chastity is admissible as bearing on a defendant's state of mind at the time of a breaking and entering where the prosecution is solely for breaking and entering with intent to commit criminal sexual conduct in the third degree.

5. EVIDENCE—PURPOSE—ADMISSIBILITY—USE OF EVIDENCE—INSTRUCTIONS TO JURY—EXCLUSION OF EVIDENCE.

The general practice where evidence is admissible for one purpose and inadmissible for another is to admit the evidence subject to a limiting instruction on use unless the legitimate use of the evidence is so slight compared to the possibility of jury misuse of the evidence that the trial court feels compelled to exclude the evidence entirely.

6. APPEAL AND ERROR—CRIMINAL LAW—CRIMINAL SEXUAL CONDUCT—WRONGFUL EXCLUSION OF EVIDENCE—REMAND—USELESS NEW TRIAL.

The appropriate remedy on an appeal from a conviction of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct in the third degree where the trial court wrongfully barred the admission of reputation evidence is a remand to the trial court to allow the defendant an opportunity to present evidence on the questions of the complainant's reputation for chastity, and that the defendant knew of this reputation, rather than order what may be a useless new trial.

7. CRIMINAL LAW—CRIMINAL SEXUAL CONDUCT—EVIDENCE—CROSS-EXAMINATION—ACTS OF INTERCOURSE—THIRD PERSONS.

Cross-examination of the complaining witness in a trial for criminal sexual conduct as to specific acts of intercourse with third persons is not relevant to show bias on the part of the complainant in bringing the charge.

8. CRIMINAL LAW—DEFENDANT TESTIFYING—PRIOR CONVICTIONS—IMPEACHMENT—JUDGE'S DISCRETION.

A prior conviction of assault with intent to take indecent liberties was not so closely related to a charge of breaking and entering

an occupied dwelling with intent to commit criminal sexual conduct as to require its exclusion for impeachment purposes from a trial on the latter charge.

9. CRIMINAL LAW—INDICTMENT AND INFORMATION—INCONSISTENT VERDICTS.

Verdicts on two charges tried together will not be held inconsistent if they can be explained on any rational basis.

Appeal from Lapeer, Martin E. Clements, J. Submitted November 14, 1977, at Detroit. (Docket No. 77-107.) Decided February 6, 1978.

Louis N. Walker was convicted of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct in the third degree. Defendant appeals. Remanded with instructions.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward B. Meth,* Prosecuting Attorney, for the people.

Robert W. Thomas, for defendant on appeal.

Before: BRONSON, P. J., and ALLEN and T. M. BURNS, JJ.

T. M. BURNS, J. defendant was charged in a two-count information with criminal sexual conduct in the third degree, MCLA 750.520d; MSA 28.788(4), and breaking and entering an occupied dwelling with an intent to commit criminal sexual conduct in the third degree, MCLA 750.110; MSA 28.305. After extensive deliberation, the jury acquitted defendant on count one, the criminal sexual conduct charge, and convicted him of the breaking and entering charge. After his motion for acquittal notwithstanding the verdict was denied, defendant was sentenced to serve 6 to 15 years in prison.

I

Before the trial in this case, defense counsel filed a motion *in limine* to allow cross-examination of the complainant on her past sexual experiences. At the argument on the motion, defense counsel stated he wished to show, among other things, the victim's reputation for chastity as bearing on defendant's state of mind on the breaking and entering charge. The trial court found the section of the statute prohibiting inquiry into the complainant's sexual past,[1] except in limited circumstances, applicable to this prosecution and a bar to the admission of reputation evidence. Defendant claims on appeal that this ruling was reversibly erroneous.

Before examining defendant's claim, it may be wise to identify the issues that are not involved. This case does not involve a claim that MCLA 750.520j; MSA 28.788(10) is unconstitutional because it bars relevant evidence on the issue of the complainant's consent (rebutting the state's case) or evidence relevant to the complainant's credibility or veracity. See, *People v Thompson,* 76 Mich

[1] MCLA 750.520j; MSA 28.788(10) provides: "(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

"(a) Evidence of the victim's past sexual conduct with the actor.

"(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

"(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

App 705; 257 NW2d 268 (1977); *People v Dawsey,* 76 Mich App 741; 257 NW2d 236 (1977); *People v Patterson,* 79 Mich App 393; 262 NW2d 835 (1977). What defendant does claim is that the circuit court incorrectly applied the statute to exclude evidence relevant to the issue of defendant's intent on the breaking and entering charge, *i.e.,* to show that he did not have the felonious intent claimed by the prosecutor.

The statute by its own terms excludes evidence only for prosecution under §§ 520b to 520g (MCLA 750.520b–520g; MSA 28.788[2]–28.788[7]). It does not apply to the breaking and entering charge. Two questions are therefore presented: (1) would the proposed evidence have been admissible if only a breaking and entering had been charged, and (2) is it admissible where defendant is also charged with an offense within the prohibitory section? These questions would not arise if the prosecutor had proceeded only on the first count—the evidence would be inadmissible.

What defense counsel sought to do was use one person's reputation for chastity (the victim's) to prove or argue that another person's conduct (defendant's entry of the house) was not done with the criminal intent charged. That distinguishes the present case from those in which it is stated that the victim's reputation may be shown to prove her conduct (consent) in a particular instance. *People v Ryno,* 148 Mich 137; 111 NW 740 (1907).

In this regard, the case appears to be unique. However, there are analogous situations. In a homicide prosecution, the deceased's reputation for ferocity, brutality and the like may be shown if known by the defendant in support of defendant's claim that he acted in self-defense, that is, that he

had a reasonable belief that he was in imminent danger of death or great bodily harm. *People v Walters,* 223 Mich 676, 680; 194 NW 538 (1923).

Similar reasoning would support defendant's claim here. If defendant knew the victim's reputation for chastity was bad, it would make his argument[2] that he did not intend to force himself on her more plausible than if this evidence were not admitted. See Michigan Proposed Rules of Evidence, Rule 401, 399 Mich 969.

Had this prosecution been solely for breaking and entering with intent to commit criminal sexual conduct in the third degree, evidence of the complainant's reputation for chastity would have been admissible as bearing on defendant's state of mind at the time of the breaking and entering.

This raises the second question noted above, what effect does the fact that defendant was also charged with criminal sexual conduct in the third degree, under which the evidence would not have been admissible, have on the question of admissibility? According to McCormick, the general practice where evidence is admissible for one purpose and inadmissible for another is to admit the evidence subject to a limiting instruction on use unless the legitimate use of the evidence is so slight compared to the possibility of jury misuse of the evidence that the trial court feels compelled to exclude the evidence entirely. McCormick, Evidence (2d ed), § 59, pp 135–136. This evidence could provide a rebuttal for the state's claim of criminal intent and would have been admissible for that purpose.

[2] Defendant did not testify at trial. However, a statement made by him shortly after his arrest was read to the jury. In this statement, defendant claimed to have had intercourse with the complainant on prior occasions and that the acts out of which the prosecution arose were consensual.

The trial court could have admitted the evidence subject to a limiting instruction in the present case. However, rather than order what may be a useless new trial, *cf. People v Robinson,* 390 Mich 629; 213 NW2d 106 (1973), the appropriate remedy is a remand to the trial court to allow defendant to present evidence on the question of the complainant's reputation for chastity and that defendant knew of this reputation. If her reputation was not bad, or if defendant did not have knowledge of this reputation, no reversible error is presented.

II

Defendant also claims that he should have been allowed to cross-examine the complainant as to specific acts of intercourse with third persons to show bias on the part of the witness. It does not appear that evidence of specific acts with third persons would be especially relevant to showing the complainant's motive in bringing the charges in the present case. This argument is rejected.

III

Defendant next contends that the trial court abused its discretion in refusing to grant his motion *in limine* to suppress reference to his 1972 assault with intent to take indecent liberties conviction should he take the stand.[3] A 15-year-old conviction for breaking and entering with intent to commit larceny was suppressed.

This contention is not well taken. Although assault with intent to take indecent liberties may be substantially the same conduct as criminal

[3] This issue is not made moot by defendant's failure to testify at trial. *People v McCartney,* 60 Mich App 620; 231 NW2d 472 (1975).

sexual conduct in the third degree, defendant was acquitted of that charge. The prior conviction is not so closely related to the breaking and entering charge on which defendant was convicted, as to require its exclusion for impeachment purposes. See, *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974).

IV

Defendant finally contends that the jury's verdict was fatally inconsistent. In ruling on defendant's motion for judgment of acquittal, the trial court stated:

"To me the main distinction with Count One and Count Two is a matter of time. In Count One the People would have to prove certain things beyond a reasonable doubt occurred, in Count Two, breaking and entering charge, that they did find the Defendant guilty of, I find that need not—the People need not prove there was sexual penetration, but that the Defendant at the time of the breaking and entering had that requisite intent. I don't feel that the charges against the Defendant are mutually exclusive in this case, because the time factor, I do find sufficient facts during the course of the trial for which the jury could indeed find the Defendant guilty."

This response provides the rational explanation required to uphold the verdict. *People v Phillips,* 43 Mich App 581; 204 NW2d 250 (1972), *People v Willie Johnson,* 58 Mich App 165; 227 NW2d 272 (1975), *lv den,* 394 Mich 755 (1975), *cert den,* 423 US 849; 96 S Ct 91; 46 L Ed 2d 72 (1975), *People v Goodchild,* 68 Mich App 226; 242 NW2d 465 (1976), *lv den,* 397 Mich 830 (1976).

Remanded for proceedings consistent with part one of this opinion. We do not retain jurisdiction.

DEPARTMENT OF SOCIAL SERVICES v ARDEN

1. ADMINISTRATIVE LAW—CONTINUANCE—WITHHOLDING FINAL DETERMINATIONS—FINAL ORDERS—RES JUDICATA.

An order by the Director of the Michigan Department of Social Services constituted a continuance of an administrative action brought by the department to determine whether the defendants had received Medicaid payments for services not covered by the program where it withheld a final determination on the amount of overpayment pending the development of a reliable method for calculating that amount after which the defendants would have the right to challenge the department's new statistical method; such an order cannot be considered a final order for purposes of res judicata since it specifically reserved resolution of the amount due pending a redetermination.

2. ADMINISTRATIVE LAW—CONTINUANCE—GENERAL RULE—ABUSE OF DISCRETION.

A general rule regarding the grant of a continuance by an administrative agency is the same as that applicable to judicial proceedings; its decision will not be disturbed absent an abuse of discretion.

3. ADMINISTRATIVE LAW—ADMINISTRATIVE PROCEDURES ACT—SUBPOENAS—LEGISLATIVE INTENTION—DEPARTMENT OF SOCIAL SERVICES—GENERAL SUBPOENA AUTHORITY—THE SOCIAL WELFARE ACT—STATUTES.

The purpose of the provisions of the Administrative Procedures Act regarding subpoenas is to grant parties in administrative proceedings access to the subpoena power necessary to permit them to procure and present all favorable relevant evidence; this legislative intention does not require the restriction of the general subpoena authority of the Michigan Department of Social Services granted under a provision of The Social Welfare

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REFERENCES FOR POINTS IN HEADNOTES

[1] 2 Am Jur 2d, Administrative Law § 499 *et seq.*

[2] 2 Am Jur 2d, Administrative Law § 426.

[3, 4] 1 Am Jur 2d, Administrative Law §§ 86, 89–91.

Act (MCLA 24.273, 24.280, 400.8; MSA 3.560[173], 3.560[180], 16.408).

4. ADMINISTRATIVE LAW—ADMINISTRATIVE AGENCIES—GENERAL INVESTIGATIVE SUBPOENA POWER—CRIMINAL ADJUDICATORY PROCEEDINGS—SAME SUBJECT MATTER.

The general investigative subpoena power of an administrative agency is not restricted because of a concurrent adjudicatory proceeding concerning the same subject matter.

Appeal from Wayne, Victor J. Baum, J. Submitted November 9, 1977, at Detroit. (Docket No. 77-260.) Decided February 6, 1978.

Complaint by the Michigan Department of Social Services and John T. Dempsey, Director of the Michigan Department of Social Services, against Bernard Arden, D. O., and Arden Clinic, P. C., for an order that defendants comply with a subpoena *duces tecum* issued by the director and for a subpoena to be issued by the circuit court for inspection of certain of defendants' records. Judgment for plaintiffs. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Milton I. Firestone, Thomas R. Wheeker,* and *Robert N. Rosenberg,* Assistants Attorney General, for plaintiffs.

Frimet, Goren & Bellamy, P. C., for defendants.

Before: D. C. RILEY, P. J., and D. F. WALSH and A. C. MILLER,* JJ.

D. F. WALSH, J. The defendants appeal from a circuit court order requiring defendant Bernard Arden, D.O., to comply with a subpoena *duces tecum* issued by the Director of the Michigan

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

Department of Social Services pursuant to MCLA 400.8; MSA 16.408.

On September 8 and 9, 1975, an administrative hearing was conducted to determine whether the defendants had received Medicaid payments for services not covered by the program and, if so, the amount of those overpayments. On January 8, 1976, the director issued the following decision and order:

DECISION

"The Opinion of the Administrative Law Judge and Recommendations in the above entitled matter have been read and considered, together with the entire record of the hearing. Said Opinion is attached hereto and, except for recommendation (3), is made a part hereof. It is my decision as follows: (1) the Department properly determined that the claimant billed and received payment from Medicaid for services not covered under the Program; (2) that the Department improperly determined the amount of the refund due; and (3) the Department will develop statistically valid and reliable sampling procedures and re-audit claimant's Medicaid account in order to determine the amount of the refund due."

ORDER

"The actions of the Department as outlined in the attached Opinion of the Administrative Law Judge are upheld in part and reversed in part. Subject to any required approval by the Circuit Court retaining jurisdiction in the matter, it is ordered that the Department's refund procedures currently in effect against the claimant be rescinded, that a statistically valid and reliable sampling procedure be developed, that claimant's Medicaid account be re-audited, and that all monies previously withheld under the Department's gross adjustment procedure be paid over to the claimant."

The defendants did not appeal that order.

Pursuant to the above order, the department developed another sampling procedure and undertook a re-audit of the defendants' Medicaid account. The department then sought access to a randomly selected group of 50 of the defendants' patients' records. These records included, but were not limited to, notations regarding care rendered during the time period in question at the September hearing. Upon defendants' refusal of the department's request the director issued a subpoena for those records. It is from the court order enforcing that subpoena that the defendants appeal.

Defendants challenge the propriety of the subpoena on several grounds which rest on the premise that once the department failed to prove the amount of overpayment at the evidentiary hearing it could not relitigate the issue at a subsequent hearing. It is this premise that we address first.

On its face the director's order contemplates further action in the matter in that it looks toward a redetermination of the amount of overpayment after which the defendants would have the right to challenge the department's new statistical method. We find that his action constituted a continuance of the case in that it withheld a final determination on the amount of overpayment pending the development of a reliable method for calculating that amount.

The right of an administrative agency to continue a hearing from time to time is well recognized. *E.g., Kartman v Parratt,* 535 F2d 450 (CA 8, 1976), *Superior Oil Co v Foote,* 214 Miss 857; 59 So 2d 85; 37 ALR2d 415 (1952). The general rule regarding the grant of a continuance by an administrative agency is the same as that applicable to judicial proceedings. 2 Am Jur 2d, Administrative Law, § 426, p 236. Its decision will not be disturbed

absent an abuse of discretion. Compare *Brown v Air Pollution Control Board,* 37 Ill 2d 450; 227 NE2d 754; 33 ALR3d 222 (1967), with *Superior Oil Co v Foote, supra.*[1] In the instant case the continuance was ordered for good cause; consequently, we find no abuse of discretion.

Given the nature of the order defendants' argument that res judicata bars further hearing in this matter is unpersuasive. The cases cited in support of that argument[2] involved final orders wherein a matter was definitely resolved by an agency. In the case at bar the order specifically reserved resolution of the amount due pending redetermination. For purposes of res judicata such an order cannot be considered a final determination.[3]

The final issue is whether under these circumstances the director could properly issue the subpoena under the general departmental authority of MCLA 400.8; MSA 16.408.[4] Defendants argue

[1] *See, generally,* Davis, Administrative Law of the Seventies, § 8.08, p 281 (1976); Davis, Administrative Law Text (3d ed), § 8.06, p 201.

[2] *Senior Accountants, Analysts & Appraisers Association v Detroit,* 399 Mich 449; 249 NW2d 121 (1976), *Roman Cleanser Co v Murphy,* 386 Mich 698; 194 NW2d 704 (1972).

[3] Even if the director's order were to be construed as a final and binding order, MCLA 24.287(1); MSA 3.560(187)(1) empowers the agency to order a rehearing on its own motion. The limits of that power have not been addressed by any Michigan court, and we do not do so here other than to observe that res judicata has never been held to restrict such statutory authorization. *See,* 2 Am Jur 2d, Administrative Law, §§ 501, 522, 529, 531.

[4] "Sec. 8. Any member of the commission or the director may issue a subpoena requiring any person to appear and be examined with reference to any matter within the jurisdiction of the commission and within the scope of the inquiry or investigation being conducted by the said commission or director, and to produce any books, records or papers, pertinent to such inquiry. Any member of the commission, the director, or their duly authorized agents, may administer an oath to a witness in any pending matter. In case of disobedience of a subpoena, the commission or director may by petition invoke the aid of the circuit court of the county in which the witness resides, or the circuit court of the county in which the inquiry is being held, to require the attendance and testimony of witnesses and the production of books,

that if the director's order was not final, the subpoena provisions of the Administrative Procedures Act[5] are the exclusive source of an agency subpoena.

We disagree.

The purpose of the cited Administrative Procedures Act provisions is to grant parties in administrative proceedings access to the subpoena power necessary to permit them to procure and present all favorable relevant evidence. See *Indiana & Michigan Electric Co v Federal Power Commission,* 224 F Supp 166 (ND Ind, 1963), Davis, Administrative Law Text (3d ed), § 8.05, p 200, 2 Am Jur 2d, Administrative Law, §§ 419–420, pp 230–232. That legislative intention does not require

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papers and documents. Any such circuit court of the state, may, in case of contumacy or refusal to obey a subpoena, issue an order requiring such person to appear and to produce books, records, and papers if so ordered and give evidence touching the matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof."

[5] "Sec. 73. An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance." MCLA 24.273; MSA 3.560(173).

"Sec 80. A presiding officer may:

* * *

"(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers and other documentary evidence." MCLA 24.280; MSA 3.560(180).

restriction of the agency's general subpoena authority. In situations analogous to the case at bar it has been held that the general investigative subpoena power of an agency is not restricted because of a concurrent adjudicatory proceeding concerning the same subject matter. *E.g., Federal Trade Commission v Waltham Watch Co,* 169 F Supp 614 (SDNY, 1959).

The order enforcing the subpoena is affirmed. No costs, a public question.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE v KURAK

1. INSURANCE—ARBITRATION AND AWARD—MULTIPLE POLICIES—COMPENSATION.

An insured who is covered by more than one insurance policy and who recovers an award in arbitration within the limits of one policy may nevertheless demand arbitration under the other policies for the same claim, provided, however, that he may be compensated only once for any damage suffered.

2. INSURANCE—ARBITRATION AND AWARD—PARTIES—RES JUDICATA.

Arbitration under one policy of insurance is not binding as res judicata on subsequent arbitration between a party and a nonparty to the first arbitration; neither a release of one insurer nor an arbitration award against one insurer affects the insured's rights under another contract.

3. ARBITRATION AND AWARD—PUBLIC POLICY—STATUTES.

There is a strong public policy in favor of arbitration of disputes, and any dispute under a contract which contains an arbitration clause may be arbitrated unless it has been expressly exempted by the terms of the contract (MCLA 600.5001[2]; MSA 27A.5001[2]).

Appeal from Wayne, Richard D. Dunn, J. Submitted November 14, 1977, at Detroit. (Docket No. 77-662.) Decided February 6, 1978. Leave to appeal applied for.

Complaint by Detroit Automobile Inter-Insurance Exchange against Karen Kurak for a declaratory judgment that the defendant had already received fair and just compensation from another insurer for injuries incurred in an automobile

REFERENCES FOR POINTS IN HEADNOTES

[1] 43 Am Jur 2d, Insurance §§ 238, 501, 997.

[2] 44 Am Jur 2d, Insurance §§ 2084, 2086.

[3] 5 Am Jur 2d, Arbitration and Award § 36.

accident and was not entitled to further payment from the plaintiff. Summary judgment for plaintiff. Defendant appeals. Reversed.

Selby, Dickinson, Pike, Mourad & Brandt (by *Daniel P. Makarski),* for plaintiff.

Stempien & Stempien, P. C., for defendant.

Before: BRONSON, P. J., and ALLEN and T. M. BURNS, JJ.

BRONSON, P. J. Defendant, Karen Kurak, was involved in an automobile accident with an uninsured motorist on January 27, 1973, while driving her personal automobile which was insured by the League General Insurance Company. Defendant made a claim under this policy, which went to arbitration, and was awarded $5,750.[1]

Defendant's father had a policy of automobile insurance with the plaintiff, which also contained uninsured motorist coverage, and covered the defendant in certain situations.[2] The defendant filed a claim under this policy after receiving her award. Plaintiff filed a complaint for declaratory action alleging that defendant had already received fair and just compensation.

Defendant's motion for summary judgment and order of arbitration was denied. Plaintiff's motion for summary judgment and to dismiss arbitration was granted. Defendant appeals as of right.

We hold that when an insured is covered by more than one insurance policy and recovers an

[1] The policy limit was $20,000.

[2] Plaintiff-appellee argues on appeal that defendant was validly excluded from coverage under her father's policy. This argument was not presented to the trial court. Consequently, we decline to consider it on appeal. *See, e.g., Three Lakes Association v Whiting,* 75 Mich App 564; 255 NW2d 686 (1977).

award in arbitration within the limits of one policy, he may nevertheless demand arbitration under the other policies for the same claim, provided however, that he may be compensated only once for any damage suffered.

Initially, we note that "stacking" of insurance policies is clearly permissible in some instances. *Boettner v State Farm Mutual Insurance Co,* 388 Mich 482; 201 NW2d 795 (1972); *Blakeslee v Farm Bureau Mutual Insurance Co,* 388 Mich 464; 201 NW2d 786 (1972). Furthermore, stacking has been permitted when the insured settles a claim under one of two or more policies for less than the policy limits. In *Detroit Automobile Inter-Insurance Exchange v Joseph,* 67 Mich App 393; 241 NW2d 221 (1976), defendants settled a claim under one of three policies for $8,000. Each policy contained uninsured motorist coverage of $10,000. The Court, holding that arbitration under the other two policies was not barred, stated at 395–396:

> "Under *Boettner* and *Blakeslee,* the Josephs clearly have valuable contract rights under each one of their three policies, for they have paid premiums for each one of their policies. A release that concerns recovery under one contract does not necessarily affect claims under other contracts." (Citation omitted.)

See, also, *Auto-Owners Insurance Co v Higby,* 57 Mich App 604; 226 NW2d 580 (1975).

The same rationale applies to the case at bar. As in *Joseph,* defendant has valuable rights under both contracts of insurance. Also, arbitration under one policy is not binding as res judicata on subsequent arbitration between a party and a nonparty to the first arbitration. See *Auto-Owners Insurance Co v Higby, supra;* 5 Am Jur 2d, Arbitration and Award, § 149, pp 630–631. Neither a

release of one insurer nor an arbitration award against one insurer affects the insured's rights under another contract.

Under MCLA 600.5001(2); MSA 27A.5001(2), any dispute under a contract which contains an arbitration clause may be arbitrated unless it has been expressly exempted by the terms of the contract. The arbitration clause of the D.A.I.I.E. policy does not exclude claims which were subject to arbitration under a different policy.[3] The statute is backed by a strong public policy in favor of arbitration of disputes. See, *e.g., Campbell v Community Service Insurance Co,* 73 Mich App 416; 251 NW2d 609 (1977). We therefore hold that the trial court should not have dismissed arbitration.

Of course, defendant may still only recover her actual losses. Thus, the $5,750 recovered in arbitration under the League General policy is to be considered in any subsequent arbitration.[4]

Reversed. Costs to defendant-appellant.

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[3] The D.A.I.I.E. arbitration clause provides:

"The determination as to whether the insured shall be legally entitled to recover damages and if so entitled the amount thereof, shall be made by agreement between the insured and the Exchange.

"In the event of disagreement and upon the written demand of either, the matter or matters upon which the insured and Exchange do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The insured and the Exchange each agrees to consider itself bound and to be bound by any award made by the arbitrators pursuant to this coverage. Such an award shall be a condition precedent to any action against the Exchange by reason of the insurance afforded by this coverage."

[4] We note that the doctrine of collateral estoppel does not apply in the case at bar; the mutuality requirement has not been met. *See City of Mason v Mason State Bank,* 63 Mich App 288; 234 NW2d 489 (1975).

CITY OF STERLING HEIGHTS v GENERAL EMPLOYEES CIVIL SERVICE COMMISSION

1. MUNICIPAL CORPORATIONS—CHARTERS—CONSTRUCTION OF CHARTERS—PLAIN MEANING.

   The courts should give rational construction to city charters because they are not always as judicially framed as they might be; the language employed must be given its plain meaning and no words should be treated as surplusage.

2. MUNICIPAL CORPORATIONS—ORDINANCES—CIVIL SERVICE COMMISSION—SUSPENSIONS—APPEALS TO COMMISSION.

   A city ordinance which states that a suspended municipal employee has a right of appeal to the Civil Service Commission but that the right of appeal shall not apply to one or more suspensions totalling not more than seven days does not bar the Commission from conducting a hearing on an employee's appeal from a suspension of not more than seven days, but means that suspensions of less than seven days may be appealed only by *leave* of the Commission.

3. MUNICIPAL CORPORATIONS—LABOR RELATIONS—PUBLIC EMPLOYMENT RELATIONS ACT—COLLECTIVE BARGAINING AGREEMENT—STATUTES.

   Grievance and other disciplinary procedures are "other terms and conditions of employment" within the meaning of the public employment relations act and the duty to perform in accordance with the terms of a collective bargaining agreement prevails over conflicting provisions of the charter of a home rule city (MCLA 423.201 *et seq.;* MSA 17.455[1] *et seq.).*

Appeal from Macomb, Howard R. Carroll, J.

REFERENCES FOR POINTS IN HEADNOTES

[1] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 30, 195.

[2] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 329, 331.

[3] 48 Am Jur 2d, Labor and Labor Relations §§ 1191, 1193–1197, 1201, 1202.

Submitted November 9, 1977, at Detroit. (Docket No. 77-867.) Decided February 6, 1978.

Complaint by the City of Sterling Heights, Leonard G. Hendricks, City Manager for the city, and Elmer Modde, building official for the city, against the General Employees Civil Service Commission of the City of Sterling Heights and Morton Garelik for a declaratory judgment that the Civil Service Commission was without jurisdiction to hear an appeal of a suspension of an employee where that suspension was for less than seven days. Judgment for defendants. Plaintiffs appeal. Affirmed.

Stewart, O'Reilly, Cornell, Donovan, Lascoe & Rancilio, P. C., for plaintiffs.

Glime, Daoust & Wilds (by *Raymond G. Glime* and *Ronald R. Tonks),* for defendant Civil Service Commission.

Brukoff, Dubin, Beras & Stewart, P. C., and *Melvin M. Raznick,* for defendant Morton Garelik.

Before: D. C. RILEY, P. J., and D. F. WALSH and A. C. MILLER,* JJ.

A. C. MILLER, J. Defendant, Morton Garelik, employed by the City of Sterling Heights, was suspended from his job for five days on charges which, if true, would seriously blemish his career. He requested a hearing on the matter before the Sterling Heights Civil Service Commission. The Civil Service Commission, in fact, held a full hearing and found the evidence insufficient and unsubstantial and ordered him reinstated with other appropriate remedies.

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

Plaintiffs, the City of Sterling Heights and some of its officers, challenged the hearing on the grounds that the Civil Service Commission was without jurisdiction to hear an appeal from a suspension, when that suspension was less than seven days. They sought declaratory judgment, superintending control, or appropriate injunctive relief in the Macomb County Circuit Court. The trial court held that the Civil Service Commission did have jurisdiction to hear the appeal and entered judgment for defendants Morton Garelik and the Civil Service Commission.

The issue here revolves around three sections of the Sterling Heights City Charter. They are §§ 8.15, 8.16 and 8.32. The first two sections set out the procedure for suspensions, by appointing authorities, of classified employees. Section 8.16 states that, upon request of the employee, the Civil Service Commission shall conduct a full and fair hearing into the matter and if it decides that the suspension was unfounded, it may reinstate the employee and provide appropriate remedies. Section 8.32 provides a procedure for appeal by any employee "aggrieved" by action affecting his status. Where one is so aggrieved, under this section, the Civil Service Commission is required to hold a "prompt hearing" on the appeal. Section 8.32 specifically states that "[t]his right of appeal shall not apply to one or more suspensions totalling not over seven (7) days". It is upon this section that appellants base their argument that the defendant Civil Service Commission was without jurisdiction to hear defendant Garelik's claim. We find the assertion without merit.

The courts will give rational construction to city charters, aware as we are that they are not always as judiciously framed as they might be. *Torrent v*

Common Council of the City of Muskegon, 47 Mich 115, 118; 10 NW 132 (1881). The language employed must be given its plain meaning, and no words should be treated as surplusage. *Baker v General Motors Corp,* 74 Mich App 237; 254 NW2d 45 (1977). We take the plain meaning of §§ 8.15 and 8.16 to mean that the Civil Service Commission shall conduct hearings on a suspension where an employee requests it. We take the plain meaning of § 8.32 to mean that, as it says, there is *no right* of appeal where the suspension is for less than seven days. The words "right of appeal" are not surplusage—they are there for a reason. Since § 8.09 of the Charter gives the Civil Service Commission both the power and the duty to conduct hearings on employees' appeals, and since § 8.16 makes such hearings in the case of suspensions mandatory, the Charter can only mean that suspensions of less than seven days may be appealed by *leave* of the Commission. If the Commission desires to hear the matter, it may. Section 8.32 does not divest the Civil Service Commission of jurisdiction, where it so clearly resides.

Furthermore, there may be appeals to the Commission based on grounds other than the *quantum* of the sanction. In this case, the allegation of misfeasance was so serious that it constituted a basis for a grievance whether or not any sanction was imposed. Defendant Garelik also has rights under the collective bargaining agreement between the City of Sterling Heights and the Building Trades Council which provides in Article 7, § 2, in part:

"Should any grievance arise there shall be an earnest effort on the part of the parties to settle such grievances promptly through the following steps:

Step 1. By oral conference between the aggrieved

employee, the steward, or both, and the immediate supervisor and, if not resolved, it shall be the responsibility of the aggrieved to then reduce any grievance to writing on the regular grievance form provided by the Union within five (5) working days of the alleged grievance if not resolved, *or he may appeal to the Civil Service Commission, but not both."* (Emphasis supplied.)

In *Pontiac Police Officers Association v Pontiac,* 397 Mich 674; 246 NW2d 831 (1976), the Supreme Court ruled that as to detail and procedure, a collective bargaining agreement controls a conflicting provision of a home rule charter. The Court stated, p 677:

"We hold that grievance and other disciplinary procedures are 'other terms and conditions of employment' within the meaning of the [public employment relations act, MCLA 423.201 *et seq.;* MSA 17.455(1) *et seq.]* and that the duty to bargain collectively on such issues *and to perform in accordance with the terms of a collective bargaining agreement prevails over conflicting provisions of the charter of a home rule city."* (Emphasis supplied.)

Here, the Commission saw merit in the claim of the defendant Garelik, it took evidence at a hearing, and it reinstated him. This is their function. It was within their jurisdiction.

Affirmed.

PEOPLE v MALCHI WHITE

PEOPLE v NEWSON

1. CRIMINAL LAW—APPEAL AND ERROR—PROSECUTORS—REMARKS—RESPONDING TO DEFENSE COUNSEL.

   Remarks of a prosecutor, even if otherwise improper, are not reversibly erroneous where the remarks are induced by and made in response to matters previously discussed by defense counsel.

2. CRIMINAL LAW—ASSISTANCE OF COUNSEL—EFFECTIVE ASSISTANCE—TRIAL STRATEGY—DEFENDANT'S FAILURE TO TESTIFY.

   A closing argument by a defense attorney wherein he mentioned the defendant's failure to testify did not amount to ineffective assistance of counsel where it appeared that defense counsel used his argument as part of valid trial strategy based on a concern that jurors are often distressed by a defendant's failure to testify.

3. CRIMINAL LAW—SENTENCES—MINIMUM SENTENCES—MAXIMUM SENTENCES—INDETERMINATE SENTENCE ACT—STATUTES.

   A minimum sentence which exceeds two-thirds of the maximum is an improper sentence only where the indeterminate sentence act applies (MCLA 769.8; MSA 28.1080).

4. CRIMINAL LAW—SENTENCES—INDETERMINATE SENTENCE ACT—APPLICATION OF ACT—STATUTES.

   The indeterminate sentence act has mandatory application only to those persons convicted for the first time; therefore, the rule which requires a minimum sentence not to exceed two-thirds of

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REFERENCES FOR POINTS IN HEADNOTES

[1] 75 Am Jur 2d, Trial § 193.

[2] 75 Am Jur 2d, Trial § 240.

[3, 4] 21 Am Jur 2d, Criminal Law §§ 540, 581, 592, 614.

Comment note.—Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

Indeterminate sentence: validity of sentence fixing identical minimum and maximum terms of imprisonment. 29 ALR2d 1344.

[5] 73 Am Jur 2d, Statutes §§ 145, 146.

the maximum sentence where an indeterminate sentence is given does not apply in the sentencing of a defendant with prior felony convictions (MCLA 769.8; MSA 28.1080).

5. STATUTES—STATUTORY CONSTRUCTION—GENERAL RULES.

The general rules of statutory construction require that every word, phrase, clause, and sentence of the provision to be construed must be given force and effect and that no word, phrase, or clause shall be rendered nugatory; it is not to be presumed that the Legislature intended to do a useless thing and if possible every part of a statute must be given effect.

Appeal from Recorder's Court of Detroit, Joseph A. Gillis, J. Submitted November 1, 1977, at Detroit. (Docket Nos. 77-897, 77-990.) Decided February 7, 1978. Leave to appeal applied for.

Malchi White and Glenn Newson were convicted of breaking and entering an unoccupied building with intent to commit larceny therein. Defendants appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people.

Carl Ziemba, for defendant White on appeal.

Charles Burke, for defendant Newson on appeal.

Before: BEASLEY, P. J., and D. E. HOLBROOK, JR. and M. J. KELLY, JJ.

M. J. KELLY, J. Defendants Malchi White and Glenn Newson were convicted of breaking and entering an unoccupied building, with intent to commit larceny therein, by a Detroit Recorder's Court jury after being tried jointly. MCLA 750.110; MSA 28.305. Both defendants were sentenced to

serve nine to ten years in prison. Defendants have appealed as of right and their cases have been consolidated.

Defendant White raises five issues, while defendant Newson raises only one.

Initially, defendant White contends that the prosecutor impermissibly commented on his failure to testify. Defendant immediately objected, but the court gave no cautionary instruction. A review of the record indicates that defendant's counsel initiated remarks in his closing argument about his client's failure to testify. The prosecutor in his rebuttal commented on the defense remarks.

The objectionable rebuttal was in response to the following argument made by defense counsel:

> "I didn't see the necessity of putting him [White] on any witness chair and letting the slilled *[sic]* and shrewd prosecutor interrogate him under examination. There is always the possibility under fear and cross-examination that something might come out and might be misunderstood by you ladies and gentlemen of the jury."

Whereupon, the prosecutor in rebuttal noted in part:

> "That Mr. Miller [defense counsel] was afraid to put his man on the stand to subject him to my skilled cross-examination and he was afraid something might come out. My only comment is, ladies and gentlemen, had this happened, maybe the truth might come out."

We fail to see what further prejudice was caused defendant White after his own counsel stated that "something might come out and might be misun-

derstood" if White had taken the stand, compared to the prosecutor's remark that "maybe the truth might come out". Both sides speculate.

The jury was well aware that defendant White had not testified. Defense counsel's remarks could be interpreted by a jury as expressing concern that his client would incriminate himself. Of course his intention was to parade the prosecutor's sophistication against defendant's supposed naiveté. The prosecutor's rebuttal did not prejudice defendant White's case. There is no reversible error when the prosecutor's remarks, even if otherwise improper, are "made primarily in response to matters previously discussed by defense counsel". See *People v Pomranky,* 62 Mich App 304, 310–311; 233 NW2d 263 (1975), *lv den,* 397 Mich 823 (1976), *People v Jones,* 75 Mich App 261, 277; 254 NW2d 863 (1977).

Turning the coin defendant White next contends that he was denied effective assistance of counsel because his attorney argued his failure to testify thus canceling his constitutional fifth amendment right to silence. It appears that White's trial counsel used his argument as part of valid trial strategy. There is no merit to defendant's contention that this amounts to ineffective assistance of counsel. See *People v Garcia,* 398 Mich 250, 266; 247 NW2d 547 (1976). Able counsel know that jurors are often distressed by a defendant's failure to testify.

The last issue requiring any discussion is raised by both defendants White and Newson. They assert that their sentences of nine to ten years violate the provisions of the indeterminate sentencing act, MCLA 769.8; MSA 28.1080, and the rule set forth in *People v Tanner,* 387 Mich 683; 199 NW2d 202 (1972).

The indeterminate sentencing act, MCLA 769.8; MSA 28.1080 provides:

"When any person shall hereafter be *convicted for the first time* of crime committed after this act takes effect * * * the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term except as hereinafter provided." (Emphasis added.)

In *People v Tanner, supra,* at 690, the Supreme Court established the following rule under this act:

"Convinced as we are, that a sentence with too short an interval between minimum and maximum is not indeterminate, we hold that any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act."

The sentences in the present case are nine to ten years, clearly contra to the Tanner "two-thirds" rule if it applies. The question is whether the rule applies to the defendants who have previous felony convictions. This is not a new question.

We adopt the following reasoning set forth recently by another panel of this Court in *People v Banks,* 73 Mich App 492, 494; 252 NW2d 501 (1977), wherein the majority stated:

"It is apparent * * * that the Supreme Court [in *People v Tanner]* limited its holding that a minimum sentence exceeding two-thirds of the maximum is improper applies only to cases to which the indeterminate sentence act applies.

"The indeterminate sentence act, MCLA 769.8; MSA 28.1080, reads in part as follows:

" 'When any person shall hereafter be *convicted for the first time of crime* committed after this act takes effect. [The court imposing sentence shall not fix a

definite term of imprisonment but shall fix a minimum term except as hereinafter provided.]' Since defendant's conviction for larceny in a dwelling house was defendant's third conviction the court was not bound by the indeterminate sentence act and was free to sentence defendant as its discretion dictated. Absent an abuse of discretion, the trial court's decision will not be disturbed. We find no abuse of discretion and defendant's sentence [three to four years] shall stand." (Emphasis in 73 Mich App.)

Cf. People v Ungurean, 51 Mich App 262; 214 NW2d 873 (1974), *People v Redwine,* 73 Mich App 83, 85; 250 NW2d 550 (1976) (ANDERSON, J., dissenting).

We are aware of and undismayed by other decisions of this Court applying *Tanner* to defendants with prior convictions. Courts sometimes make mistakes. Even supreme courts. See *People v Redwine, supra, People v Bullock,* 48 Mich App 700, 705–706; 211 NW2d 108 (1973), *People v Hempton,* 43 Mich App 618; 204 NW2d 684 (1972), *People v Justice,* 50 Mich App 55; 212 NW2d 762 (1973), *lv den,* 391 Mich 792 (1974). See also Judge CAVANAGH's dissent in *People v Banks, supra.* Even the Supreme Court has adopted this approach. *People v Haggitt,* 388 Mich 773; 200 NW2d 321 (1972), and *People v Jordan,* 388 Mich 773; 200 NW2d 321 (1972). Both of these decisions were memorandum opinions and did not discuss the indeterminate sentencing statute in its application to multiple offenders. See also *People v Moore,* 391 Mich 426, 430; 216 NW2d 770 (1974), wherein the Supreme Court noted that the Court of Appeals, in an unpublished opinion, applied *Tanner* to prior offenders. The Supreme Court did not discuss the issue.

The plain language of the statute applies the indeterminate sentencing act to those who are first

offenders. MCLA 8.3a; MSA 2.212(1). The general rules of statutory construction require that: "[e]very word, phrase, clause, and sentence of the provision to be construed must be given force and effect and no word, phrase, or clause shall be rendered nugatory". *Chrysler Corp v Washington,* 52 Mich App 229, 237; 217 NW2d 66 (1974), *lv den,* 399 Mich 859 (1977). "[I]t will not be presumed that the legislature intended to do a useless thing and if possible every part of a statute must be given effect." *Davis v Imlay Township Board,* 7 Mich App 231, 236; 151 NW2d 370 (1967), *lv den,* 379 Mich 780 (1967).

The courts, by adapting the rule of *Tanner* to factual situations involving prior offenders, are creatively expanding the scope and legal effect of *Tanner. Tanner* is inapplicable because that ruling is precisely directed to sentences under the indeterminate sentencing act. To hold that the *Tanner* decision applies to multiple offenders would presuppose that the Legislature intended to do a useless thing when it inserted the words "convicted for the first time of crime". To bind trial courts to the *Tanner* sentencing rule for all multiple offenders is illogical and those decisions which do so are either prognosticating correctly or ignoring established canons of statutory construction.

If the Supreme Court wishes to expand the rule of *Tanner* to the instant facts, we think that further reasoning is required and not mere reliance on *Tanner* in a memorandum opinion. See *People v Haggitt, People v Jordan, supra.* Until the Supreme Court does issue an explicit decision expanding *Tanner* to the instant facts, we feel free to follow the reasoning in *People v Banks, supra.* See also *People v Ungurean, supra.*

Defendant White has raised two other issues

relating to the trial court's instructions to the jury. Defendant did not object, and a review of the record indicates no manifest injustice has resulted. Therefore, there is no reversible error. MCLA 769.26; MSA 28.1096.

Affirmed.

LAWRENCE v DEPARTMENT OF CORRECTIONS

1. CONSTITUTIONAL LAW—DUE PROCESS—NOTICE OF PROCEEDING—OPPORTUNITY TO RESPOND.

   Due process of law requires that notice of a proceeding must be given to an opposing party sufficiently in advance of the scheduled proceeding to afford the opposing party a reasonable opportunity to prepare and answer.

2. CONSTITUTIONAL LAW—DUE PROCESS—NOTICE OF PROCEEDING—OPPORTUNITY TO RESPOND.

   A plaintiff was denied due process where the defendant moved for summary judgment and did not timely serve the plaintiff with a notice of the hearing on the motion, where because the plaintiff, a prison inmate, was incarcerated the court had already denied him the opportunity to argue on a previous motion in person so that the only way the plaintiff could appear was by way of written material sent through the mail, and where the record indicates that the plaintiff did not actually receive notice of the scheduled hearing on the motion until after the hearing was held and the motion granted.

3. MOTIONS—ORAL ARGUMENTS—COURT RULES—DISCRETION.

   A trial court has the discretion to dispense with or limit oral arguments on motions; this discretion was abused where the court refused a plaintiff's request to appear in person yet allowed the defendant to appear and argue a motion unopposed (GCR 1963, 119.2).

4. TORTS—PLEADING—CONVERSION—GOVERNMENTAL IMMUNITY—STATUTES.

   An allegation by a plaintiff prison inmate that his property was stolen by prison employees is an allegation of conversion, which is an intentional tort; the commission of an intentional tort is not a governmental function, and in such a case the defendant Department of Corrections if possibly liable under a theory of

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 16 Am Jur 2d, Constitutional Law §§ 560–568.

[3] 20 Am Jur 2d, Courts §§ 82–86.

[4] 57 Am Jur 2d, Municipal, School, and State Tort Liability, § 243.

respondeat superior is not protected by governmental immunity (MCLA 691.1407; MSA 3.996[107]).

Appeal from Court of Claims, Kenneth B. Glaser, Jr., J. Submitted October 6, 1977, at Detroit. (Docket No. 77-1066.) Decided February 7, 1978.

Complaint in four counts by James Lawrence against the Department of Corrections for recovery of the value of personal property allegedly stolen by employees of Southern Michigan State Prison while plaintiff was an inmate at the prison. Accelerated and summary judgments for defendant. Plaintiff appeals. Remanded for further proceedings.

James Lawrence, *in propria persona.*

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Michael J. Hodge,* Assistant Attorney General, for defendant.

Before: D. F. WALSH, P. J., and V. J. BRENNAN and BEASLEY, JJ.

V. J. BRENNAN, J. Plaintiff James Lawrence appeals by right from a Court of Claims grant of accelerated judgment, pursuant to GCR 1963, 116.1(5) on counts 1 and 2 of his complaint, and summary judgment, pursuant to GCR 1963, 117.2(1) on counts 3 and 4. Plaintiff, an inmate at Jackson Prison, sought to recover $130.95 for the loss of personal property allegedly taken by prison employees.

Plaintiff claimed that on August 3, 1976, he was placed in a detention cell for an alleged violation of prison rules. At that time, he had a quantity of personal property in his cell. Between August 3

and August 12, 1976, defendant Department of Corrections moved this property to the prison property room. When his property was returned after his release from detention, several items were missing.

Count 1 of plaintiff's complaint alleges negligence in that prison officials when they placed him in detention had a duty to exercise reasonable care to see that his property was not lost, stolen or destroyed and that they breached that duty causing him loss. Count 2 alleged under the same facts that the property had been converted. Counts 3 and 4 pled in summary fashion that his property was taken in violation of due process and was a public taking without just compensation.

The Attorney General on behalf of defendant filed a motion for accelerated judgment claiming the operation of a prison is a state function and therefore defendant was immune under the statute. MCLA 691.1407; MSA 3.996(107). This motion was filed on January 3, 1977.

Plaintiff responded to that motion on January 10, 1977. He reasoned that governmental immunity would not apply to his complaint because he alleged his property had been unconstitutionally taken. He also observed that governmental immunity applied wholly to tort claims and that the last two counts in his complaint were not based on tort law.

The Attorney General then moved for summary judgment on March 10, 1977. In support of the motion, the Attorney General argued that due process was not denied because no need for a hearing existed before a prisoner's property could be removed from his cell after the prisoner had been placed in detention. He further alleged that no "taking" within the meaning of the constitution

occurred because the constitutional provision does not apply to the theft of personal property.

The motion for summary judgment was mailed to plaintiff on Thursday, March 10, 1977. The Court of Claims granted the motion on Tuesday, March 15, 1977. The court had previously denied plaintiff's application for a writ of habeas corpus, so plaintiff was not represented or present to respond in person to defendant's motion. He claims now he did not even receive a copy of the motion until after the court had granted the motion.

The orders from the Court of Claims pursuant to granting the motion state only that counts 1 and 2 are barred by governmental immunity and that counts 3 and 4 fail to state a claim upon which relief can be granted. GCR 1963, 117.2(1).

Plaintiff brings three assignments of error on appeal. We need deal with only one at this time.

Plaintiff claims that the procedure by which the Court of Claims granted summary judgment denied him due process of law because he failed to receive adequate notice and an opportunity to appear and present his defense to the motion for summary judgment brought by defendant.

Plaintiff contends the Court of Claims procedure denied him procedural due process in two particulars. First, plaintiff claims he received no notice that the Attorney General had filed a motion for summary judgment on counts 3 and 4 of this complaint until after the motion had been granted by the court. Second, he claims that allowing the Attorney General to present oral arguments on the motion while denying him a similar opportunity is fundamentally unfair.

On the basis of the record presented, we find that notice of the motion for summary judgment

was not mailed to plaintiff until Thursday, March 10, 1977. The motion was granted on Tuesday, March 15, 1977. Plaintiff claims that he did not receive actual notice the motion had been filed until after the motion was granted. We have no reason to doubt this claim, given the quality of mail service generally and within a prison particularly. Clearly, the motion was not timely served even under the court rule. GCR 1963, 108.4 generally allows notice of a motion 4 days before the motion is heard; but where the mailing must be delivered to another county, an additional 2 days are required, not including the day of mailing. GCR 1963, 108.6 and 108.7(1). But see also Court of Claims Rules 6 and 7.[1]

Plaintiff was denied due process. Underlying the claim made here is the principle that notice must be given sufficiently in advance of the scheduled proceeding to afford the party a reasonable opportunity to prepare and answer. *People v Gulley,* 66 Mich App 112, 116; 238 NW2d 421 (1975), *lv den,* 396 Mich 850 (1976). See also *Laird v Rinckey,* 371 Mich 96, 98; 123 NW2d 243 (1963); *Ridenour v Bay County,* 366 Mich 225, 240; 114 NW2d 172 (1962).

Because plaintiff was incarcerated, the Court of Claims had already denied him the opportunity to argue the motion for accelerated judgment in person. The only way plaintiff could appear was through written material he sent through the mail. Plaintiff had no way of responding to the motion through the mail when defendant had not mailed the motion to him until five days before the actual hearing. The procedure employed by the

[1] We find that Rule 7 of the Court of Claims was violated in this case where plaintiff received no notice of the motion hearing before the court acted. We would require receipt of the motion by personal or registered mail service four days or more prior to the time for hearing to constitute proper compliance with the rule.

Attorney General and accepted by the Court of Claims prevents plaintiff from properly and fairly responding to the motion. The court granted the motion without ever hearing opposing argument.

We thus find plaintiff was denied due process by a procedure which effectively excluded any opportunity for him to be heard. Therefore, we find a remand necessary in order to allow plaintiff to properly respond to the motion for summary judgment filed by the Attorney General. Though lacking clarity, we do observe that plaintiff did a creditable job of "filling out" the complaint in his brief in response to the governmental immunity motion filed by the Attorney General. If given the opportunity, he might well do the same on the questions presented by the Attorney General in his motion for summary judgment. We feel fairness and proper procedure dictate that plaintiff be given the opportunity.

Plaintiff also claims he was denied due process when the court allowed the Attorney General to present oral argument while at the same time preventing him from being present. We find this procedure objectionable, but need not subject the problem to constitutional scrutiny.

GCR 1963, 119.2 gives trial courts discretion to "dispense with or limit oral arguments on motions". We find an abuse of discretion where the court refused plaintiff's request to appear in person and yet allowed defendant to appear and argue the motion unopposed. The proper procedure would have been either to allow both parties to argue or to allow neither to argue. See generally *Florence v Moors Concrete Products Inc (On Rehearing),* 35 Mich App 613, 620–621; 193 NW2d 72 (1971), *lv den* 387 Mich 761 (1972). Given that defendant has already been provided an opportu-

nity to present his position and information to the court, on remand the court should allow plaintiff to appear in person to present his response to defendant's motion.

We also strongly urge that the court reconsider its grant of summary judgment to defendant on the basis that governmental immunity precludes plaintiff's suit for conversion under count 2 of his complaint. MCLA 691.1407; MSA 3.996(107). Plaintiff is charging that prison employees stole his property. Such conversion is an intentional tort. The commission of an intentional tort is not a governmental function. If not a governmental function, then defendant is not protected by governmental immunity. *McCann v State of Michigan,* 398 Mich 65; 247 NW2d 521 (1976); *Galli v Kirkeby,* 398 Mich 527; 248 NW2d 149 (1976). We would give the trial court an opportunity to review its decision concerning this second count with special regard to defendant's possible liability under a theory of respondeat superior. In any case, more complete factual allegation by plaintiff will be necessary. See 18 Am Jur 2d, Conversion, § 125; Annotation, 15 ALR2d 829.

Having reviewed plaintiff's third allegation of error and found the court's decision concerning counts 3 and 4 of plaintiff's complaint essentially correct, we find no grounds to disturb the court's judgment here.

Remanded for proceedings in conformity with this opinion.

VILLAGE OF HOLLY v GROMAK

1. ZONING—NONCONFORMING USE—CHANGE IN USE—STATUTES.

   Extended or expanded uses of land or structures exceeding the boundaries of an existing nonconforming use are unlawful uses that violate the statute governing nonconforming use; however, a lesser or diminishing nonconforming use is not only lawful, but proceeds toward the objectives of the statute (MCLA 125.583a; MSA 5.2933[1]).

2. ZONING—ORDINANCES—REASONABLENESS—CIRCUMSTANCES.

   Zoning ordinances, as a rule, stand by themselves and the reasonableness of an ordinance must be judged by the circumstances of each case.

3. ZONING—NONCONFORMING USE—CHANGE IN USE—CIRCUMSTANCES.

   A decision of whether to permit a proposed change in a nonconforming use must be made by viewing each situation in the light of all the surrounding facts and circumstances.

4. ZONING—NONCONFORMING USE—BOARDS OF APPEAL—COURTS—CHANGE IN USE—FACTORS CONSIDERED.

   A zoning board of appeals and courts, in considering a proposed change in a nonconforming use, should consider, in addition to the use of the property at the time of the enactment of the zoning ordinance, such factors as prior interruptions in the nonconforming use and the reasons for them, expansions or contractions of the nonconforming use and the intent of the

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REFERENCES FOR POINTS IN HEADNOTES

[1] 82 Am Jur 2d, Zoning and Planning §§ 196–199.
Zoning: Changes, repairs, or replacements in continuation of nonconforming use. 87 ALR2d 4.

[2] 82 Am Jur 2d, Zoning and Planning § 15.

[3] 82 Am Jur 2d, Zoning and Planning §§ 200, 201.
Plan: Requirement that zoning variances or exceptions be made in accordance with comprehensive plan, 40 ALR3d 372.

[4] 82 Am Jur 2d, Zoning and Planning § 234.
Zoning: Right to resume nonconforming use of premises after involuntary break in the continuity of nonconforming use caused by governmental activity. 56 ALR3d 138.

user in making such changes, whether there has been a partial or total abandonment of the nonconforming use, and the role of governmental agencies involved.

Appeal from Oakland, Frederick C. Ziem, J. Submitted December 14, 1977, at Detroit. (Docket No. 77-1886.) Decided February 7, 1978.

Complaint by the Village of Holly against Frank Gromak, Romila Development Corporation and William Eller to enjoin the defendants from violating the village's zoning ordinance. Counter complaint by Romila Development against the Village of Holly to enjoin the village from enforcing its zoning ordinance and for damages. Judgment for plaintiff. Defendants appeal. Affirmed.

Albert H. Callahan, for plaintiff.

Campbell, Kurzman & Plunkett, for defendants.

Before: BASHARA, P. J., and BEASLEY and D. E. HOLBROOK, JR., JJ.

BEASLEY, J. This case comes before this court on defendants-appellants' appeal as of right from a trial court judgment affirming denial by plaintiff's board of zoning appeals of an application to operate a so-called "convenience food" establishment in a structure on property that is the subject of a valid nonconforming use.

The record indicates that in 1945 or 1946 defendant Gromak put a war surplus Quonset hut on the premises and started a farm equipment sales and service business. Around 1955, as farming in the area lessened, he switched emphasis to heavy industrial equipment including bulldozers, cater-

pillars, back hoes and fork-lifts which continued until 1967 or 1968 when he ventured into the lawn, garden and outdoor power equipment sales and service business.

In 1970, plaintiff enacted a zoning ordinance which zoned the subject land R1C, a single-family residence classification. In 1973, defendant Gromak sold the premises on land contract to defendant Romila, but rented part of the premises back from the new purchaser and started slowly to phase out his business. Defendant Romila subdivided part of the property, built houses on two parcels and rented the front part of the Quonset hut to defendant Bennett Insulation Company for an insulation, storage and sales business.

Plaintiff started this suit to oust the insulation operation from the premises and defendant Bennett Insulation Company counter-claimed. While the case was pending, defendant Romila, desiring to use part of the property for a so-called convenience food establishment, petitioned the board of zoning appeals for permission to change the nonconforming use, if no structural alterations were made and if the proposed use was equally appropriate or more appropriate to the district than the existing nonconforming use. This request was made pursuant to § 4.5(c) of plaintiff's zoning ordinance which provides as follows:

"c) If no structural alterations are made, any nonconforming use of a structure, or structure and premises, may as a special exception be changed to another nonconforming use provided that the Board of Appeals, either by general rule or by making findings in the specific case, shall find that the proposed use is equally appropriate or more appropriate to the district than the existing nonconforming use. In permitting such change, the Board of Appeals may require appropriate condi-

tions and safeguards in accord with the provisions of this ordinance * * * ."[1]

Extensive hearings were held in October 1975 and May 1976.

The board of zoning appeals denied the petitions, concluding that a convenience food store was less appropriate to the district than the then-existing use of the part-time sales and service of lawn and garden equipment. Defendants then amended their claims in this lawsuit, seeking superintending control in the circuit court. After trial, the trial court, in a carefully prepared opinion, concluded that although the nonconforming use had not been abandoned, the decision of the board of zoning appeals denying permission for the changed nonconforming use was supported by competent and material evidence and, thus, met the constitutional test under Article 6, § 28 of the 1963 Michigan Constitution.

On appeal, as in the trial court, defendants-appellants argue that the board of zoning appeals proceeded on an erroneous conception of the law, namely, that it looked to the use of the subject premises as it existed at the time of filing of the petition, which appears to have been servicing of lawnmowers and other lawn equipment on a part-time basis by a semi-retired owner. Appellants say that the board of zoning appeals should have looked to the use on the effective date of the zoning ordinance in 1970 when a busy retail sales

[1] The statute authorizing § 4.5(c) provides as follows:
"The lawful use of land or a structure exactly as such existed at the time of the enactment of the ordinance affecting them, may be continued, except as hereinafter provided, although such use or structure does not conform with the provisions of such ordinance. The legislative body may in its discretion provide by ordinance for the resumption, restoration, reconstruction, extension or substitution of non-conforming uses or structures upon such terms and conditions as may be provided in the ordinance." MCLA 125.583a; MSA 5.2933(1).

and service lawnmower and equipment business was in operation. The trial judge took into consideration that the 1973 land contract purchaser built two residential structures on the premises and altered the use to put an insulation company in part of the Quonset hut. After noting that the case involved a close question, with respect to defendants-appellants' chief claim, the trial judge said, among other things, as follows:

" * * * in view of the fact that the present lawn and garden equipment business has become a limited operation run by a person who is in a semi-retired or work as he pleases; even though the Court has made a finding with the nonconforming use, it has not been abandoned; nevertheless, in view of the wording of the ordinance which speaks of the existing nonconforming use, this Court is of the opinion that the Board of Appeals had the right to compare the proposed use to the use as it existed in the last three or four years.

"This Court is not ruling that the Defendants couldn't go back to the use of the prior years, because that is not before the Court. But this Court is of the opinion that the Board did have the right to compare the proposed use to the use as it had existed in the last three or four years."

Appellants cite *City of Hillsdale v Hillsdale Iron & Metal Co, Inc,* 358 Mich 377; 100 NW2d 467 (1960), as authority to support the proposition that absent abandonment, the basis for comparison with the proposed use is the lawful use exactly as such existed at the time of enactment of the ordinance. In *Hillsdale,* at the date of adoption of the zoning ordinance, defendant's business was "largely storage of scrap metal", 358 Mich at 385. The court found extension of use *after* the effective date of the ordinance. Defendant claimed that the use was expanded because mechanization and

modernization were necessary to meet competition. The trial court enjoined the use and maintenance of machinery, equipment and buildings placed on the premises after effective date of the ordinance. Consequently, as distinguished from the within case where we have abatement or reduction of a nonconforming use, in *Hillsdale* there was an expansion or broadening of a nonconforming use. Defendant also cites *Dearden v Detroit,* 70 Mich App 163; 245 NW2d 700 (1976), where, from 1938 through 1971, the Roman Catholic Archdiocese of Detroit owned and used the subject building as a convent. In 1940, defendant city adopted a zoning ordinance under which the area became R2 (two family); thus, the convent became a nonconforming use. In 1971, plaintiff sought to lease to the Michigan Department of Corrections the premises for use in rehabilitating convicts. The zoning ordinance did not specifically exclude governmental use. This Court held that the nonconforming use must be substantially the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance, citing *White Lake Twp v Lustig,* 10 Mich App 665; 160 NW2d 353 (1968). This Court held that the proposed use as a correctional facility was an expansion of the nonconforming use, that housing is only one aspect of the proposed use by the Department of Corrections and, therefore, affirmed the denial by defendant of the proposed use.

In *Dearden,* the nonconforming use as a convent appears to have remained constant while the proposed new use would be a clear extension of the nonconforming use. Thus, both *Hillsdale* and *Dearden* are distinguishable from the within case. Extended or expanded uses exceeding the boundaries of an existing nonconforming use are unlawful

uses that violate the nonconforming use statute. On the other hand, lesser or diminishing nonconforming uses are not only lawful, but proceed toward the objectives of the nonconforming use statute. The trial court did not ignore the use existing in 1970 at the date of enactment of the zoning ordinance, but also gave consideration to the actual use of the subject premises thereafter. Just as each zoning ordinance, as a rule, stands by itself and its reasonableness must be judged by the circumstances in each case,[2] each situation where a decision must be made whether to permit a proposed change in a nonconforming use must be viewed in the light of all the surrounding facts and circumstances.

It would be neither practical nor desirable to attempt to formulate a rule that described the weight to be given to each fact and circumstance.

While the use of the property at the time of enactment of the ordinance is a proper starting place in analysis of nonconforming use questions, there are additional factors that must be considered. To be considered are such factors as prior interruptions in the nonconforming use and the reasons for them, expansions or contractions of the nonconforming use and the intent of the user in making such changes, whether there has been a partial or total abandonment of the nonconforming use and the role of governmental agencies involved. Appellants' argument that the only factor properly considered is the nonconforming use existing when the ordinance is adopted would be a sterile, limiting approach that we do not care to embrace. Under these circumstances, we do not find that the trial court clearly erred in its inter-

[2] *Redford Moving & Storage Co v Detroit,* 336 Mich 702, 711; 58 NW2d 812 (1953), citing *Pere Marquette R Co v Muskegon Township Board,* 298 Mich 31; 298 NW 393 (1941).

pretation of the law. Each case must be decided upon its own peculiar circumstances. In this case, the trial court's application of the law to the facts was not clearly in error; there was evidence to support the findings of the board of zoning appeals as the trial court found.

Affirmed, with costs.

AMERICAN FEDERAL SAVINGS AND LOAN ASSOCIATION v ORENSTEIN

OPINION OF THE COURT

1. VENDOR AND PURCHASER—INVESTIGATION OF TITLE—DUTY OF PURCHASER—INQUIRY NOTICE—DUE DILIGENCE.

A purchaser of real estate has the duty to investigate the title of his vendor and to take notice of any adverse rights or equities of third parties which he has the means of discovering and as to which he is put on inquiry; if he fails to inquire with due diligence he is chargeable, as a matter of law, with notice of the facts which the inquiry would have disclosed.

2. MORTGAGES—PRIORITIES—SUBORDINATION CLAUSE—AMBIGUITIES—INQUIRY NOTICE—SUMMARY JUDGMENT.

Summary judgment granting a plaintiff mortgagee priority over the mortgage of a defendant was improper where the judgment was based upon a subordination clause in the defendant's mortgage which was so obviously ambiguous that it should have put plaintiff on inquiry notice of a third-party interest in the realty.

CONCURRENCE IN PART, DISSENT IN PART BY W. R. BROWN, J.

3. JUDGMENT—FINAL JUDGMENT—PRIOR ORDERS—APPEAL BY RIGHT—COURT RULES.

An otherwise nonfinal judgment is considered to be final only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment; upon entry of a final judgment all prior nonfinal rulings and

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 5, 8] 55 Am Jur 2d, Mortgages §§ 324, 325, 1096–1099.
66 Am Jur 2d, Records and Recording Laws §§ 102, 104, 105.
[2, 5, 8] 55 Am Jur 2d, Mortgages §§ 343, 344.
[3] 46 Am Jur 2d, Judgments §§ 457, 675.
47 Am Jur 2d, Judgments § 926.
[4] 55 Am Jur 2d, Mortgages § 99.
[6] 55 Am Jur 2d, Mortgages §§ 328, 345.
[7] 55 Am Jur 2d, Mortgages § 175.

orders are incorporated into the final judgment and are finalized for purposes of appeal and upon perfection of an appeal by right from a final judgment a party may seek review of any prior ruling in the case affecting the party that would otherwise be only a nonfinal order (GCR 1963, 518.2).

4. MORTGAGES—DISCHARGE OF MORTGAGE—FORGED INSTRUMENT—RIGHTS OF PARTIES.

A forged document purporting to be a discharge of a mortgage and duly recorded as such does not affect the rights of one mortgagee over the rights of another mortgagee.

5. PROPERTY—RECORDING STATUTES—PROPERTY INTERESTS—EXTRINSIC EVIDENCE.

One important purpose of the recording statutes is to impart certainty so that parties can rely on the public record of outstanding property interests; it is impermissible to resort to extrinsic evidence to determine what property interests are protected by recording, the constructive notice imparted by the record of an instrument being strictly limited to that which is set forth on its face.

6. MORTGAGES—RECORDING STATUTES—WAIVER OF PRIORITY—CONSTRUCTIVE NOTICE—STATUTES.

A recorded waiver of priority of a mortgage is constructive notice thereof to all persons dealing with the mortgage (MCLA 565.391; MSA 26.701).

7. MORTGAGES—SUBORDINATION CLAUSE—AMBIGUITIES—CONSTRUCTION.

An ambiguous subordination clause in a recorded mortgage should be construed against the party who drafted the clause.

8. MORTGAGES—DEFECTS IN TITLE—DISCHARGE OF MORTGAGE—INQUIRY NOTICE—RELIANCE ON RECORD.

A party who has searched the record regarding a particular piece of property and in reliance on a discharge of mortgage contained therein has attained the status of a bona fide mortgagee without notice of defects in the title should not be charged with inquiry notice as to a more subtle defect earlier in time; for purposes of inquiry notice, a mortgagee is fully entitled to rely on an apparently perfect legal title as shown by the records.

Appeal from Oakland, Robert L. Templin, J. Submitted October 18, 1977, at Detroit. (Docket No. 77-2223.) Decided February 7, 1978. Leave to appeal denied, 402 Mich 945.

Complaint by American Federal Savings and Loan Association against Charles Orenstein and others for foreclosure of a mortgage and for a declaratory judgment that a mortgage held by Orenstein was a nullity. A partial summary judgment was entered declaring plaintiff's mortgage to be senior to defendant's and a subsequent judgment of foreclosure was entered in favor of plaintiff. Defendant appeals. Reversed and remanded.

Smith, Miro, Hirsch & Brody (by *David M. Miro* and *Martin C. Weisman),* for plaintiff.

Schlussel, Lifton, Simon, Rands, Kaufman & Lesinski (by *T. John Lesinski* and *Joseph F. Galvin),* for defendant.

Before: T. M. BURNS, P. J., and R. B. BURNS and W. R. BROWN,* JJ.

R. B. BURNS, J. We concur in the opinion of Judge BROWN, except as to his discussion and resolution of the substantive issue. The reader is referred to Judge BROWN's opinion for the facts in the instant case.

The trial court granted summary judgment because it found the subordination clause unambiguously subordinated Orenstein's mortgage to that of plaintiff. However, each party on appeal has presented reasonable interpretations of the same clause which are at variance with each other. If the clause is interpreted, as plaintiff suggests, as subordinating Orenstein's mortgage not only to the interests of the New York State Teacher's Retirement System and the General Electric Pension Trust, but also to an unspecified, yet-to-be-incurred interest of $4,125,000, then one immedi-

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

ately encounters an obvious ambiguity. If Orenstein's mortgage is subordinate to three interests, why are only two numerals listed?

Judge BROWN's argument that the ambiguity must be resolved against the drafter of the clause, Orenstein, rests on the premise that a title searcher is never chargeable with inquiry notice when an ambiguity is encountered. This is not the law.

> "It is the duty of a purchaser of real estate to investigate the title of his vendor, and to take notice of any adverse rights or equities of third persons which he has the means of discovering, and as to which he is put on inquiry. If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused, but, if he fails to use due diligence, he is chargeable, as a matter of law, with notice of the facts which the inquiry would have disclosed.
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> * * *
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> "The questions in such cases are: *First,* whether the facts were sufficient to put the party on inquiry; and, *second,* did he fail to exercise due diligence in making the inquiry?" *Schweiss v Woodruff,* 73 Mich 473, 477–478; 41 NW 511, 512–513 (1889). (Emphasis in original.)

Cases in which a title defect would prevent a diligent title searcher from discovering the deed or recognizing its applicability must be distinguished from those in which the deed would have been discovered and a possible error revealed. *Schweiss v Woodruff, supra* at 478–479; 41 NW at 513; see, *e.g., Savidge v Seager,* 175 Mich 47; 140 NW 951 (1913); *Van Slyck v Skinner,* 41 Mich 186; 1 NW 971 (1879). In *Patterson v Miller,* 249 Mich 89, 96; 227 NW 674, 677 (1929), the ambiguity contained in a subordination clause was so subtle that the

Court indicated that a covenant would have had to have been read into the clause to give it the asserted meaning.

The ambiguity in the instant subordination clause was so obvious as to put a prudent person on inquiry notice. Whether plaintiff would have discovered that the Orenstein mortgage would be superior or inferior to its own is a fact which is in dispute. Summary judgment was therefore improper.

Reversed and remanded for trial.

T. M. BURNS, P. J., concurred.

W. R. BROWN, J. *(concurring in part, dissenting in part).* Defendant Orenstein appeals from a partial summary judgment of June 23, 1976, that Orenstein's mortgage was junior to that of plaintiff, and Orenstein appeals from the July 26, 1976, judgment of foreclosure, as well as the June 17, 1977, order making the judgment of foreclosure a final judgment pursuant to GCR 1963, 518.2.

Defendant Orenstein was given a mortgage on the subject property on March 10, 1972, to secure a loan of $1,300,000. The purpose of the loan was to supplement construction funds for the completion of an office building in Southfield, Michigan. Previously, a mortgage had been conveyed to a third party in the amount of $3,025,000 to provide funds for construction of the building, with an agreement for an additional loan of $1,100,000 upon attaining a certain percentage of tenants for the building. The other mortgagee, however, declined to consummate the additional $1,100,000 loan and the building owners eventually sought and obtained the loan from Orenstein in the amount of $1,300,000. Although the agreement was reached on March 10, 1972, the Orenstein

mortgage was not recorded until November 20, 1973. The Orenstein mortgage contained the following emphasized subordination clause which is at the crux of the dispute before us:

"12. This Mortgage and Assignment of Leases and Rentals is subject and subordinate in all respects to the following: (i) The lien of that certain mortgage given by Mortgagor by assignment to the New York State Teacher's Retirement System dated May 21, 1970, recorded at Liber 5508, Page 167, Oakland County Records on May 22, 1970, and all obligations and indebtedness thereof up to the sum of Four Million One Hundred Twenty-Five Thousand and 00/100 Dollars ($4,125,000.00), exclusive of interest; *and all advances, obligations and indebtedness now or hereafter incurred up to the sum of $4,125,000.00, exclusive of interest,* and (ii) The terms and conditions of a land lease from the Trustees of General Electric Pension Trust fee holder granted to Mortgagor from said Trustees executed on May 21, 1970 and recorded on May 22, 1970, in Liber 5508, Page 167, Oakland County Records." (Emphasis added.)

On November 28, 1973, a document purporting to discharge the Orenstein mortgage was recorded. Defendant Orenstein claims that the document is a forgery and for purposes of review of the summary judgment, we will assume this assertion is correct. On April 1, 1974, plaintiff recorded its mortgage securing a loan in the amount of $4,110,000. It is undisputed that, at that time, plaintiff had no actual knowledge of the existence of the Orenstein mortgage.[1] On December 13, 1974, the Orenstein mortgage was re-recorded.

Plaintiff commenced this action on October 13, 1975, alleging default and requesting that the Orenstein mortgage be declared a nullity and that

[1] Plaintiff had obtained title insurance, but because of the discharge, Orenstein's mortgage was not shown as an outstanding interest.

plaintiff's mortgage be foreclosed. Following the filing of counter-complaints and cross-complaints, plaintiff moved for a summary judgment that its mortgage has priority over the Orenstein mortgage based on the above-quoted subordination clause in the Orenstein mortgage. Defendant Orenstein seeks review of the summary judgment as well as the judgment of foreclosure and the confirmation of sale.

I. APPEAL BY LEAVE OR BY RIGHT

The threshold issue is whether defendant Orenstein has an appeal by right or only by leave. We hold this appeal to be by right. Even the judgment of foreclosure did not resolve all of the claims of all the parties. Thus, like the prior partial summary judgment as to priorities, it is subject to GCR 1963, 518.2. That rule makes an otherwise nonfinal order a final judgment "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment". Absent such a finding, the judgment is not final. See *Pigott v City of Westland,* 48 Mich App 169, 172–173; 210 NW2d 111 (1973). Thus, the 20-day appeal by right period of GCR 1963, 803.1 did not commence until the entry of the order specifying finality. See *Chevrolet Local 659, UAW-CIO v Reliance Insurance Cos,* 21 Mich App 123, 124–125; 174 NW2d 924 (1970). Upon entry of a final judgment, all prior nonfinal rulings and orders, (including in this case the partial summary judgment as to priorities), are incorporated into the final judgment and are finalized for purposes of appeal. We reject plaintiff's argument that the claim of appeal is defective in not further delineating the nonfinal orders appealed from. Standing alone, the nonfinal orders

are not appealable as of right. *Chevrolet Local 659, supra.* The argument advanced by plaintiffs would result in piecemeal appeals, a result sought to be avoided by GCR 1963, 518.2. See 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 628. See also *Panichella v Pennsylvania R Co,* 252 F2d 452, 455 (CA 3, 1958), *cert den,* 361 US 932; 80 S Ct 370; 4 L Ed 2d 353 (1960). Upon perfection of an appeal by right from a final judgment, a party may seek review of any prior ruling affecting the party that would otherwise be only a nonfinal order.

II. PRIORITIES OF THE MORTGAGES

The majority and I part company as to the substantive issue in this appeal, whether the subordination clause in the Orenstein mortgage gives plaintiff priority. I respectfully dissent.

Absent the subordination clause of Orenstein's mortgage, Orenstein's would have priority over plaintiff's as being the first mortgage recorded for purposes of constructive notice by virtue of MCLA 565.25; MSA 26.543. The forged discharge does not entitle plaintiff to priority. *Ferguson v Glassford,* 68 Mich 36, 47; 35 NW 820 (1888). See also *Saginaw Building & Loan Assoc v Tennant,* 111 Mich 515, 516; 69 NW 1118 (1897), 66 Am Jur 2d, Records and Recording Laws, § 123, p 415, *cf. Horvath v National Mortgage Co,* 238 Mich 354, 360; 213 NW 202 (1927). However, if the subordination clause is read to afford plaintiff priority, Orenstein cannot prevail despite the earlier recorded mortgage. See generally, 59 CJS, Mortgages, § 246, p 315.

Defendant Orenstein argues on appeal that the trial judge should not have granted summary judgment because the subordination clause is ambigu-

ous, thereby leaving fact questions to be resolved by further testimony. While such an argument might be appropriate if this case involved only a contract, we are dealing with constructive notice to the public at large as well as plaintiff. It does great violence to the recording statutes to hold that a party may on the one hand rely on the recording statutes for priority purposes, but on the other hand assert an ambiguity in the recorded document and bring in extrinsic evidence to explain such an ambiguity.

One important purpose of the recording statutes is to impart certainty so that parties can rely on the public record of outstanding property interests. *Atwood v Bearss,* 47 Mich 72, 73; 10 NW 112 (1881). In *Savidge v Seager,* 175 Mich 47, 55; 140 NW 951 (1913), the Michigan Supreme Court indicated that it is impermissible to resort to extrinsic evidence to determine what property interests are protected by recording:

> "[T]he constructive notice imparted by the record of an instrument is strictly limited to that which is set forth on its face * * * ."

While *Savidge* was concerned with a property description, the same requirement of certainty should be required of any interest sought to be protected by recording. See also *Van Slyck v Skinner,* 41 Mich 186, 190; 1 NW 971 (1879). Nor should a different rule apply by virtue of the fact that this is a subordination clause. By statute, a recorded waiver of priority of a mortgage is "constructive notice thereof to all persons dealing with the mortgage". MCLA 565.391; MSA 26.701. Even in a case arising prior to the effective date of this statute, the Michigan Supreme Court gave effect to a subordination clause in a recorded mortgage and

held that it should be strictly construed against the party who drafted and recorded the subordination clause. See *Patterson v Miller,* 249 Mich 89, 96–97; 227 NW 674 (1929).

As a matter of constructive notice, the trial court properly considered and resolved the motion for summary judgment as to the priorities. No extrinsic evidence can be submitted to explain the import of a recorded document, *Savidge v Seager, supra,* and the extent of constructive notice by virtue of a recorded document should be regarded as peculiarly one of law for a trial court to resolve from within the four corners of the recorded document. Defendant Orenstein's argument that the clause is ambiguous concedes the point that the clause can be interpreted to afford plaintiff protection; thus, construing the subordination clause against defendant Orenstein, *Patterson v Miller, supra,* plaintiff is entitled to priority.

The inquiry notice on which the majority rests reversal raises entirely separate considerations. While the forged discharge cannot be considered for constructive notice purposes, I believe the majority holding in this case goes too far in failing to give due regard to the forged discharge for purposes of inquiry notice. I have no quarrel with the law quoted from *Schweiss v Woodruff,* 73 Mich 473, 477–478; 41 NW 511, 512–513 (1889). However, where a party such as plaintiff has searched the record and in reliance on a discharge contained therein has attained the status of a bona fide mortgagee without notice of defects in the title, it is incorrect to hold that the mortgagee must be charged with inquiry notice as to a more subtle defect earlier in time. As *Schweiss, supra,* points out, "If he makes all the inquiry which due diligence requires, and still fails to discover the outstanding right, he is excused".

For inquiry notice purposes, a mortgagee is fully entitled to rely on an apparently perfect legal title as shown by the records:

"He will generally be justified in relying on an apparently perfect legal title in his mortgagor, as shown by the records." 59 CJS, Mortgages, § 235, p 305.

Ferguson v Glassford, supra, 68 Mich at 46–47, indicates that this is the law in Michigan, stating that parties "have a right to look to the record for protection".

A similar statement of the law is found in 92 CJS, Vendor & Purchaser, § 335, p 250:

"It is the duty of a purchaser of real estate to search the public records with respect to the title he plans to purchase *and he is entitled to rely on the record."* (Emphasis added.)

In light of plaintiff having obtained title insurance following a search of the record, I cannot agree that plaintiff must be charged with inquiry notice as plaintiff might be if the forged discharge had not been filed. *Cf.* 92 CJS, Vendor & Purchaser, § 326, p 238.

Lastly, I dissent from the absence of meaningful instructions to the trial court on remand. The majority holds that plaintiff is chargeable with inquiry notice as a matter of law. The case should then be remanded for entry of judgment against plaintiff, or, trial of the secondary issue as to whether or not Orenstein's attorney had authority to sign and enter the discharge. I cannot agree with the last paragraph of the majority opinion, indicating on the one hand that plaintiff is chargeable with inquiry notice as a matter of law, and on the other hand, indicating that this is a fact question yet to be resolved.

PEOPLE v GARCIA

OPINION OF THE COURT

1. CONSTITUTIONAL LAW—CRIMINAL LAW—CONSTITUTIONAL STANDARDS—POLICE ACTIVITIES—RESTRICTION.

   A state is free as a matter of its own law to impose greater restrictions on police activity than those which the United States Supreme Court holds to be necessary under Federal constitutional standards.

2. SEARCHES AND SEIZURES—REASONABLENESS—TIME OF SEARCH OR SEIZURE—POLICE OFFICER—INFORMATION.

   The reasonableness of any search or seizure must be determined as of the time of the search or seizure; in the determination of reasonableness, consideration may be given to the information possessed by the police officer who is conducting the search or seizure.

3. SEARCHES AND SEIZURES—OUTSIDE OF CURTILAGE—REASONABLENESS—CONSTITUTIONAL LAW—CONSTRUCTION—EVIDENCE.

   The proviso in a section of an article of the Michigan Constitution protecting against "unreasonable searches and seizures" which prohibits the exclusion from evidence of "any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house" precludes a construction of the Michigan search and seizure clause imposing a higher standard of reasonableness for searches and seizures of items named in the proviso than the United States Supreme Court has held applicable under the Fourth Amendment (US Const, Am IV, Const 1963, art 1, § 11).

4. SEARCHES AND SEIZURES—INTERIM BAIL STATUTE—HIGHER STATE STANDARD—ARREST—TRAFFIC VIOLATION—PAT-DOWN SEARCH—SUPPRESSION OF EVIDENCE—STATUTES.

   The interim bail statute embodies a legislative policy affording a

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REFERENCES FOR POINTS IN HEADNOTES

[1–3] 68 Am Jur 2d, Searches and Seizures §§ 5, 6.
[2] 68 Am Jur 2d, Searches and Seizures §§ 68–70.
[3] 68 Am Jur 2d, Searches and Seizures § 20.
[4–6] 8 Am Jur 2d, Bail and Recognizance § 21.
68 Am Jur 2d, Searches and Seizures §§ 39, 103.

qualification for higher state standards on police conduct involved in searches and seizures than those required under the Federal standard; therefore, it was unreasonable for a police officer after arresting defendant for a minor traffic violation and completing an otherwise proper frisk for weapons to proceed with a more intrusive search of the defendant's inner pockets which cannot be justified either as a protective search for weapons or as an effort to uncover evidence of a traffic offense, and evidence seized in the further search should be suppressed (MCLA 780.581; MSA 28.872[1]).

5. CRIMINAL LAW—SEARCHES AND SEIZURES—INTERIM BAIL STATUTE—TRAFFIC OFFENSES—CUSTODIAL ARREST—PAT-DOWN SEARCH—STATUTES.

A police officer after stopping a defendant for a minor traffic violation for which a custodial arrest is made and after a pat-down search for weapons is made has a duty to inform the defendant of the defendant's rights under the interim bail statute and, upon arrival at the station house, to accept bail proffered by the defendant or one acting on his behalf if no magistrate is readily available for an arraignment (MCLA 780.581; MSA 28.872[1]).

DISSENT BY J. H. GILLIS, J.

6. SEARCHES AND SEIZURES—SEARCH INCIDENT TO ARREST—CUSTODIAL ARREST—INTERIM BAIL STATUTE—WEAPONS.

The interim bail statute does not circumvent the right of a police officer to guarantee his own safety by restricting his right to search an individual who is under full custodial arrest; a police officer has every right to insure that the individual he has arrested does not possess any instrument which could be used as a weapon to harm the officer or effectuate an escape (MCLA 780.581; MSA 28.872[1]).

Appeal from Saginaw, Hazen R. Armstrong, J. Submitted October 5, 1977, at Lansing. (Docket No. 28413.) Decided February 7, 1978.

Jose Garcia was convicted of possession of cocaine, carrying a weapon in an automobile, extortion, and subornation of perjury. Defendant appeals. Conviction for possession of cocaine and

carrying a weapon in an automobile vacated; conviction for extortion and subornation of perjury affirmed, and the matter remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Lawrence W. Smith,* Assistant Prosecuting Attorney, for the people.

Doherty & Thomas, P. C., for defendant on appeal.

Before: D. C. RILEY, P. J., and J. H. GILLIS and R. M. MAHER, JJ.

PER CURIAM. Following a jury trial, defendant Jose Garcia appeals his conviction of possessing the controlled substance cocaine, MCLA 335.341(4)(b); MSA 18.1070(41)(4)(b), carrying a weapon in an automobile, MCLA 750.227; MSA 28.424, extortion, MCLA 750.213; MSA 28.410, and subornation of perjury, MCLA 750.424; MSA 28.666.

I.

On September 25, 1974, at approximately 6 a.m., Officer Jessie Ibanez, patrolling alone in the city of Buena Vista, observed the driver of a 1973 Pontiac make an improper left turn. Officer Ibanez followed the Pontiac and signaled the driver to pull over. The driver (later identified as defendant) came to a stop in an adjacent K-Mart parking lot. The sole passenger, Marcos Martinez, remained in the Pontiac.

Emerging from his car, defendant met the officer between the two vehicles. The officer advised de-

fendant of the reason for the stop *(viz.,* an improper left turn and failure to signal for a left turn) and asked him for his operator's license. Defendant responded that he had no license in his possession.[1] Officer Ibanez directed defendant to the police car, informed him that he "would have to go with" the officer and instructed him to place his hands on the patrol car. The policeman then began to pat defendant down "because he was going to jail". The officer testified at trial that he was searching defendant for weapons and not contraband. In the course of this search, the officer felt an object in an inner pocket of defendant's jacket, an "object which I thought was a file or something * * * [because] when I pressed it, it maintained its shape". This testimony conflicted with the officer's account at the preliminary examination:

"Q. *[Defense attorney]* [D]id it feel like a knife to you?
"A. *[Officer Ibanez]* No, sir.

* * *

"Q. Did it feel like a weapon of any kind to you?
"A. It felt like something that wouldn't retain its a * * * it kept retaining its shape, when I squeezed it.
"Q. But not like a weapon?
"A. No, sir."

Apprised of the conflict by defense counsel, Officer Ibanez acknowledged his prior testimony, including the statement that the object did not feel like a weapon. Defense counsel then asked:

"Q. Now you said you knew it was a file?
"A. *[Officer Ibanez]* No, sir, I didn't say it was a file. I said it could have been a file; could be anything.

[1] Defendant testified, and Officer Ibanez denied, that defendant identified himself to the officer.

"Q. Could be anything. Could be a piece of paper.
"A. Could also be a piece of tinfoil."

The record discloses that the unresilient object turned out to be a tinfoil packet containing cocaine. A more thorough search of defendant's pockets yielded another tinfoil packet of cocaine. At this, Officer Ibanez placed defendant in the back seat of the patrol car, radioed for back-up support, and, on the arrival of Officer Richard Schaefer, approached the passenger, Martinez. At Officer Ibanez's request, Martinez stepped from the car.

"Q. *[Defense attorney]* Why did you ask him to step out of the vehicle?
"A. *[Officer Ibanez]* I wanted to see—I had reason to believe possibly there was some more in the car, possibly more narcotics, more narcotics—there could be more.
"Q. Then what did you do, after he got out of the car? Did you proceed to search him?
"A. No, I asked him for I.D. He said he didn't have none. Then I asked him to—when I was asking him to turn around, I put my hand on his back pocket. So he had a wallet. I took it out. He had I.D."

Officer Ibanez then searched Martinez more thoroughly, discovering in the process seven .45-caliber bullets. The officer then led Martinez to the cruiser and told him to sit in the back seat. Next Officer Ibanez removed defendant from the back seat, placed handcuffs on him and directed him to sit beside Martinez. With Officer Schaefer standing by, Officer Ibanez searched the front seat of the Pontiac but found nothing. A second search, conducted by both officers, again produced nothing. At this point, Officer Ibanez returned to the cruiser and talked to Martinez, telling him that if a gun

were found in the car he (Martinez) would go to jail. Officer Ibanez also told Martinez that if he cooperated the police would give him a break. Martinez then stated that there was a gun in the car, allegedly without specifying its precise location, but added that it was not his. Officer Ibanez then released Martinez and permitted him to walk away. A third and final search disclosed a .45-caliber gun between the driver's bucket seat and the console.[2]

In addition to the foregoing testimony, Officer Ibanez related several instances, subsequent to the discovery of the cocaine, in which defendant uttered threats against the officer and his family; the defendant, according to Officer Ibanez, also urged the officer to testify untruthfully in court. These alleged statements by defendant ultimately led to the extortion and subornation of perjury charges.

II.

In a pre-trial motion, a motion for directed verdict and on appeal to this Court, defendant has consistently urged suppression of the cocaine, the gun "and all testimony of appellant's threats and bribes" as the poisonous fruit of an illegal search. Specifically, defendant contends (1) that, under Michigan law, the full search of defendant's person incident to an arrest for a traffic offense exceeded the permissible limits of a protective pat-down search; (2) that, under the interim bail statute, MCLA 780.581; MSA 28.872(1), as interpreted in *People v Dixon,* 392 Mich 691; 222 NW2d 749 (1974), the instant personal search contravened

[2] Produced at trial, Martinez testified on defense cross-examination that he had earlier planted two tinfoil packets of cocaine on defendant and later had secreted the gun under the seat while Officer Ibanez frisked defendant.

defendant's right to post bail prior to being subjected to any custodial search or seizure; and (3) the automobile search, conducted after defendant had been taken into custody, was unjustified since it could not have yielded fruits of a traffic violation.

A.

Defendant concedes that as a matter of Federal constitutional law the search of his person did not offend the Fourth Amendment. *United States v Robinson,* 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973), *Gustafson v Florida,* 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973).[3] Instead, defendant urges us to hold the instant searches, precipitated by a concededly valid traffic arrest, unreasonable under state law.

Undoubtedly, "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those * * * [the United States Supreme] Court holds to be necessary upon federal constitutional standards. See, *e.g., Cooper v California,* 386 US 58, 62 [87 S Ct 788; 17 L Ed 2d 730] (1967); *Sibron v New York,* 392 US 40, 60–61 [88 S

[3] In *Robinson,* the Supreme Court held:

"The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." 414 US at 235; 94 S Ct at 477; 38 L Ed 2d at 440–441.

Accord, Gustafson v Florida, 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973).

Ct 1889; 20 L Ed 2d 917] (1968). See also *State v Kaluna,* 55 Haw 361, 368–369, 520 P 2d 51, 58–59 (1974)." *Oregon v Hass,* 420 US 714, 719; 95 S Ct 1215; 43 L Ed 2d 570 (1975). And, to be sure, a number of cases have declined to apply *Robinson* and *Gustafson, supra,* in interpreting their law. See *Zehrung v State,* 569 P2d 189 (Alaska, 1977), *People v Brisendine,* 13 Cal 3d 528; 119 Cal Rptr 315; 531 P2d 1099 (1975), *People v Clyne,* — Colo —; 541 P2d 71 (1975), *State v Kaluna, supra.*

The Michigan Supreme Court, although having had occasions to comment on *Robinson* and *Gustafson, supra,* has never expressly ruled that these Federal cases apply in the factual setting now before us. *Cf., People v Stergowski,* 391 Mich 714, 724–726; 219 NW2d 68 (1974), *People v Moore,* 391 Mich 426, 432–435; 216 NW2d 770 (1974), and *People v Dixon, supra,* at 706–707.

In *Stergowski,* our Supreme Court affirmed the denial of defendant's motion to quash or suppress evidence of heroin found in a search of defendant's person. Defendant Stergowski had been lawfully arrested for assaulting a police officer. The arresting officer noticed " 'a large bulge in * * * [defendant's] right pocket' ". 391 Mich at 716. Feeling the bulge, the officer noted that " 'it appeared to have some bullets in there' ". 391 Mich at 716. He emptied the pocket of its contents:

> " 'a large quantity of money, some of it being counterfeit, and four bullets for a 9-millemeter gun and some heroin and a plastic vial, and inside the plastic vial there was 11 tinfoil packs [later found to contain heroin].' " 391 Mich at 716.

Although noting the holdings in *Robinson* and *Gustafson, supra,* the Michigan Supreme Court ultimately ruled:

"It is unquestioned that defendant was subject to a warrantless search incident to * * * [a] lawful arrest. In *People v Tisi,* 384 Mich 214; 180 NW2d 801 (1970), the Court said at p 219:

" 'The reasonableness of any search or seizure must be determined as of the time of the search or seizure. In the determination of reasonableness, consideration may be given to the information possessed by the officer. *People v Harper* (1962), 365 Mich 494 [113 NW2d 808].'

"The search is to be tested 'in light of the information or facts possessed by the officer at the time he made the search'. *People v Danny Williams,* 383 Mich 549, 556; 177 NW2d 151 (1970).

"The police had received a report of an individual firing 'shots'. They saw defendant carrying what looked to be and was a pistol and ordered defendant to drop the gun. Defendant refused to drop the weapon when ordered and fled from the officers. The officers properly followed him into a house where he tried to hide the weapon but was disarmed. Defendant struck an officer with a metal box. Defendant was lawfully arrested. All these facts justify the body search. It was reasonable and proper. The entire range of search and seizure cases speak to the 'reasonableness' of the procedures. In the context of this series of events, the officers' acts were reasonable." 391 Mich at 727–728. (Footnote omitted.)

In *Dixon, supra,* the Supreme Court relied on the prior version of the interim bail statute in effect at the time of defendant's arrest, MCLA 780.581; MSA 28.872(1), to support suppression of heroin found on defendant during a station house search, where defendant had already been searched for weapons prior to his arrival at the jail:

"We are persuaded * * * that the sense of the statute and its purpose of avoiding unnecessary incarceration of minor offenders can only be served by imposing on the arresting officer (and now, the sheriff as well) the

duty to inform the person about to be jailed of the statutory protection of which he otherwise would probably be ignorant.

* * *

"Any evidence gained in derogation of this statutory right is to be suppressed; no other remedy is as likely to assure its full enforcement and the protection of the citizenry at large from unwarranted and unnecessary inconvenience, embarrassment and risk attendant incarceration for a minor traffic offense." 392 Mich at 703, 705–706.

Distinguishing *Robinson* and *Gustafson, supra,* the Court observed:

"Dixon had already been searched for weapons before even entering the police car. The station house procedures were not intended nor could they be justified as a further search for either weapons or possible fruits of the crime." 392 Mich at 706. (Footnote omitted.)

In *Moore, supra,* a police officer arrested defendant " 'for soliciting for immoral purposes' ". 391 Mich at 432.

"Moore [then] placed his hand in his pants pocket. The officer, believing Moore might be reaching for a weapon, grabbed him and spun him against the side of an automobile. Moore then opened his right hand and a small plastic vial fell to the ground.

"The vial was of clear plastic with a snap-on top of a kind commonly used by pharmacies to dispense medicine. The vial was unlabeled. Inside were 20 small capsules containing white powder. Eighteen capsules were of clear plastic and the other two were red. The capsules lacked the fresh, uniform appearance typical of capsules dispensed by a pharmacy. Immediately upon taking Moore to the police station, the officer conducted a cursory examination of the vial, concluded that the capsules contained heroin, and then arrested Moore on a narcotics charge." *Id.* (Footnote omitted.)

Reiterating without clearly approving the holdings of *Robinson* and *Gustafson, supra,* the Court then said:

"In both *Robinson* and *Gustafson* there were motions to suppress and full hearings concerning the reasonableness of the seizure. Moore did not move to suppress and there is no reason on this record to question the reasonableness of the arresting officer's belief upon his cursory examination that the white powder contained in the aberrant transparent capsules in the curiously unmarked, transparent vial was heroin." 391 Mich at 433–434. (Footnote omitted.)

In a footnote appended to this passage, the Court stated in part:

"We express no opinion * * * about the *constitutional validity* of an examination by the arresting officer of the seized material any more intensive or time-consuming than a cursory examination like those conducted by the arresting officers in *Robinson, Gustafson* and this case. *Cf. People v Trudeau,* 385 Mich 276, 279–281; 187 NW2d 890 (1971); *People v Roderick Walker,* 27 Mich App 609; 183 NW2d 871 (1970)." 391 Mich at 434–435, fn 5. (Emphasis added.)

Further, the Court noted:

"While Const 1963, art 1, § 11 protects against 'unreasonable searches and seizures', its proviso prohibiting the exclusion from evidence of 'any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house', precludes a construction of the Michigan search and seizure clause imposing a higher standard of reasonableness for searches and seizures of items named in the proviso than the United States Supreme Court has held applicable under the Fourth Amendment. In *People v Pennington,* 383 Mich 611; 178 NW2d 471 (1970), this Court held the narcotic and

firearms proviso invalid under the Federal constitution only to the extent it would permit receipt of evidence barred under the Fourth and Fourteenth Amendments as construed by the United States Supreme Court." 391 Mich at 435. (Footnotes omitted.)

B.

As we perceive it, the question defendant frames is not whether as a matter of state constitutional law, Const 1963, art 1, § 11, we may impose higher standards on police conduct than those federally required, but whether the legislative policy embodied in the interim bail statute affords a justification for the imposition of such higher standards. We are persuaded that the defendant's contention is correct.

Here, defendant was arrested for a minor traffic offense. He readily complied with the officer's signal to stop the car and obligingly permitted the officer to search his person.[4] Testing this search in light of the information possessed by the officer at the time he made the search, *Stergowski, supra,* at 727, we cannot justify this intrusion into defendant's inner pockets either as a protective search for weapons or as an effort to uncover evidence of a traffic offense. Once the officer had completed his otherwise proper frisk for weapons, he clearly lacked justification to proceed further.

Under the circumstances of this case, we believe that a sound regard for the policy underpinning the interim bail statute as fleshed out by the *Dixon* Court (namely, the avoidance of "unwarranted and unnecessary inconvenience, embarrassment and risk attendant incarceration for a minor traffic offense", 392 Mich at 705–706) requires us

[4] According to Officer Ibanez, defendant did not threaten him until *after* defendant had been placed in the backseat of the scout car.

to hold the instant search and seizure unreasonable and thus to suppress the evidence of cocaine.[5] If *Dixon* were only to apply at the station house, as the prosecutor maintains, then astute police officers would quickly learn that, absent an advice of rights under the bail statute, evidence produced in an exhaustively intrusive on-the-scene search could be admitted but evidence derived from an equally comprehensive search at the jail could not. We doubt that the Supreme Court intended to create such an anomaly. Thus, to shore up what would otherwise be a gaping loophole in the law, we hold that Officer Ibanez, after having frisked defendant for weapons and having found none, had no authority to retrieve or examine the seemingly innocuous tinfoil packets.[6] Instead, he had a duty to inform this defendant "of the statutory protection [under the interim bail act] of which he otherwise would probably be ignorant". *Dixon, supra,* at 703.

Contrary to the prosecutor's suggestion, we do not rule that police are now required "to accept bail on the street", but that arresting officers, following an external (but fruitless) pat-down for weapons, are obliged to inform a minor traffic offender of his statutory rights and upon arrival at the station house to accept bail (proffered by such

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[5] Since the search of Martinez and the three searches of the Pontiac avowedly were founded on the officer's improper search and seizure of cocaine, we likewise require suppression of the gun found in the car. But the fruit-of-the-poisonous-tree doctrine cannot be used to condone death threats leveled against a police officer. Consequently, we leave intact defendant's convictions on charges of extortion and subornation of perjury.

[6] Unlike a panel of this Court in *People v Ridgeway,* 74 Mich App 306, 314; 253 NW2d 743 (1977), we cannot hold that a defendant's possession of a tinfoil packet *ipso facto* authorizes a search of the packet. Although controlled substances may at times be wrapped in foil, so may innumerable legitimate items.

a defendant or one acting on his behalf, *Zehrung v State, supra,* 569 P2d at 195)[7] if no magistrate is readily available for an arraignment.

Accordingly, defendant's conviction for possession of cocaine and carrying a weapon in an automobile are hereby vacated. His remaining convictions shall nonetheless stand affirmed. The matter is remanded for sentencing anew on the remaining charges.

J. H. GILLIS, J. *(dissenting).* I respectfully dissent. The majority's opinion appears to contradict a long line of well-reasoned precedent and policy.[1] Furthermore, it ignores the practicalities and intricacies of legitimate and effective law enforcement. Today's holding severely limits an age-old exception to the search and seizure warrant requirement, the right to search incidental to a lawful arrest.[2]

The majority opinion concludes that a police officer, after effectuating a full custodial arrest, may only "pat down" an arrestee in a search for

[7] Although lacking a statutory counterpart to Michigan's interim bail act, the Alaska Supreme Court in *Zehrung v State,* 569 P2d 189, 193 (1977), applied the "nonstatutory rationale" of *People v Dixon,* 392 Mich 691; 222 NW2d 749 (1974), to suppress evidence discovered in a warrantless, jailhouse inventory search.

[1] *See United States v Lefkowitz,* 285 US 452; 52 S Ct 420; 76 L Ed 877 (1932), *Harris v United States,* 331 US 145; 67 S Ct 1098; 91 L Ed 1399 (1947), *Trupiano v United States,* 334 US 699; 68 S Ct 1229; 92 L Ed 1663 (1948), *United States v Rabinowitz,* 339 US 56; 70 S Ct 430; 94 L Ed 653 (1950), *Preston v United States,* 376 US 364; 84 S Ct 881; 11 L Ed 2d 777 (1964), *Chimel v California,* 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969).

[2] The majority holds that a police officer may only conduct a "*Terry*type" pat-down search even though the individual is under full custodial arrest. In order for a police officer to conduct a more intensive search he must have further justification (probable cause) to believe that the person arrested possesses a weapon. Hence, where a police officer feels an item which he cannot identify, which is the case here, he is precluded from searching further unless he has probable cause to believe it is a weapon.

weapons and fruits of the offense which resulted in the arrest.

The procedure set forth in the majority opinion is analogous to the procedure prescribed by the United States Supreme Court in "stop and frisk" cases.[3]

However, the policy considerations underlying the search procedures to be employed by police officers in "stop and frisk" cases are readily distinguishable from the policy considerations to be weighed when analyzing search procedures in full custodial arrest cases.

"*Terry v Ohio, supra* [392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968)], did not involve an arrest for probable cause, and it made quite clear that the 'protective frisk' for weapons which it approved might be conducted without probable cause. *Id.,* at 21–22, 24–25.
This Court's opinion explicitly recognized that there is a *'distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons.'*

" 'The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston v United States,* 376 US 364, 367 [84 S Ct 881; 11 L Ed 2d 777] (1964), is also justified on other grounds, *ibid.,* and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. *Warden v Hayden,* 387 US 294, 310 [87 S Ct 1642; 18 L Ed 2d 782] (1967) (Mr. Justice Fortas, concurring). Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others

[3] *See Terry v Ohio,* 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).
It should be noted that "*Terry*-type" searches are permitted incidental to an investigative stop based upon less than probable cause to arrest. In the instant matter we are dealing with a full custodial arrest.

nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

"' * * * *An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different.* An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable intrusion upon the sanctity of the person.' *Id.,* at 25–26. (Footnote omitted.)

"Terry, therefore, affords no basis to carry over to a probable-cause arrest the limitations this Court placed on a stop-and-frisk search permissible without probable cause." United States v Robinson, 414 US 218, 227–228; 94 S Ct 467; 38 L Ed 2d 427 (1973). (Emphasis supplied.)

The majority concludes that the State of Michigan via the interim bail statute, MCLA 780.581; MSA 28.872(1), has imposed greater restrictions on police activity than those deemed constitutionally necessary by the United States Supreme Court.[4] The majority bases its opinion on the premise that the interim bail statute restricts a police officer to a "*Terry*-type" pat-down search after effectuating a full custodial arrest of an individual who is charged with a traffic violation.

The legislative policy underlying the interim bail statute is to avoid the "unwarranted and unnecessary inconvenience, embarrassment and risk attendant incarceration for a minor traffic offense". *People v Dixon,* 392 Mich 691, 705–706; 222 NW2d 749 (1974). It does not circumvent the

[4] A state is free to adopt greater restrictions on police activity than those that the Supreme Court deems to be necessary in respect to Federal constitutional standards.

right of a police officer to guarantee his own safety by restricting his right to search an individual who is under full custodial arrest.[5]

A police officer has every right to insure that the individual he has arrested does not possess any instrument which could be used as a weapon to harm the officer or effectuate an escape.

To support its presumption that the interim bail statute restricts a police officer's ability to search incidental to a lawful arrest, the majority relies upon *People v Dixon,* 392 Mich 691; 222 NW2d 749 (1974).

However, the *Dixon* case, *supra,* is distinguishable from the case at bar. In *Dixon, supra,* there were two searches, one at the scene of the crime, and another at the station house. The latter search produced the evidence upon which Dixon was convicted. The Michigan Supreme Court concluded that the second search was in violation of Dixon's statutory right to bail. MCLA 780.581; MSA 28.872(1). The Court reasoned that the second search was an inventory search which did not stem from the objective of protecting the arresting officer. Hence, there was no need to search Dixon unless he was to be incarcerated.

In the instant matter, the search in question was conducted at the scene of the crime by the arresting officer for his own protection. Therefore, the *Dixon* case is not applicable to the facts in the instant matter.

The majority, while recognizing this factual distinction, extends *Dixon* to cover the initial search incidental to an arrest in order "to shore up what would otherwise be a gaping loophole in the law".

[5] This writer fails to see how the purpose of the interim bail statute is undermined by allowing a police officer to insure that an individual who is under full custodial arrest does not possess any weapon which might be used to harm the officer.

I cannot condone what I perceive to be an improper extension of the *Dixon* case, *supra.*

It should be noted that the *Dixon* Court carefully distinguished the facts in that matter from the United States Supreme Court cases of *United States v Robinson, supra,* and *Gustafson v Florida,* 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973).

> "Discovery of the heroin is not validated by the opinions of the United States Supreme Court in *United States v Robinson,* 414 US 218; 94 S Ct 467; 38 L Ed 2d 427 (1973), and *Gustafson v Florida,* 414 US 260; 94 S Ct 488; 38 L Ed 2d 456 (1973).
>
> "*The Court predicated the right to search there as an incident of the arrest and the need of the officer to protect himself.*
>
> "*Dixon had already been searched for weapons before even entering the police car. The station house procedures were not intended nor could they be justified as a further search for either weapons or possible fruits of the crime.*" *Dixon, supra,* at 706. (Footnotes omitted; emphasis supplied.)

The *Dixon* Court restricted its holding so as to render it inapplicable to initial searches incidental to a lawful arrest. The majority's abolition of this limitation disregards the fact that the *Dixon* Court carefully avoided issuing an opinion that conflicted with the holdings of the *Robinson* and *Gustafson* cases, *supra.*

Hence, the majority is attempting to extend the holding of the *Dixon* case to an area expressly avoided by the *Dixon* Court. Such an extension is unwarranted and is not supported by the interim bail statute or the *Dixon* case.

Therefore, I would deem the search conducted in the instant matter a valid exercise of a police officer's right to search without a warrant incidental to an arrest.

Accordingly, I would admit the contraband taken from defendant's person into evidence and affirm his conviction.

MERRITT v DETROIT MEMORIAL HOSPITAL

1. LIBEL AND SLANDER—QUALIFIED PRIVILEGE—PUBLIC INTEREST—PUBLICATION—DEFAMATORY UTTERANCES—DAMAGES—INTERESTS INVOLVED.

   Generally, a qualified privilege is recognized where the public interest in activities which presuppose frank communication on certain matters between persons standing in particular relationships to each other outweighs the damage to individuals of good faith but defamatory utterances relevant to the interests of those involved.

2. LIBEL AND SLANDER—QUALIFIED PRIVILEGE—PUBLICATION—BONA FIDE COMMUNICATION—INTERESTS OF THE PARTIES.

   A qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty, and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation.

3. LIBEL AND SLANDER—PRIVILEGE—DEFINITION.

   The term privilege relates to a situation or occasion in which the importance of the criticism published justifies a modification or indeed a withdrawal of the protection normally afforded to our citizens' reputations.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 50 Am Jur 2d, Libel and Slander §§ 192, 195, 196.

[2] 50 Am Jur 2d, Libel and Slander §§ 273, 274.

[4, 5] 50 Am Jur 2d, Libel and Slander §§ 167, 275.

Libel and slander: Privileged nature of communication to other employees or employees' union of reasons for plaintiff's discharge. 60 ALR3d 1081.

[6] 50 Am Jur 2d, Libel and Slander §§ 149, 194.

[7] 4 Am Jur 2d, Appeal and Error § 76.

Formal requirements of judgment or order as regards appealability. 73 ALR2d 250.

[8] 50 Am Jur 2d, Libel and Slander §§ 193, 198.

4. LIBEL AND SLANDER—MASTER AND SERVANT—QUALIFIED PRIVILEGE —INTERESTS OF THE PARTIES—PUBLICATION.

An employer has a qualified privilege to defame an employee by publishing statements to other employees whose duties interest them in the subject of the publication.

5. LIBEL AND SLANDER—MASTER AND SERVANT—QUALIFIED PRIVILEGE —EMPLOYEE MISCONDUCT—SUPERVISORY PERSONNEL.

Employees responsible for hiring and firing are entitled to hear accusations of employee misconduct which warrant dismissal and preclude rehiring; therefore, employees who are supervisors, personnel department representatives or company officials are those employees to whom an employer-defendant's qualified privilege extends.

6. LIBEL AND SLANDER—CONSENT TO PUBLICATION—PRIVILEGE.

A communication regarding a person is absolutely privileged if the person consents to it.

7. APPEAL AND ERROR—CLEARLY ERRONEOUS RULE—COURT RULES.

A trial court's finding of fact will not be set aside unless it is clearly erroneous (GCR 1963, 517.1).

8. LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—GOOD FAITH COMMUNICATIONS—FALSE COMMUNICATIONS.

Absolutely privileged communications and qualifiedly privileged communications made in good faith do not lose their status even if the content of the communication is proved false.

Appeal from Wayne, William J. Giovan, J. Submitted October 12, 1977, at Detroit. (Docket No. 29655.) Decided February 7, 1978.

Complaint by Willie Merritt against Detroit Memorial Hospital for damages for libel and slander. Judgment for defendant. Plaintiff appeals. Affirmed.

Rifkin, Schultz & Kingsley, P. C., for plaintiff.

Dice, Sweeney, Sullivan & Feikens, P. C. and *Clark, Klein, Winter, Parsons & Prewitt* (by *Fred W. Batten),* for defendant.

Before: D. E. HOLBROOK, P. J., and N. J. KAUFMAN and J. E. MCDONALD,* JJ.

PER CURIAM. Plaintiff appeals from an adverse judgment in her action for slander against her former employer, Detroit Memorial Hospital, entered by Wayne County Circuit Court Judge William J. Giovan.

From 1969, until June 1973, the plaintiff worked as a ward clerk for defendant hospital. On April 18, 1973, she was injured in an automobile accident. Her family physician treated plaintiff for two months, prescribing a muscle relaxant, pain killer, and other drugs for her. Plaintiff returned to work on June 18, 1973, when her supervisor, Mrs. J. McMackin, told her to report for her annual physical examination. As part of that examination, plaintiff furnished blood and urine samples.

On June 26, 1973, plaintiff attended a meeting with Mona Gay Harmon, director of personnel at defendant hospital, J. S. Blaine, executive director of personnel, plaintiff's supervisor, Mrs. McMackin and Mrs. A. Ross, representing the American Federation of State, County and Municipal Employees. Blaine told plaintiff that there was a problem regarding the urine sample and asked her to obtain from her doctor a list of all medication he had prescribed for her during the previous six months.

That same day plaintiff secured a list of her medications from Dr. Long and hand-carried it to the nursing office at the hospital. The list mentions eight drugs; at that time plaintiff was taking two: Norflex, a skeletal-muscle relaxant and Phenaphen No. 4, which contains codeine. Dr. Long testified that neither Norflex nor Phenaphen No. 4 contained morphine sulphate, a controlled sub-

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

stance, and that nothing he prescribed contained that substance.

Another meeting was held, attended by Blaine, Harmon, Ross and the plaintiff. Blaine told defendant that the urinalysis revealed morphine sulphate. Shortly afterward, plaintiff received a letter from Harmon terminating her employment as of June 28 for the stated reason that plaintiff had violated a work rule forbidding "[a]ny activities regarding personal use or abuse of drugs". Soon after, plaintiff filed this suit, charging defamation.

At trial, plaintiff testified to the above facts and related that after her dismissal, she applied to five hospitals and to an employment agency for work. As to Zieger Hospital, one of the five, plaintiff listed defendant hospital as her last employer and informed Zieger that she had been fired. However, plaintiff was less than certain on her testimony as to these events[1] and it is sufficient to note that at trial plaintiff complained that defendant told "prospective employers that she was fired for violating a work rule".[2]

Additionally, plaintiff testified that despite the fact nobody knew about the reason for her firing except her mother and her boyfriend, friends from work also knew the reason. Plaintiff encountered Larry, a union steward, who stated in the presence of others, "I heard they let you go for dope". She also testified that a Mr. Barnes, head of the union local, called her about the firing and knew the reason for it.

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[1] For example, plaintiff denied furnishing her termination letters and related papers to Zieger when she applied there and denied asking defendant hospital for a reference but later admitted that she did ask the personnel office for a reference and did show the letter at Zieger.

[2] Although, on cross-examination, plaintiff admitted that only Zieger was informed of her employment at defendant hospital.

Some weeks after plaintiff's firing, her grievance was aired at a meeting attended by Blaine, Harmon, McMackin, a Mr. Pearson (an assistant administrator) and union representatives Barnes, Christine Jefferson, and Bonnie Davis. Blaine again said that plaintiff had been fired for drug abuse after morphine sulphate was found in her urine. Plaintiff signed a waiver form which stated: "I hereby authorize Detroit Memorial Hospital to release any and all Laboratory examinations and test results. I hereby waive legal privelege *[sic]* against release of this information to AFSCME Local #140." Plaintiff claimed that the second sentence was not on the form when she signed it, but eventually admitted that she knew the purpose of the form was to release the results of the drug screening test to the union in connection with her grievance. At trial, the test results were admitted, over objection, under the business records exception to the hearsay rule.

The director of personnel at defendant hospital also testified. She stated that she was the only person handling requests for references concerning employees terminated at defendant hospital. She testified that the personnel director at Zieger Hospital inquired about plaintiff. She told the director that plaintiff had been terminated for violating a work rule and was not "rehireable". Plaintiff's folder was marked: "All requests for reference *must* be directed *only* to: Personnel director—DMH".

After the close of all the evidence, the trial court made findings of fact and drew conclusions of law as follows:

(1) If defendant's statements were untrue and not privileged, they would be defamatory, charging plaintiff with commission of a crime.

(2) Although further evidence of the reliability of the drug screening test would have been desirable, the preponderance of the evidence shows that plaintiff did use morphine. The test furnishes the evidence of this. The only evidence to the contrary was plaintiff's denial, but because of plaintiff's several deliberately false statements of material facts, the court chose to give her testimony no weight.

(3) Even if the statement were untrue, defendant's communications to its employees, union officials, and other hospitals were clothed with a qualified privilege. Plaintiff herself published the reasons for her termination to Zieger Hospital; defendant could not have reasonably foreseen that she would do so.

On appeal, drawing from the trial court's first and third findings, plaintiff argues that the defendant did not have a qualified privilege to publish the reason for plaintiff's firing to supervisory personnel and to prospective employers. If a qualified privilege attached to those statements, the judgment for defendant hospital was correct. *Bacon v Michigan Central R Co,* 66 Mich 166; 33 NW 181(1887), *Harrison v Arrow Metal Products Corp,* 20 Mich App 590; 174 NW2d 875 (1969).

In general, a qualified privilege is recognized where the public interest in activities which presuppose frank communication on certain matters between persons standing in particular relationships to each other outweighs the damage to individuals of good faith but defamatory utterances relevant to the interests of those involved:

"The great underlying principle upon which the doctrine of privileged communications stands, is public policy. * * * Qualified privilege * * * extends to all communications made *bona fide* upon any subject-mat-

ter in which the party communicating has an interest, or in reference to which he has a duty, to a person having a corresponding interest or duty. And the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. [Citations omitted.]" *Bacon v Michigan Central R Co, supra* at169–170.

"The term privilege relates to a situation or occasion in which the importance of the criticism published justifies a modification or indeed a withdrawal of the protection normally afforded to our citizens' reputations." *Harrison v Arrow Metal Products Corp, supra* at 609.

An employer has a qualified privilege to defame an employee by publishing statements to other employees whose duties interest them in the subject. *Cf. Carroll v Owen,* 178 Mich 551; 146 NW 168 (1914). Employees responsible for hiring and firing are entitled to hear accusations of employee misconduct which warrant dismissal and preclude rehiring. *Bacon v Michigan Central R Co, supra, Sias v General Motors Corp,* 372 Mich 542; 127 NW2d 357 (1964), *Poledna v Bendix Aviation Corp,* 360 Mich 129; 103 NW2d 789 (1960).

In the present case, the employees who attended the June 26, 1973, meetings included plaintiff's supervisor, the head of the hospital personnel office and his immediate subordinate. Thus, those employees were supervisors, personnel department representatives and company officials, see *Sias v General Motors Corp, supra* at 546–547, and as such, are those employees to whom defendant's qualified privilege extends. The trial court did not err as to this issue.

As to plaintiff's argument regarding publication to prospective employers, based on plaintiff's own admissions on cross-examination, the trial court found that plaintiff concealed her previous employ-

ment at defendant hospital from the employers to whom she subsequently applied except Zieger Hospital. Since there was no communication of any sort from anyone to these employers concerning plaintiff's employment with defendant, only Zieger need be considered.

The trial court found that plaintiff and no one else disclosed the reasons for her termination at defendant hospital to Zieger Hospital. A communication regarding a person is absolutely privileged if he consents to it. *Schultz v Guldenstein,* 144 Mich 636; 108 NW 96 (1906), *Shinglemeyer v Wright,* 124 Mich 230; 82 NW 887 (1900), *Bonkowski v Arlan's Department Store,* 12 Mich App 88; 162 NW2d 347 (1968), *Schechet v Kesten,* 3 Mich App 126; 141 NW2d 641 (1966). A trial court's finding of fact will "not be set aside unless clearly erroneous", GCR 1963, 517.1. As we do not so find, the trial court did not err as to this issue.

Plaintiff also argues that defendant did not have an absolute or a qualified privilege to publish defamatory statements about an employee to union representatives during grievance proceedings held pursuant to a collective bargaining agreement. However, the trial court found that the union representative was present at each of the June 26 meetings "more or less as the agent of the plaintiff". As plaintiff never objected, we cannot state that the finding was clearly erroneous. GCR 1963, 517.1. As such, plaintiff's actions amount to the equivalent of consent. We therefore hold that the communication was absolutely privileged. *Schultz, supra, Shinglemeyer, supra, Bonkowski, supra, Schechet, supra.* The trial court did not err as to this issue.

To summarize, the communications to the union representative and Zieger Hospital were absolutely

privileged and the communication to the supervisory personnel was qualifiedly privileged. Since all of the assailed communications were privileged, and since the trial court made a finding—undisputed on appeal—that all statements made by defendant hospital were made in good faith in reliance on the test results, it is not necessary to determine if the trial court erred in admitting the test results under the business records exception to the hearsay rule. Clearly, absolutely privileged communications and qualifiedly privileged communications made in good faith (as was the case here) do not lose their status if the content of the communication is indeed proved false. Thus, the admissibility (and impliedly the veracity) of the drug screening test is not a factor necessary to the disposition of the case.

Affirmed. Costs to appellees.

PEOPLE v HOFFMAN

OPINION OF THE COURT

1. CONSTITUTIONAL LAW—TRIAL—JURY—DISCHARGE—ACQUITTAL—CONSENT—EXPRESS—IMPLIED.

Any discharge of a jury, after it has been impaneled and sworn, without sufficient cause operates as an acquittal in that it effectually bars another trial for the same offense; such discharge must have been made without the consent, express or implied, of the respondent in order to operate as an acquittal and bar another trial.

2. CONSTITUTIONAL LAW—CRIMINAL LAW—DOUBLE JEOPARDY—JURY—DISCHARGE—SILENCE—WAIVER.

A defendant's silence could not operate as his consent to, or acquiescence in, a trial court's dismissal of an impaneled and sworn jury where the record shows that defendant neither agreed nor dissented to the jury's dismissal; the courts have, nonetheless, found consent if it was expressed by defendant's counsel.

3. CONSTITUTIONAL LAW—MISTRIALS—CONSENT—DOUBLE JEOPARDY—DEFENDANT'S PERSONAL CONSENT—DEFENDANT'S PRIMARY CONTROL.

Case precedent requires an express manifestation of consent to a mistrial either from the defendant or from his attorney to effectively eliminate the bar of double jeopardy where a mistrial is sought after a jury is impaneled and sworn; the absence of the defendant's personal consent to a mistrial where the

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REFERENCES FOR POINTS IN HEADNOTES

[1, 6] 21 Am Jur 2d, Criminal Law §§ 194, 195.
76 Am Jur 2d, Trial § 1089.
What constitutes accused consent to court to discharge of jury or to grant of state's motion for mistrial which will constitute waiver of former jeopardy plea. 63 ALR2d 782.

[2, 3, 6] 21 Am Jur 2d, Criminal Law §§ 194–196, 198, 204.

[4] 16 Am Jur 2d, Constitutional Law §§ 58–100, 221.

[5, 6] 21 Am Jur 2d, Criminal Law §§ 165, 166, 209, 476.

record shows a consent by counsel does not necessarily bespeak the absence of his primary control over the proceedings.

4. CONSTITUTIONAL LAW—COURTS—INTERPRETATIONS.

The fealty of the Court of Appeals is to the United States Supreme Court in matters of Federal constitutional interpretation.

CONCURRENCE BY R. M. MAHER, J.

5. CONSTITUTIONAL LAW—DOUBLE JEOPARDY—FUNDAMENTAL RIGHTS—WAIVER.

The guarantee against double jeopardy is a fundamental right which can be waived only by the defendant himself.

6. CONSTITUTIONAL LAW—DOUBLE JEOPARDY—DEFENDANT'S PRIMARY CONTROL—MISTRIALS—WAIVER—RECORD—PERSONAL MANIFESTATION.

A defendant must do something positively in order to indicate that he is exercising primary control over the course to be followed and consents to a mistrial where such consent operates as a waiver of the protection against double jeopardy; primary control must reside in the defendant himself or personally; the record must disclose a personal manifestation by defendant that he consents to a waiver; it is not necessary that the record contain a statement by the defendant but it must be demonstrated that counsel has at least spoken with his client about the constitutional protection and after such discussion defendant has made the decision to consent.

Appeal from Ingham, Louis E. Coash, J. Submitted October 4, 1977, at Lansing. (Docket No. 30262.) Decided February 7, 1978. Leave to appeal applied for.

Robert R. Hoffman was convicted of first-degree murder. Defendant appealed. Affirmed, 24 Mich App 244 (1970). Defendant applied for leave to appeal to the Supreme Court. Application denied, 383 Mich 820 (1970). Defendant filed a complaint for habeas corpus which the Court of Appeals treated as an application for delayed appeal and granted leave to appeal. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *Lee Wm. Atkinson,* Chief Appellate Attorney, for the people.

Paul E. Lincolnhol, for defendant on appeal.

Before: D. C. RILEY, P. J., and J. H. GILLIS and R. M. MAHER, JJ.

D. C. RILEY, P. J. Defendant appeals, by leave granted, his 1964 conviction of first-degree murder and corresponding sentence of life imprisonment. We affirm.

I

Charged with murdering his ex-wife, defendant first came to trial in February, 1964. During the trial, the court, for reasons unexplained by the present record, excluded a Reverend Schuurmans as a defense witness. Later, during defense examination of witness Geraldine Wilson, defendant's sister, Reverend Schuurmans became the subject of discussion:

"Q. *[MR. KEYWORTH, DEFENSE ATTORNEY]* Now, you say you talked with other people. Did you and any other member of your family make an effort to get outside help other than the ones that we have discussed here?

"A. Yes, we did.

"Q. And where did you try to seek help?

"A. I went to Reverend Schuurmans and he went to the Prosecutor's office."

At that point the prosecutor objected, sought and secured the jury's removal, and then requested a mistrial "based on the actions of this

witness in injecting evidence that is absolutely immaterial, irrelevant, and incompetent, and which has been formally excluded by this court in her presence, and I ask that she be cited for contempt".

While defendant's other attorney, Benjamin Watson, originally seemed to resist the motion for mistrial, his views changed following an in-chambers conference[1] with the trial judge:

"THE COURT: All right. I understand you have something to say, Mr. Watson?

"MR. WATSON: I did tell the court informally in chambers that we would not oppose the Prosecutor's motion, and indeed would concur in it.

"We deplore the incident that led to the making of the motion. We do not think it is as serious as Mr. Farhat [the prosecuting attorney] seems to think. But if he feels the way he does about it, why, we would not challenge his right to make the motion and we would concur in it.

"THE COURT: Do you have anything to say at this time, Mr. Farhat?

"MR. FARHAT: No.

"THE COURT: All right. Inasmuch as both sides have made a motion for a mistrial, the court is going to grant it."

Upon the jury's return to the courtroom, the judge informed them of his ruling:

"THE COURT: Ladies and gentlemen of the jury: You were asked to leave the courtroom just a few minutes ago before this court took a recess, or asked you to leave.

"During your absence a motion was made by the Prosecuting Attorney that the court declare a mistrial in this case. A mistrial means that the case is ended.

[1] The record does not reveal whether defendant, the prosecutor or attorney Keyworth were present during the in-chambers conference.

"*That motion was concurred in by Mr. Watson and Mr. Keyworth, the attorneys for the defendant,* and the motion was granted."

Later retried and convicted, defendant unsuccessfully pursued appellate relief. *People v Hoffman,* 24 Mich App 244; 180 NW2d 99 (1970), *lv den,* 383 Mich 820 (1970).

On January 14, 1977, a panel of this Court, in response to defendant's complaint for habeas corpus, treated the matter as an application for delayed appeal and granted same.

II

Defendant's renewed attack on his conviction relies entirely on the double jeopardy clauses of the state and Federal constitutions.[2] Const 1963, art 1, § 15 and US Const, Am V. Citing *People v Alvin Johnson,* 396 Mich 424; 240 NW2d 729 (1976), and *People v Gardner,* 37 Mich App 520; 195 NW2d 62 (1972), he argues initially that manifest necessity did not require the trial court's declaration of a mistrial. We agree. The error, if any, in witness Wilson's isolated comment regarding Reverend Schuurmans' visit to the prosecutor —a non-responsive answer to a proper question by defense counsel—could have been cured by a cautionary instruction. See *People v Kelsey,* 303 Mich 715, 717; 7 NW2d 120 (1942). If a single reference to a polygraph test does not compel the granting of a mistrial, *Alvin Johnson, supra,* at 437, witness

[2] "The scope of the law of jeopardy is apparently the same under both the Michigan and United States Constitutions. *In re Ascher,* 130 Mich 540, 545; 90 NW 418; 57 LRA 806 (1902)." *People v Alvin Johnson,* 396 Mich 424, 430, fn 2; 240 NW2d 729 (1976). United States Supreme Court interpretations of the Federal double-jeopardy clause are binding upon the states. *Benton v Maryland,* 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969), *Alvin Johnson, supra,* p 430, fn 1.

Wilson's brief remark clearly did not merit such drastic action.

III

Defendant also maintains that *Alvin Johnson, supra,* requires a showing either that defendant *personally* consented to the mistrial or that he exerted primary control in the decision to accede to the prosecutor's mistrial motion. Claiming that the record satisfies neither requirement, he seeks release from confinement on grounds of double jeopardy.

Alvin Johnson, a case where neither defendant nor his counsel requested or consented to a mistrial, ostensively derived its holding from *United States v Dinitz,* 424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976).

In *Dinitz,* three attorneys, Messrs. Wagner, Meldon and Baldwin, represented defendant. During the opening statement (conducted by Wagner), the trial court ejected Wagner from the courtroom for obstreperous conduct, but allowed defendant's other counsel to remain.

"The next morning, Meldon told the judge that the respondent wanted Wagner and not himself or Baldwin to try the case. The judge then set forth three alternative courses that might be followed—(1) a stay or recess pending application to the Court of Appeals to review the propriety of expelling Wagner, (2) continuation of the trial with Meldon and Baldwin as counsel, or (3) a declaration of a mistrial which would permit the respondent to obtain other counsel. Following a short recess, Meldon moved for a mistrial, stating that, after 'full consideration of the situation and an explanation of the alternatives before him, [the respondent] feels that he would move for a mistrial and that this would be in his best interest.' * * * The Government prosecu-

tor did not oppose the motion. The judge thereupon declared a mistrial, expressing his belief that such a course would serve the interest of justice." 424 US at 604–605; 96 S Ct at 1078; 47 L Ed 2d at 272.

In reversing the Fifth Circuit Court of Appeals, which had accepted Dinitz's double jeopardy claims, the Supreme Court observed:

"The Court of Appeals viewed the doctrine that permits a retrial following a mistrial sought by the defendant as resting on a waiver theory. The court concluded, therefore, that 'something more substantial than a Hobson's choice' is required before a defendant can 'be said to have relinquished voluntarily his right to proceed before the first jury.' See 492 F2d, at 59. The court thus held that no waiver could be imputed to the respondent because the trial judge's action in excluding Wagner left the respondent with 'no choice but to move for or accept a mistrial.' *Ibid.* But *traditional waiver concepts have little relevance where the defendant must determine whether or not to request or consent to a mistrial in response to judicial or prosecutorial error.* See *United States v Jorn,* 400 US 470, 484–485, n 11; [91 S Ct 547; 27 L Ed 2d 543 (1971)], *United States v Jamison,* 164 US App DC 300, 305–306; 505 F2d 407, 412–413 (1974). In such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. *The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.*[11]

" 11. The respondent characterizes a defendant's mistrial motion as a waiver of 'his right not to be placed twice in jeopardy' and argues that to be valid the waiver must meet the knowing, intelligent, and voluntary standard set forth in *Johnson v Zerbst,* 304 US 458; [58 S Ct 1019; 82 L Ed 1461; 146 ALR 357 (1938)]. This approach erro-

neously treats the defendant's interest in going forward before the first jury as a constitutional right comparable to the right to counsel. It fails to recognize that the protection against the burden of multiple prosecutions underlying the constitutional prohibition against double jeopardy may be served by a mistrial declaration and the concomitant relinquishment of the opportunity to obtain a verdict from the first jury. This Court has implicitly rejected the contention that the permissibility of a retrial following a mistrial or a reversal of a conviction on appeal depends on a knowing, voluntary, and intelligent waiver of a constitutional right. *See Breed v Jones* 421 US 519, 534; [95 S Ct 1779; 44 L Ed 2d 346 (1975)], *United States v Wilson,* 420 US 332, 343–344, n 11; [95 S Ct 1013; 43 L Ed 2d 232 (1975)], *United States v Jorn,* 400 US 470, 484–485, n 11; [91 S Ct 547; 27 L Ed 2d 543 (1971)] (plurality opinion), *United States v Tateo,* 377 US 463, 466 [84 S Ct 1587; 12 L Ed 2d 448 (1964)]."

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424 US at 608–610; 96 S Ct at 1080–1081; 47 L Ed 2d at 274–275. (Footnote 10 omitted; emphasis supplied.)

The *Alvin Johnson* Court, in apparent obeisance to the rule espoused in *Dinitz, supra,* opined:

"[E]ven where the mistrial was improperly declared, it is not a bar to retrial if the action was taken with defendant's consent. *State v Fenton,* 19 Ariz App 274, 276; 506 P2d 665, 667 (1973).

"Mere silence or failure to object to the jury's discharge is not such consent, 19 Ariz App 274, 276; 506 P2d 665, 667.[7]

" [7] *Accord, Commonwealth v Baker,* 413 Pa 105, 115; 196 A2d 382, 387 (1964); *Curry v Superior Court,* 2 Cal 3d 707, 713; 87 Cal Rptr 361, 364; 470 P2d 345, 348 (1970).

"*See also, People v Carlton Brown,* 23 Mich App 528, 534; 179 NW2d 58 (1970).

" 'Silence cannot operate against a defendant.'

"*Contra, Coppage v State,* 62 Okla Cr 325, 335; 71 P2d 509, 513 (1937).

"In a very recent case in which defense counsel himself requested a mistrial, the United States Supreme Court has addressed this point as follows:

'The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed * * * ', *United States v Dinitz,* 424 US 600, 609; 96 S Ct 1075, 1081; 47 L Ed 2d 267, 275 (1976), and the defendant must therefore do something positively in order to indicate he or she is exercising that primary control. Further,

" 'The circumstance that it is defense counsel who initiates the court's inquiry into a matter which ultimately results in an order of mistrial does not ipso facto transform counsel's expression of concern into an implied consent to such drastic ruling.' *People v Compton,* 6 Cal 3d 55, 62; 98 Cal Rptr 217, 221; 490 P2d 537, 541 (1971).

" '[A]n appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision' *United States v Jorn,* 400 US 470, 483; 91 S Ct 547; 27 L Ed 2d 543 (1971). Thus, in the absence of bright-line rules deliberately eschewed by the United States Supreme Court, 400 US 470, 486, we must first look to whether in the exercise of that control of the course of his own trial, highlighted by *Dinitz,* defendant Alvin Johnson approved termination of the proceedings.

"It is not difficult to require a trial court to inquire whether defendant consents. Therefore, in the absence of an affirmative showing on the record, this Court will not presume to find such consent.

"There was no such affirmative showing in this case. At best, *defense counsel* may be said to have been silent. At worst, *he* did not protest, but *he* did not assent. *Therefore,* we find that defendant did not personally consent to the end of the first trial." 396 Mich at 432–433 (Emphasis added.)

The foregoing extract from *Alvin Johnson* is susceptible of two, very different interpretations, one of which doubtless accords with defendant's

contention on appeal. To require, however, that "the defendant must * * * do something positively in order to indicate he or she is exercising * * * primary control" over the proceedings is to disregard settled precedent:

"After a jury has been impaneled and sworn, any discharge thereof without sufficient cause operates as an acquittal, in that it effectually bars another trial for the same offense. But to have this operation and effect such discharge must have been made without the consent, express *or implied,* of the respondent." *People v Gardner,* 62 Mich 307, 311; 29 NW 19 (1886). (Emphasis added.)

Similarly, see *People v White,* 68 Mich 648, 654; 37 NW 34 (1888). Indeed, *People v Carlton Brown,* 23 Mich App 528, 534; 179 NW2d 58 (1970), quoted approvingly, if selectively, in *Alvin Johnson,* appears to dispute defendant's double-jeopardy analysis:

"We are also confronted with the issue of whether this defendant *[i.e.,* Carlton Brown] consented or *acquiesced* in the dismissal of the jury. The transcript shows that defendant Grimmett's counsel made the original motion to allow his client to plead guilty of second-degree murder. Defendant Johnson's attorney is on record as agreeing with some points. At no point does the record show that *counsel for this defendant [i.e.,* Carlton Brown] said anything, either in agreement or dissent. Silence cannot operate against a defendant." 23 Mich App at 534. (Emphasis added.)

Moreover, the decisions cited in *Alvin Johnson* to show that mere silence cannot be equated with defendant's consent would appear nonetheless to find such consent if expressed by counsel. See, *e.g., Commonwealth v Baker,* 413 Pa 105, 115; 196 A2d 382, 387 (1964) ("[M]ere silence by defendant *or his*

counsel to the proposed discharge * * * will not amount to a waiver [of double jeopardy]" [emphasis added]) and *Curry v Superior Court,* 2 Cal 3d 707, 713; 87 Cal Rptr 361, 364; 470 P2d 345, 348 (1970) ("[a]t no time did petitioners, in person *or through counsel,* expressly consent to the granting of the mistrial" [emphasis added]). In addition, these decisions speak in terms of "waiver" of the double-jeopardy protections—an interpretation subsequently disapproved in *Dinitz, supra,* at 609–610, fn 11. See also *Alvin Johnson,* 396 Mich at 431, fn 4.[3]

In light of our recognition that neither defendant nor counsel in *Alvin Johnson* expressly assented to the mistrial, we interpret the ambiguous language of that case to require an express manifestation of consent either from defendant or from his attorney. Thus, since defendant Hoffman's two attorneys concurred in the prosecution's motion for mistrial, their actions on defendant's behalf effectively eliminated the bar of double jeopardy.[4]

To the extent this holding is interpreted as misreading *Alvin Johnson* and thereby disregarding our role in the judicial hierarchy and the rule of stare decisis, we note that in matters of Federal constitutional interpretation our fealty is to the United States Supreme Court. See *People v Martin,* 78 Mich App 518; 260 NW2d 869 (1977).

Although we, of course, encourage trial courts to

[3] In *People v Cooper,* 398 Mich 450, 455; 247 NW2d 866 (1976), the Supreme Court, despite its prior recognition that " 'the permissibility of a retrial following a mistrial' [no longer] depends on waiver", *Alvin Johnson, supra,* at 431, fn 4, nevertheless perpetuated a mistaken, "waiver" analysis to permit appellate consideration of a double-jeopardy claim.

[4] This author acknowledges the position taken in *People v Flansburgh,* 71 Mich App 1, 7, fn 2; 246 NW2d 360 (1976). To the extent it fails to discern the misapplication of *Dinitz* that occurred in *Alvin Johnson,* the *Flansburgh* footnote no longer reflects this writer's views.

elicit a defendant's express consent to a mistrial,[5] we do not believe that the absence of defendant's *personal* consent necessarily bespeaks the absence of his primary control over the proceedings.[6]

Affirmed.

J. H. GILLIS, J., concurred.

R. M. MAHER, J. *(concurring).* I agree with the result reached by the majority in this case but cannot agree with the analysis by which it reaches that result. The majority's attack on *People v Alvin Johnson,* 396 Mich 424; 240 NW2d 729 (1976), the Michigan case which construes *United States v Dinitz,* 424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976), is unwarranted.

I believe *Alvin Johnson* correctly interprets *Dinitz* to require something more than a defendant's attorney's acquiescence to a waiver of double jeopardy. *Dinitz* states,

"The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain

[5] "While it may not be difficult to inquire [whether defendant consents to a mistrial], the unanswered question [in *Alvin Johnson]* is why the double jeopardy clause, as a matter of constitutional law, should require such a procedure." Grano, *1976 Annual Survey of Michigan Law: Criminal Procedure,* 23 Wayne L Rev 517, 589 (1977).

[6] The recently released *People v Benton,* 402 Mich 47, 55; 260 NW2d 77 (1977), (Opinion of LEVIN, J.), in no way disparages the present holding: "In the instant case, there is no indication that Benton *or his counsel* consented to a mistrial and there is substantial evidence that his counsel objected." (Emphasis added.) Indeed, the cases there cited for the proposition that "[d]efendant's silence or failure to object to a declaration of mistrial does not constitute the requisite affirmative showing on the record", *Id.* at fn 6, appears to support our resolution. *See especially, People v Grimmett,* 388 Mich 590, 601, fn 6; 202 NW2d 278 (1972). Moreover, we have no doubt that Justices FITZGERALD, COLEMAN and RYAN, employing a totality-of-the-circumstances test, *People v Alvin Johnson,* 396 Mich 424, 451; 240 NW2d 729 (1976) (COLEMAN, J., *dissenting),* would find primary control on the present record.

primary control over the course to be followed in the event of such error." 424 US at 609.

Alvin Johnson, interpreting that language, holds:

"[T]he defendant must therefore do something positively in order to indicate he or she is exercising that primary control." 396 Mich at 432–433.

The guarantee against double jeopardy is a fundamental right. *Benton v Maryland,* 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969), *People v Cooper,* 398 Mich 450; 247 NW2d 866 (1976). As *Alvin Johnson* correctly observed, it is a right which defendant himself or herself must waive.

Arguably, the "knowing, voluntary and intelligent" waiver concept is not applicable in Michigan because of the footnote in *Dinitz* which states that the Supreme Court rejects the concept. I can only note, however, that after *Dinitz* and after *Alvin Johnson,* our Supreme Court, in *People v Cooper, supra,* chose to use a waiver analysis to permit appellate consideration of a double jeopardy claim. The majority calls this analysis mistaken because of the *Dinitz* footnote. But it may also be viewed as a reflection of Michigan law in an area in which that law is beginning to vary from its Federal counterpart. Such action by our Supreme Court is not without precedent. See, for example, *People v Beavers,* 393 Mich 554; 227 NW2d 511 (1975).

But whether the analysis be traditional waiver or not, *Alvin Johnson* and *Dinitz* do require that defendant have primary control over the course to be followed. I believe that primary control must reside in the defendant himself or herself, or, as *Alvin Johnson* says, personally. The record must disclose a personal manifestation by defendant

that she or he consents to a waiver of the protection against double jeopardy. It is not necessary, though it is commendable, that the record contain a statement by the defendant; but it must be demonstrated that counsel has at least spoken with his or her client about the constitutional protection and that after such discussion defendant has made the decision to consent.

The passages quoted at length by the majority are equally supportive of our respective positions. Only the supplied emphasis is different.[1] Indeed, that *Alvin Johnson* uses the term "defense counsel" is not inconsistent with the view that a de-

[1] To demonstrate that a change in supplied emphasis sustains an interpretation contrary to that urged by the majority, consider the following:

"In a very recent case in which defense counsel himself requested a mistrial, the United States Supreme Court has addressed this point as follows:

" 'The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed * * * ', *United States v Dinitz,* 424 US 600, 609; 96 S Ct 1075, 1081; 47 L Ed 2d 267, 275 (1976), *and the defendant must therefore do something positively in order to indicate he or she is exercising that primary control.* Further,

" 'The circumstance that it is defense counsel who initiates the court's inquiry into a matter which ultimately results in an order of mistrial does not ipso facto transform counsel's expression of concern into an implied consent to such drastic ruling.' *People v Compton,* 6 Cal 3d 55, 62; 98 Cal Rptr 217, 221; 490 P2d 537, 541 (1971).

" '[A]n appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision', *United States v Jorn,* 400 US 470, 483; 91 S Ct 547; 27 L Ed 2d 543 (1971). Thus, in the absence of bright-line rules deliberately eschewed by the United States Supreme Court, 400 US 470, 486, *we must first look to whether in the exercise of that control of the course of his own trial, highlighted by Dinitz, defendant Alvin Johnson approved termination of the proceedings.*

"It is not difficult to require a trial court to inquire whether defendant consents. Therefore, in the absence of an affirmative showing on the record, this Court will not presume to find such consent.

"There was no such affirmative showing in this case. At best, defense counsel may be said to have been silent. At worst, he did not protest, but he did not assent. Therefore, we find that defendant *did not personally consent* to the end of the first trial. However, the finding of manifest necessity would still make the second trial permissible." 396 Mich at 432–433. (Emphasis supplied.)

fendant's attorney can, in a sense, waive a defendant's right, as long as counsel affirmatively indicates on the record that the defendant has had the primary control in the double jeopardy decision.

The majority's references to "settled precedent," *i.e.,* its references to *People v Gardner,* 62 Mich 307; 29 NW 19 (1886), *People v White,* 68 Mich 648; 37 NW 34 (1888), *People v Carlton Brown,* 23 Mich App 528; 179 NW2d 58 (1970), I find both unenlightening and unpersuasive.

Alvin Johnson represents a discernible modification of prior case law. "Settled precedent" is, therefore, of limited value. Even so, I do not agree that *Alvin Johnson* disregards settled precedent. The majority quotes *People v Gardner, supra,* on this point. *Gardner* states:

> "But to have this operation and effect such discharge must have been made without the consent, express *or implied,* of the respondent." 62 Mich at 311. (Emphasis supplied by majority.)

Alvin Johnson, rather than disregarding the *Gardner* language, actually expands upon the concept of "implied" used there, by requiring that an implied consent, *i.e.,* one made by counsel for his or her client, be the result of a procedure in which defendant had primary control. The only effective way to ensure that defendant has primary control is for defendant himself or herself to consent on the record or for defendant's counsel to establish on the record that the decision to consent was the outcome of a process over which defendant had primary control.

From the record in this case I am led to believe, assuming but not deciding the retroactivity of *Alvin Johnson,* that defendant had the requisite primary control. Accordingly, I concur.

PEOPLE v RADNEY

1. CRIMINAL LAW—PROBATION REVOCATION—NOTICE—RIGHT TO CONTEST—CHARGES—RIGHT TO AN ATTORNEY.

The questions of whether a defendant was given timely notice of the charges he was to face at a probation revocation hearing and whether he was adequately informed of his rights to contest rather than admit the charges were adequately raised on appeal where defendant states in his brief that "the only information the defendant had was that of a notice of violation and that he had a right to an attorney; he was also asked if he had any answer to the charge to which he replied 'No'" and where defendant alleges that the probation revocation was "without any of the procedure safeguards necessary for due process".

2. CRIMINAL LAW—PROBATION REVOCATION—NOTICE—TIMELY SERVICE OF NOTICE—STATUTES.

Written notice to a defendant of charged probation violations is statutorily required; such notice must be served sufficiently in advance of scheduled court proceedings so that the defendant has a reasonable opportunity to prepare (MCLA 771.4; MSA 28.1134.)

3. CRIMINAL LAW—PROBATION REVOCATION—NOTICE—TIMELY SERVICE OF NOTICE.

A defendant charged with violation of the terms of his probation was not served with timely notice of the violation where the probation revocation hearing was held forthwith after the defendant received a written notice of violation.

4. CRIMINAL LAW—PROBATION REVOCATION—HEARING—NOTICE—WAIVER—RIGHT TO CONTEST CHARGES.

It is necessary that a defendant charged with probation violation be informed of his right to a hearing and that he has an

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REFERENCES FOR POINTS IN HEADNOTES

[1–5] 21 Am Jur 2d, Criminal Law §§ 567, 568.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation. 29 ALR2d 1074.

alternative to admitting the violations before he may validly waive a hearing on the charges and admit a violation of his probation; that requirement was not met where neither the form language on the notice of violation nor the court's mention of the word "hearing" in its colloquy with the defendant sufficiently apprised the defendant of his right to contest the charges.

5. CRIMINAL LAW—PROBATION REVOCATION—HEARING—WAIVER.

A statement of a defendant charged with probation violation that he has no answer to the charges of probation violation is not a sufficient indication that the defendant wishes to waive his probation revocation hearing.

Appeal from Recorder's Court of Detroit, George W. Crockett, Jr., J. Submitted November 15, 1977, at Detroit. (Docket No. 30507.) Decided February 7, 1978.

Roosevelt Radney, Jr., was convicted, on his plea of guilty, of attempted breaking and entering with intent to commit larceny and attempted obtaining money under false pretenses, and was placed on probation. Defendant's probation was revoked and defendant was sentenced to jail. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Principal Attorney, Appeals, and *E. Gail Willhardt,* Assistant Prosecuting Attorney, for the people.

John C. Mouradian, for defendant on appeal.

Before: BRONSON, P. J., and ALLEN and T. M. BURNS, JJ.

PER CURIAM. Defendant was placed on probation after having pled guilty to attempted breaking and

entering with intent to commit larceny, MCLA 750.110; MSA 28.305, and attempted obtaining money under false pretenses, MCLA 750.218; MSA 28.415. No appeal was taken from those convictions. Subsequently, defendant's probation was revoked in both cases and defendant was sentenced to serve concurrent two to five year terms.

Most of the issues on appeal, as framed by defendant, have no application to the facts of this case. There were no "contested issues" below. See, *People v Rial,* 399 Mich 431; 249 NW2d 114 (1976). However, defendant does state in his brief:

> "The only information the Defendant had was that of a notice of violation and that he had a right to an attorney; he was also asked if he had any answer to the charge to which he replied 'No'.
>
> "The violation of probation hearing in this case amounts to merely giving a notice of violation to the Defendant and then revoking probation without any of the procedural safeguards necessary for due process."

We believe this adequately raises the questions of whether defendant was given timely notice of the charges he was to face at the hearing and whether he was adequately informed of his right to contest, rather than admit, the charges.

The record shows that defendant was served with notice of violations on June 29, 1976, and appeared before the court for arraignment on those charges on the same date. Defendant appeared without an attorney. A hearing was held "forthwith" resulting in immediate revocation of probation and sentencing.

The substance of the hearing is shown by this exchange:

> "THE COURT: Among other things, evidently you

were ordered to go to Harbor Light, and you entered there and you left without permission.

"You have had another conviction, I understand, since you were placed on probation. You were convicted before Judge Brezner; is that right?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: Each of those things would be a violation of your probation.

"Since you were convicted of a felony, Mr. Radney, you're entitled to have a lawyer represent you at the violation hearing, and if you are unable to pay for a lawyer, we will appoint a lawyer at public expense. Do you understand that?

"THE DEFENDANT: Yes, your Honor.

"THE COURT: Did you want a lawyer?

"THE DEFENDANT: No, I don't.

"THE COURT: Very well. Have you got any answer you want to make to these charges?

"THE DEFENDANT: No, your Honor, I don't."[1]

The only proof that there was a violation was the probation officer's statement to the court. Defendant made no comment in relation to the charged violations other than that noted above.

Our cases make it clear that the written notice of charged violations which is statutorily required, MCLA 771.4; MSA 28.1134, must be served sufficiently in advance of scheduled court proceedings so that defendant has a reasonable opportunity to prepare. *People v Gulley,* 66 Mich App 112; 238 NW2d 421 (1975), *lv den,* 396 Mich 850 (1976), *People v Bell,* 67 Mich App 351; 241 NW2d 203 (1976), *lv den,* 397 Mich 807 (1976), *People v Gillman,* 71 Mich App 374; 248 NW2d 553 (1976).

[1] The prosecutor admits on appeal that the "conviction" referred to by the court at the revocation proceeding was, in fact, not a conviction but rather, a pending charge which has subsequently been dismissed.

In this case defendant received a written notice of violation on June 29, 1976, and the hearing was held forthwith. This was not timely service of the notice. However, because it could be considered that defendant waived timely service, we would not reverse on this ground alone. But see, *People v Bell, supra,* at 355 (opinion of DANHOF, P. J.).

A more fundamental error appears in this record. Before a defendant may validly waive a hearing on the charges and admit a violation of his probation it is necessary that he be informed of his right to a hearing and that there is an alternative to admitting the violations. *People v Rial, supra,* at 440 (LEVIN, J., concurring), *People v Hardin,* 70 Mich App 204; 245 NW2d 566 (1976), *People v Allen,* 71 Mich App 465; 248 NW2d 588 (1976), *People v Michael Brown,* 72 Mich App 7; 248 NW2d 695 (1976). That requirement has not been met on this record. Neither the form language on the notice of violations nor the court's mention of the word "hearing" in its colloquy with the defendant sufficiently apprises defendant of his right to contest the charges. *People v Darrell,* 72 Mich App 710, 714; 250 NW2d 751 (1976) (BRONSON, J., dissenting), *People v Gaudett,* 77 Mich App 496; 258 NW2d 535 (1977).

Defendant is entitled to another revocation hearing at which he is adequately informed of his right to contest the charges if he wishes to do so. We also note that this record does not show that defendant had, in fact, admitted the charged violations. Defendant stated only that he had no answer to the charges. This is not a sufficient indication that defendant wishes to waive his revocation hearing. *People v Allen, supra, People v Coleman,* 74 Mich App 498; 255 NW2d 203 (1977).

Reversed and remanded.

OAKLAND COUNTY v CITY OF DETROIT

1. MUNICIPAL CORPORATIONS—SEWERS—SEWER RATES—CONSTITUTIONAL LAW—STATUTES.

   A city may extend its sewer service beyond the city limits and may collect charges for the cost of such service, including a fair rate of return on the value of the property devoted to providing the sewer service (Const 1963, art 7, § 24, MCLA 117.4f[4]; MSA 5.2079[4]).

2. MUNICIPAL CORPORATIONS—SEWERS—SEWER RATES—REASONABLENESS.

   The rate charged by a city for its sewer service is presumed to be reasonable in the absence of a showing that the rate is capricious, arbitrary, or unreasonable.

3. CONSTITUTIONAL LAW—EQUAL PROTECTION—LEGISLATIVE CLASSIFICATIONS—REASONABLENESS.

   The Equal Protection Clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws but allows the exercise of discretion in that regard, avoiding what is done only when it is without any reasonable basis and is therefore purely arbitrary (US Const, Am XIV).

4. CONSTITUTIONAL LAW—EQUAL PROTECTION—CLASSIFICATIONS.

   A classification having some reasonable basis does not offend

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REFERENCES FOR POINTS IN HEADNOTES

[1, 7] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 568.

[2] 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 574.

[3, 4] 16 Am Jur 2d, Constitutional Law § 506.

[5] 16 Am Jur 2d, Constitutional Law § 512.

[6] 16 Am Jur 2d, Constitutional Law § 174.

[7] Discrimination between property within and that outside municipality or other governmental district as to rates for use of sewers. 4 ALR2d 610.

[8] 5 Am Jur 2d, Appeal and Error § 545.

[9] 30 Am Jur 2d, Evidence §§ 1040, 1069, 1070, 1072.

[10] 4 Am Jur 2d, Appeal and Error § 521.
5 Am Jur 2d, Appeal and Error § 738.

against the Equal Protection Clause merely because it is not made with mathematical nicety or because in practice it results in some inequality (US Const, Am XIV).

5. CONSTITUTIONAL LAW—CLASSIFICATIONS—STATE OF FACTS.

Any state of facts which reasonably can be conceived that would sustain a classification must be assumed to have existed at the time such a law was enacted, where such classification is called into question.

6. CONSTITUTIONAL LAW—CLASSIFICATIONS—ARBITRARINESS—BURDEN OF PROOF.

One who assails a classification carries the burden of showing that the classification does not rest upon any reasonable basis, but is essentially arbitrary.

7. MUNICIPAL CORPORATIONS—SEWERS—SEWER RATES—MUNICIPAL CUSTOMERS—SUBURBAN CUSTOMERS.

A city sewer system is justified in charging a higher rate to customers located outside the city than it charges to customers within the city because the city incurs costs related to operation of the sewage treatment system which the suburbs do not, such as police and fire protection for the treatment plant, the risk of tort liability arising from the system's operation, and the loss of tax base resulting from devoting land to a tax-free utility, and because the suburban areas served by the sewer may have an enhancement in valuations which the city can not tax.

8. APPEAL AND ERROR—APPELLATE COURTS—FUNCTION.

The function of an appellate court is restricted to the test of questions which, in the court below, have been raised and saved for review, and a claim not so raised should not be considered by an appellate court, even if the claim may be of some merit and even if it is a constitutional question.

9. EVIDENCE—PAROL EVIDENCE—CONTRACTS—ADMISSIBILITY.

The question in a case involving parol evidence is whether the proffered parol evidence is inconsistent with the written language of the contract; if there is no inconsistency, the parol evidence is admissible.

10. EVIDENCE—ERRONEOUS EXCLUSION—REVERSAL.

The erroneous exclusion of evidence does not require reversal unless it has caused a denial of substantial justice.

Appeal from Iosco, Allan C. Miller, J. Submitted

December 7, 1977, at Lansing. (Docket No. 30710.) Decided February 7, 1978. Leave to appeal applied for.

Complaint by the County of Oakland against the City of Detroit, its Board of Water Commissioners, and the Detroit Metro Water Department challenging the rates charged for sewage treatment to those customers located outside the City of Detroit and in Oakland County, and for breach of contract. Judgment for defendant. Plaintiff appeals. Remanded.

Fraser, Trebilcock, Davis & Foster (by *Michael H. Perry) (Robert H. Fredericks, II,* of counsel), for plaintiff.

Dyer, Meek, Ruegsegger & Bullard (by *Richard J. McClear),* for defendant.

Before: R. B. BURNS, P. J., and ALLEN and R. M. MAHER, JJ.

PER CURIAM. The County of Oakland appeals the trial court's determination that the sewage treatment costs adopted by the City of Detroit and charged Oakland County residents are fair, reasonable and properly related to the costs incurred for providing the services received. The court ruled that the City of Detroit could charge its resident customers $.75 per 1,000 cubic feet of sewage while charging suburban customers $.89 per 1,000 cubic feet. It found the $.14 differential a reasonable 7% rate of return on investment.

Plaintiff Oakland County alleges that defendant city has no right to charge suburban customers more for sewage treatment than city residents are charged; and that the City of Detroit, by charging more to its suburban customers, has breached

contracts with three sewer districts in Oakland County. The contracts call for an assessment of "reasonable rates".

The Michigan Constitution, Const 1963, art 7, § 24, allows a city to extend its sewer treatment lines beyond city limits. MCLA 117.4f(4); MSA 5.2079(4), part of the home rule act, allows a city to provide in its charter for the extension of sewer service beyond city limits and to collect charges for the cost of such service. A part of the charge a city collects may include a fair rate of return on the value of the property devoted to providing sewer service.

A city's sewage rate is presumed to be reasonable in the absence of a showing that it is capricious, arbitrary, or unreasonable. *Detroit v Highland Park,* 326 Mich 78; 39 NW2d 325 (1949).

At issue in the instant case is the classification made by the City of Detroit by which nonresidents, unlike city residents, are charged an extra rate of return for sewage treatment. Plaintiff argues that the classification is unfair and that the extra charge constitutes an unreasonable rate.

The standards to be applied in evaluating the reasonableness of a municipality's system of classification are summarized in *Land v Grandville,* 2 Mich App 681; 141 NW2d 370 (1966).

" '1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in

such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' " 2 Mich App at 690.

Plaintiff contends that since it costs the same to treat the city's and the suburbs' sewage, the sewage rate should be the same for both and that since the rate is not the same the classification is unjust.

Costs attributable solely to sewage treatment and costs associated with the financing of the sewage treatment system are the same for city and suburbs. But to focus on these costs alone is to ignore other costs related to sewage treatment which the city incurs while the suburbs do not. The city supplies police and fire protection for the treatment plant. It faces the risk of tort liability arising out of the operation of the system. Because the water department pays no taxes, the city loses a large amount from its tax base. The suburbs, however, receive sewage treatment without having to devote any of their land to a tax free utility.

City areas with connection to the sewage treatment system have higher valuations than areas which do not have the utility. The city levies and collects taxes on this enhanced value. Suburban areas, not taxed by the city, receive the same benefits of enhanced value but bear no part of the additional burden. See *Faxe v Grandview,* 48 Wash 2d 342; 294 P2d 402 (1956), *Town of Terrel Hills v San Antonio,* 318 SW2d 85 (Tex Civ App, 1958).

Plaintiff suggests that when city taxpayers are not liable for the utility's revenue bonds, as is the

case here, no rate difference should be allowed. That city taxpayers are not directly liable for the bonds is of little moment. Plaintiff's argument ignores the above mentioned indirect costs that the city residents must pay but from which their suburban counterparts are free. Detroit taxpayers must pay for fire and police protection of the system and must compensate for the utility's tax exemption by paying higher taxes.

Hence, the rate difference is justified. One could reasonably view the extra amount which the Oakland County residents pay directly as tantamount to the sums paid, indirectly, by City of Detroit residents.

Oakland County's objections based on the Revenue Bond Act, MCLA 141.101 *et seq.;* MSA 5.2731 *et seq.,* and on the Federal Water Pollution Control Act, 33 USCA 1251 *et seq.,* are not properly before this Court. Plaintiff failed to raise the issues at trial and is thus precluded from asserting it here. The function of an appellate court is restricted to the test of questions which, in the court below, have been raised and saved for review. *Swartz v Laurencelle,* 371 Mich 153; 123 NW2d 244 (1963). This is true even if the claim may be of some merit and even if it is a constitutional question. *Falk v Macomb County Civil Service Commission,* 57 Mich App 134; 225 NW2d 713 (1974).

In any event, we would reject plaintiff's claim. The revenue bond act contains no limitation or directive as to what methods of developing rates may or shall be used by the governing body of the borrower. To determine what rates and charges can lawfully be fixed by a city, this Court defers to the home rule act, MCLA 117.4(f)(4); MSA 5.2079(4). This section of the act specifically provides that a municipality may fix "charges" for its

sewage service and that such may include a fair rate of return.

As a substantive matter, the Federal Water Pollution Control Act does not apply in the instant case. Oakland County contends it is paying more than its proportionate share of the treatment costs, as the statute requires. Since the Water Pollution Control Act does not define treatment costs, we again defer to state law. In *Meridian Twp v East Lansing,* 342 Mich 734; 71 NW2d 234 (1955), the Court determined that "[p]rudent business administration requires that the item of costs incurred include, among others, operating expenses, upkeep of the property, and *a fair return on the value thereof".* 342 Mich at 751. (Emphasis supplied.)

During trial plaintiff attempted to introduce its proposed exhibit number 22 which, it is alleged, demonstrated that the transportation rate for providing sewage disposal service was estimated on a "cost" basis. Plaintiff contends that the proposed exhibit would have helped the trial court in its efforts to construe the term "reasonable in relation to costs" in the contracts. The trial court ruled that the evidence arose out of negotiations and that it attempted to give a specific meaning to the term "reasonable" which was not explained in the contract and would, therefore, be varying the terms of the contract and contrary to the parol evidence rule.

Defendant city's contention, that the issue has not been properly preserved for review, is without merit. Plaintiff made an offer of proof sufficient to comply with GCR 1963, 604. See *Hes v Haviland Products Co,* 6 Mich App 163; 148 NW2d 509 (1967), *Schwartz v Davis Mfg Co,* 32 Mich App 451; 189 NW2d 1 (1971).

In *Goodwin, Inc v Orson E Coe Pontiac, Inc,* 392 Mich 195, 204; 220 NW2d 664 (1974), the Supreme Court stated the parol evidence rule in these terms: "Where a contract is clear and unambiguous, parol evidence of negotiations cannot be admitted to vary the contract." The Court noted several exceptions to the rule, one of which allowed the admission of parol evidence to explain ambiguous language in the contract. The Court propounded the following rules concerning clarification of ambiguous terms:

> "1) Where ambiguity may exist in a contract, extrinsic evidence is admissible to prove the existence of ambiguity.
>
> "2) Where ambiguity may exist in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties.
>
> "3) Where ambiguity exists in a contract, extrinsic evidence is admissible to indicate the actual intent of the parties as an aid in the construction of the contract." 392 Mich 209–210.

In *Union Oil Co v Newton,* 397 Mich 486; 245 NW2d 11 (1976), however, the Court, in a perceptible shift, adopted a modified interpretation of the parol evidence rule. *Newton* noted that the real question in a case involving parol evidence is whether or not the proffered parol evidence "is inconsistent with the written language. If there is no inconsistency, the parol evidence is admissible." 397 Mich at 488. In support of this, the Court cited Restatement 2d, Contracts, § 239(1), which reads, "A binding integrated agreement discharges prior agreements to the extent that it is *inconsistent* with them". 397 Mich at 488, n 1. (Emphasis in original.)

In *Michigan National Bank v Holland-Dozier-*

Holland Sound Studios, 73 Mich App 12; 250 NW2d 532 (1976), a panel of this Court held, and we believe correctly, that *Newton* had surreptitiously reversed *Goodwin.* The Court interpreted the word "inconsistent" to be synonymous with "contradictory". Using the standards articulated in *Newton* and *Holland-Dozier-Holland,* we do not find the exhibit offered by plaintiff to be inconsistent with or contradictory to the written language of the contract, *viz.,* "reasonable in relation to the cost".

Rather, the exhibit may, perhaps, explain what "reasonable in relation to the cost" means. There is clearly a misunderstanding about this term's definition. The basic issue in the case is whether the parties intended or knew that a rate of return was to be a cost for which the suburbs were liable. In cases of misunderstanding, the court must inquire into the meaning that each party attached to the term in question.

GCR 1963, 529 provides that if the trial judge erroneously excludes evidence this will not require reversal unless it has caused a denial of substantial justice. The evidence here excluded would have helped the court interpret the contract in question. The evidence went to the heart of the issue before the court. Since it might have altered the outcome of the case, its exclusion was reversible error.

Accordingly, the cause is remanded to the trial court for its consideration of the document in question. Should the court still find that a rate of return can be charged despite the contract, such a rate of return is, as a matter of law, proper.

WAYNE COUNTY PROSECUTOR v RECORDER'S COURT JUDGES

1. COURTS—SUPERINTENDING CONTROL—GENERALIZED PRACTICES.

   Superintending control is the proper remedy for challenging the generalized practices of a court.

2. BAIL—RECORDER'S COURT—RECOGNIZANCE BONDS—DEFAULT—HEARING—COURT'S DISCRETION—STATUTES.

   Any person against whom the default of a recognizance bond may have been entered by a Recorder's Court has a right to apply to that court within 20 days after the judgment for vacation of the judgment for good and sufficient cause shown, and the court in its discretion may vacate such judgment on such terms as it may deem just; a surety against whom a judgment of forfeiture of a recognizance bond has been entered may address a petition for relief in the Recorder's Court issuing the judgment after the 20 day period and seek the discretion of the court.

3. APPEAL AND ERROR—RECORDER'S COURT—BAIL—RECOGNIZANCE BONDS—SURETIES—FORFEITURE OF BONDS—RELIEF.

   A surety seeking remittance of a forfeited recognizance bond may appeal to the Court of Appeals if he fails to obtain the requested relief in Recorder's Court.

4. BAIL—RECORDER'S COURT—RECOGNIZANCE BONDS—FORFEITURE OF BONDS—SURETIES—COURTS—JUDGES—PROGRESS OF ASSIGNED CASES—COURT RULES.

   A surety seeking remittance of a bond ordered forfeited by the Recorder's Court must seek relief initially from the Recorder's Court judge who ordered the forfeiture of the bond because this judge is responsible for the progress and ultimate disposition of

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REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 17 *et seq.*
[2] 8 Am Jur 2d, Bail and Recognizance §§ 201, 202.
[3] 8 Am Jur 2d, Bail and Recognizance § 206.
[4] 8 Am Jur 2d, Bail and Recognizance § 201.
[5] 8 Am Jur 2d, Bail and Recognizance §§ 139–143.
[6] 46 Am Jur 2d, Judges § 47.
[7] 8 Am Jur 2d, Bail and Recognizance § 203.

the cases and proceedings on his docket of assigned cases (RCR 16.4).

5. COURTS—RECORDER'S COURT—JUDGES—REASSIGNMENT OF PETITIONS—BAIL—RECOGNIZANCE BONDS—FORFEITURE OF BONDS—REINSTATEMENT OF BONDS—COURT RULES.

One Recorder's Court judge may reassign a matter to another Recorder's Court judge provided the order of reassignment is signed by both judges; without such signed orders it is entirely improper for one Recorder's Court judge to entertain a petition to reinstate a recognizance bond which was ordered forfeited by another judge of co-equal power (RCR 16.11).

6. COURTS—JUDGES—RECORDER'S COURT JUDGES—JUDGE'S DISCRETION—STATUTES.

A Recorder's Court judge may not review or revise any order, judgment, sentence or act of any other Recorder's Court judge involving the personal discretion, judgment or opinion of such other judge (MCLA 726.2; MSA 27.3552).

7. BAIL—RECOGNIZANCE BONDS—FORFEITURE OF BONDS—HEARING—NOTICE TO PROSECUTOR—VOID PETITIONS—COURT RULES.

An application for the remission of penalties, including the remittance of forfeited recognizance bonds, may not be heard until reasonable notice has been given to the prosecuting attorney and until he has an opportunity to examine the matter and to prepare to resist such application; orders for the remittance of forfeited recognizance bonds which are based on petitions filed without proper notice to the prosecutor's office are void (GCR 1963, 108.4, 110.2, 772.4).

Original action in the Court of Appeals. Submitted November 16, 1977, at Detroit. (Docket Nos. 31270–31279.) Decided February 7, 1978. Leave to appeal applied for.

Complaint in the Court of Appeals by the Wayne County Prosecutor for superintending control seeking relief from a series of orders which set aside bond forfeitures and remitted bail in certain criminal cases. Charles B. Goldfarb was added as a party defendant by order of the Court of Appeals. Referred to Recorder's Court of Detroit for further proceedings.

William L. Cahalan, Prosecuting Attorney, *Patrick J. Foley, Robert H. Healy* and *John E. Steele,* Assistants Prosecuting Attorney, for plaintiff.

Norman L. Zemke, for defendant.

Before: BRONSON, P. J., and ALLEN and T. M. BURNS, JJ.

PER CURIAM. The Wayne County Prosecutor, in a complaint for superintending control,[1] seeks relief from a series of orders which set aside bond forfeitures and remitted bail in 10 criminal cases in Detroit Recorder's Court. The prosecutor alleges that in these 10 cases various Recorder's Court judges other than Clarence Laster, Jr. and James Del Rio ordered the forfeiture of surety bonds after the individual defendants failed to appear for trial. Subsequently, in each case, defendant-appellee Goldfarb, as attorney in fact of the surety, filed a petition for reinstatement of bond forfeiture before either Judge Laster or Judge Del Rio. No notice was given to the prosecutor's office of these motions. In all 10 cases, Judges Laster and Del Rio ordered the forfeited bail remitted to defendant Goldfarb.

The prosecutor alleges that these 10 cases are representative of some 90 similar cases in which Judges Laster and Del Rio remitted forfeited bonds to Goldfarb. Furthermore, it appears that no rec-

[1] Defendant Goldfarb argues that superintending control is unavailable to plaintiff at this time, as an adequate remedy (appeal in each case) is available. *See* GCR 1963, 711.2. This issue is controlled by *Cahill v 15th District Judge,* 70 Mich App 1; 245 NW2d 381 (1976), in which, on similar facts, the Supreme Court held that superintending control was the proper remedy for challenging the generalized practices of a court. Additionally, we hold that Goldfarb was properly added as a party defendant. *See* GCR 1963, 205.1; MCLA 600.2041; MSA 27A.2041. *See, also,* GCR 1963, 820.1(2).

The other issues raised by Goldfarb on appeal are meritless.

ords are available in the 10 cases involved in this appeal. Consequently, we remand these causes to Recorder's Court for hearings on the merits before an independent judge. Because the legal issues are clear, we will address them here to provide a legal framework for the hearings we have ordered.

I.

The first alleged procedural error was the review by Judges Laster and Del Rio of the orders of other Recorder's Court judges forfeiting bonds in cases in which defendants had failed to appear for trial.

Recorder's Court procedure for default of recognizance bonds which are posted by sureties is governed by MCLA 726.14; MSA 27.3564:[2]

"[W]henever defaults shall be made in any such recognizance, such default shall be duly entered of record in said recorder's court, and thereafter said court shall, upon the motion of the prosecuting, or city attorney, summarily enter judgment against all parties liable on said recognizance for the full amount thereof: Provided, however, That any person against whom such judgment may have been entered, shall have the right to apply to the court within 20 days after the rendition of such judgment, for the vacation of the same for good and sufficient cause shown, and said court may in its discretion, vacate such judgment on such terms as it may deem just. Execution shall be awarded and executed upon said judgment, in like manner as is provided in personal actions."

[2] MCLA 765.28; MSA 28.915 also prescribes a procedure for default on a recognizance bond posted by a surety. MCLA 726.14; MSA 27.3564 seems to be more directly applicable to Recorder's Court. We need not decide, however, which procedure controls; Goldfarb's actions, on the facts alleged by the prosecutor, violated either procedure.

If the surety fails to seek review within 20 days of the judgment of forfeiture, it may address a petition for relief after that period and seek the discretion of the court. See *People v Judge of Recorder's Court,* 23 Mich App 126; 178 NW2d 146 (1970).

If a surety seeking remittance of a forfeited bond fails to obtain the requested relief in Recorder's Court, the surety may appeal to this Court. *People v Glumb,* 42 Mich App 166; 201 NW2d 282 (1972).

In all cases, the surety must seek relief initially from the Recorder's Court judge who ordered the initial bond forfeiture. RCR 16.4 provides:

> "Each regular judge of this court shall be responsible for the progress and ultimate disposition of the cases and proceedings on his docket of assigned cases. He shall hear and determine all motions and preliminary matters, and shall conduct the pre-trials, the trials and all post-conviction proceedings in such cases assigned to him."

While it is possible for a judge to reassign a matter to another judge, according to RCR 16.11, the order of reassignment must be signed by both judges. We find no allegations that such orders were employed.

Without these orders, it would be entirely improper for one Recorder's Court judge to entertain a petition to reinstate a recognizance bond which was ordered forfeited by another judge of co-equal power. MCLA 726.2; MSA 27.3552 provides that in Recorder's Court:

> "No judge of said court shall review or revise any order, judgment, sentence or act of any other judge of said court, involving the personal discretion, judgment or opinion of such other judge."

If the judges who originally ordered the forfeiture of bonds, or the successors of those judges, are active members of Recorder's Court, no other judges may vacate or overrule those orders without a formal reassignment of the cause. See *People v Paille #1,* 383 Mich 605; 178 NW2d 469 (1970). Judges of co-equal authority lack jurisdiction to set aside the orders of bond forfeiture issued by their fellow judges. See *Wilson v Romeos,* 387 Mich 664, 678; 199 NW2d 208 (1972). In short, the only proper method by which defendant Goldfarb could seek review of judgments forfeiting the bonds was to petition the original trial judge for relief or to seek review by this Court. See, also, *In The Matter of Del Rio,* 400 Mich 665; 256 NW2d 727 (1977).

II.

In addition to the requirement that the petition for remittance of a forfeited bond be filed before the judge who ordered the forfeiture, a court rule mandates that the prosecutor's office receive notice of the petition. GCR 1963, 772.4 provides:

> "No application for the remission of penalties may be heard until reasonable notice has been given to the prosecuting attorney, and until he has had an opportunity to examine the matter and prepare to resist such application; nor shall such application in any case be granted without payment of the costs and expenses incurred in the proceedings for the collection of such penalty."[3]

The specific requirement of GCR 1963, 772.4 concerning the remittance of forfeited bonds comports with the general notice requirements for

[3] The term "penalty" includes forfeited recognizances. *See* GCR 1963, 772.2; MCLA 600.4801; MSA 27A.4801.

motions under GCR 1963, 110.2 and GCR 1963, 108.4. Orders for the remittance of forfeited bonds which are based on petitions filed without proper notice to the prosecutor's office are void.

Because of the unsettled nature of the facts in these 10 causes and the possible existence of similar cases, this Court reserves judgment on the propriety of the orders from which the Wayne County Prosecutor seeks relief. In the framework of the above statement of the law, these causes are remanded to Recorder's Court for hearings before a completely independent circuit judge on the merits of the individual cases. See GCR 1963, 710.7(3). The Recorder's Court administrator is directed to appoint a suitable substitute judge, not a member of the Recorder's Court or Wayne County benches, to conduct appropriate hearings. The appointed circuit judge shall hear these causes as well as any additional actions which involve allegedly improper remittances of forfeited recognizance bonds by Recorder's Court judges. He shall determine in each case if the order of Judges Del Rio or Laster remitting bond was valid under the principles we have stated. In the event an order is declared void, the surety may seek remittance anew, utilizing the proper procedure.

We retain no further jurisdiction.

PEOPLE v PANGBURN

1. CRIMINAL LAW—APPEAL AND ERROR—HABITUAL OFFENDER—PRIOR CONVICTIONS—COLLATERAL ATTACK—RIGHT TO COUNSEL.

As a general rule a defendant who has been convicted of being an habitual offender may not in the appellate review of that conviction have a consideration of the allegation that the prior convictions which are the basis for the habitual offender conviction are constitutionally infirm where the prior convictions have never been appealed in their own right and were first subjected to collateral attack through the appeal of the habitual offender conviction; however, cases involving the issue of the right to counsel are uniquely distinguished by the retroactivity accorded them and a review is mandated where the collateral attack on appeal involves the claim that the defendant was neither properly informed nor clearly waived his right to appointed counsel.

2. CRIMINAL LAW—CONSTITUTIONAL LAW—HABITUAL OFFENDER—PRIOR CONVICTIONS—INVALID CONVICTION—RESENTENCING.

A defendant's conviction as a third felony offender should stand, even though the defendant's conviction on one of the earlier charges was constitutionally invalid, where the defendant still had three felony convictions without regard to the invalid conviction; however, the matter should be remanded for resentencing on the assumption that the court may have considered the invalid conviction in its sentence, and on resentencing, consideration of the invalid conviction should be avoided.

Appeal from Sanilac, Allen E. Keyes, J. Submitted January 5, 1978, at Lansing. (Docket No. 31372.) Decided February 7, 1978.

REFERENCES FOR POINTS IN HEADNOTES

[1] 39 Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 31, 32.

[2] 21 Am Jur 2d, Criminal Law § 585.
39 Am Jur 2d, Habitual Criminals and Subsequent Offenders §§ 9, 30.

Jack F. Pangburn was convicted of being a third felony offender. Defendant appeals. Affirmed, but remanded for resentencing.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *James Marcus,* Prosecuting Attorney, and *Robert W. Barnes,* Assistant Prosecuting Attorney, for the people.

Richard P. Riordan, for defendant on appeal.

Before: V. J. BRENNAN, P. J., and D. E. HOLBROOK and R. B. MARTIN,* JJ.

PER CURIAM. Defendant Jack Frederick Pangburn was tried by a jury on September 16, 1976, pursuant to a supplemental information charging him as a third felony offender, contrary to MCLA 769.11; MSA 28.1083. Defendant was found guilty and sentenced, on October 15, 1976, to a prison term of from 20 to 30 years. Defendant appeals as of right under GCR 1963, 806.1.

Defendant's prosecution as an habitual offender was grounded upon (1) conviction on May 7, 1962, for breaking and entering, contrary to MCLA 750.110; MSA 28.305, (2) conviction on February 4, 1963, for carrying a concealed weapon, contrary to MCLA 750.227; MSA 28.424 and (3) convictions on May 7, 1976, for second-degree criminal sexual conduct, contrary to MCLA 750.520(c)(1)(e); MSA 28.788(3)(1)(e), and larceny from a person, contrary to MCLA 750.357; MSA 28.589. Defendant's two felony convictions in 1976 were jury convictions. Under consideration on the present habitual offender charge, then, were four separate felony convictions. On appeal, defendant alleges one principal claim of error.

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

Defendant contends that the underlying prior guilty plea conviction for carrying a concealed weapon obtained on February 4, 1963, is constitutionally invalid and so was inappropriate to consider in determining the charge against defendant as a third felony offender.

Defendant properly moved at trial to exclude the conviction for carrying a concealed weapon due to the fact that defendant was not properly apprised during those proceedings of his right to appointed counsel. Consequently, the trial court was given adequate opportunity to pass upon defendant's constitutional challenge. *People v Covington,* 70 Mich App 188, 195; 245 NW2d 558 (1976). See also *People v Henry,* 395 Mich 367, 376; 236 NW2d 489 (1975).

Generally, on appeal of an habitual offender prosecution, when defendant argues infirmity in a prior conviction, even an error of constitutional dimension, we have denied review in instances where the allegedly infirm prior conviction has never been properly appealed in its own right but is first subject to collateral attack on review of the presently appealed habitual offender prosecution. *People v Mays,* 77 Mich App 389, 390–391; 258 NW2d 87 (1977), *People v Hendrick,* 52 Mich App 201, 207; 217 NW2d 112 (1974), *aff'd,* 398 Mich 410; 247 NW2d 840 (1976).

However, unlike those cases, the matter before us now involves the claim that defendant was neither properly informed nor clearly waived his right to appointed counsel if indigent. See *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), *Argersinger v Hamlin,* 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972). See also *Burgett v Texas,* 389 US 109; 88 S Ct 258; 19 L Ed 2d 319 (1967), *United States v Tucker,* 404 US 443; 92 S

Ct 589; 30 L Ed 2d 592 (1972), *People v Moore,* 391 Mich 426; 216 NW2d 770 (1974). We find cases involving the right to counsel question as uniquely distinguished by the retroactivity accorded them, which mandates review in this case despite the fact that considerations of collateral attack would normally preclude review. See *United States v Tucker, supra,* at 445–448; *People v Moore, supra,* at 437.

Having determined review necessary and proper in this matter, we find defendant correctly complied with the procedure required at the trial level and on appeal. *People v Moore, supra,* at 440–441. Our review of the court's decision concerning the conviction for carrying a concealed weapon in 1963 convinces us that defendant neither was properly informed of his right to appointed counsel if indigent nor clearly waived the right. However, even with the elimination of this conviction from consideration of defendant's status as an habitual offender, still we find three valid felony convictions upon which the jury could have based their third felony offender verdict. Consequently, we affirm defendant's conviction but remand for resentencing on the assumption the court may have considered the invalid conviction in its sentence. On resentencing, consideration of this conviction should be avoided.

Affirmed but remanded for resentencing.

RADWAY v RADWAY

1. APPEAL AND ERROR—CHILD CUSTODY—STANDARD OF REVIEW—STATUTES.

An order of a circuit court in a child custody dispute shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue (MCLA 722.28; MSA 25.312[8]).

2. PARENT AND CHILD—CHILD CUSTODY—BEST INTEREST OF CHILD—STATUTES.

A court must consider the best interest of the child in making a determination of custody, and only if there is presented clear and convincing evidence that it is in the best interest of the child will a court change a previous custody order (MCLA 722.27[c]; MSA 25.312[7][c]).

3. DIVORCE—REMAND—ALIMONY—CHILD SUPPORT.

A case in which the trial court refused to reduce a defendant's alimony and child support payments must be remanded for clarification where the defendant had apparently been unemployed for a period of time and where there is no record of the defendant's present earnings or of his efforts to secure employment, either at the time of a trial court's earlier order or subsequently.

REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 826, 831.

[2] 42 Am Jur 2d, Infants §§ 42, 43.

[3] 24 Am Jur 2d, Divorce and Separation § 677.

Change in financial conditions or needs of husband or wife as ground for modification of decree for alimony or maintenance. 18 ALR2d 10.

[4] 24 Am Jur 2d, Divorce and Separation § 573.

[5] 24 Am Jur 2d, Divorce and Separation § 571.

Attorneys' Fees: necessity and sufficiency of notice and hearing as to allowance of suit money or counsel fees in divorce or other marital action. 10 ALR3d 280.

[6] 24 Am Jur 2d, Divorce and Separation § 7.

4. DIVORCE—SEPARATION—ATTORNEY FEES—JUDGE'S DISCRETION—ABILITY TO CONTINUE LITIGATION.

An award of attorney fees, costs and expenses in an action for divorce or separation rests in the sound discretion of the trial court; however, attorney fees are not awarded as a matter of right but only if necessary to enable a party to carry on or defend the litigation (MCLA 552.13; MSA 25.93).

5. DIVORCE—SEPARATE MAINTENANCE—ANNULMENT—AFFIRMATION OF MARRIAGE—ATTORNEY FEES—FACTS ALLEGED—COURT RULES.

A party who moves for an award of attorney fees in an action for divorce, separate maintenance, annulment or affirmation of marriage shall allege facts showing that she or he is unable to bear the expense of the action without that aid (GCR 1963, 726.1).

6. EQUITY—ATTORNEY FEES—EQUITABLE PRINCIPLES—SPECIFIC FACTORS.

A trial court's reliance on general equitable principles without articulating any specific factors is insufficient to justify an award of attorney fees.

Appeal from Livingston, Paul R. Mahinske, J. Submitted October 5, 1977, at Lansing. (Docket No. 31170.) Decided February 7, 1978.

Complaint by Brenda C. Radway against Richard M. Radway for divorce. Divorce granted, with alimony, child support and custody of the minor children awarded to plaintiff. Defendant petitioned to reduce his support payments and to obtain custody. The petition was denied and the plaintiff was awarded attorneys fees, costs and expenses. Defendant appealed. Remanded. On remand the court reaffirmed. Defendant appeals. Remanded.

Stiles, Fowler, Dudley & Tuttle, for plaintiff.

Farhat, Burns & Story (by *Norman C. Farhat),* for defendant.

Before: D. C. RILEY, P. J., and J. H. GILLIS and R. M. MAHER, JJ.

PER CURIAM. The parties to the dispute were married in 1963. They have two children. In October, 1969, plaintiff wife filed for divorce. In a consent judgment of divorce granted in November, 1972, plaintiff wife received custody of the two children. Additionally, defendant husband was ordered to pay support of $75 per week as well as alimony of $25 per week.

In January, 1975, defendant, who is a certified public accountant, was fired from or voluntarily left his father's business after a disagreement with his father. Defendant had been earning $30,000 annually but could not find a job after leaving the family business. During this period defendant paid only $50 per week in child support since his unemployment benefits were only $94 per week.

Defendant petitioned, in January, 1975, to reduce his support payments and in August, 1975, he sought to change the custody of the two children. In an April 1, 1976, opinion and in an order dated May 17, 1976, the trial court determined and ordered that custody should remain in the plaintiff. The trial court also found that defendant had an above average ability to earn sufficient income to pay the alimony and child support awarded in the divorce decree.

In a December 2, 1976, opinion the lower court awarded plaintiff $3,141.46 in attorney fees and $1,201.81 in costs and expenses.

Defendant's delayed appeal was granted on February 10, 1977, but further findings were required. The hearing on remand was held on April 1, 1977. In an opinion containing the requested findings of fact, the trial court reaffirmed its previous deci-

sion. Defendant now appeals the December 2, 1976, and the May 17, 1977, orders of the trial court.

The Child Custody Act of 1970, MCLA 722.21 *et seq.;* MSA 25.312(1) *et seq.,* provides the general guidelines for appellate review of custody decisions:

> "[A]ll orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCLA 722.28; MSA 25.312(8).

See, also, *Bahr v Bahr,* 60 Mich App 354; 230 NW2d 430 (1975).

It appears that both parents can support the children financially. The rest of the testimony dealt largely with the relationships between the parents and their children and the conception each child had of each parent. In making the determination of custody, the court must use the best interest of the child standard. Only if there is presented clear and convincing evidence that it is in the best interest of the child, will a court change a previous custody order. MCLA 722.27(c); MSA 25.312(7)(c). Examining the evidence in this case, we cannot say that the trial court committed an abuse of discretion in giving plaintiff-wife custody of the children.

We acknowledge that through an agreement of the parties, the children now reside with the defendant husband. We commend the parties for reaching such an accord on their own without the intrusion of the state into what should ideally be a private matter. Nevertheless, the trial court's decision is legally binding. While the parties may

agree to a settlement *inter se,* they cannot usurp the legal function of this Court. In the instant case, however, we find no cause, at the present time, to interfere with the parties' arrangement.

The other two parts of the trial court's judgment to which defendant objects present us with greater difficulty. The trial court refused to reduce alimony and child support payments after defendant lost his job when his income declined from $30,000 per year to $6,000 per year.

The court deemed defendant had "a sufficient and better than average ability to earn income in sufficient amounts to defray the alimony awarded in the judgment of divorce [and] to pay the child support awarded in the judgment". At the time of the original hearing in this case, April 1, 1976, defendant was apparently employed, but had been unemployed in 1975. We have no information concerning the nature of his employment in April, 1976, when the first opinion was written or in May, 1977, after the trial court held the hearing on remand. We are not apprised of defendant's salary nor of his efforts, if any, to secure different employment both in 1975 and afterwards. Both of these factors are of paramount importance in evaluating defendant's obligation to pay past due alimony and child support.

While the trial court's conclusions of law seem correct, we must know the factual bases for those conclusions in order to adequately review the decision from which defendant appeals. Furthermore, any other factors which may have intervened in the period between the trial court's last decision and the present should be taken into account by the trial court. Such factors may shed light on defendant's ability or inability to pay the arrearage. For clarification of these areas, we must remand the cause to the trial court.

The matter of attorney fees poses another difficulty. In the trial court, plaintiff was awarded attorney fees, costs and expenses. As generally stated, the award of such fees and expenses rests in the sound discretion of the trial court. *Schaffer v Schaffer,* 37 Mich App 711; 195 NW2d 326 (1972), *Schilleman v Schilleman,* 61 Mich App 446; 232 NW2d 737 (1975).

The trial court, however, is not unfettered in its use of discretion. Attorney fees are not awarded as a matter of right but only if necessary to enable a party to carry on or defend the litigation. *Gove v Gove,* 71 Mich App 431; 248 NW2d 573 (1976), *Mixon v Mixon,* 51 Mich App 696; 216 NW2d 625 (1974). See, also, MCLA 552.13; MSA 25.93 which provides in pertinent part:

> "In every action brought, either for a divorce, or for a separation, the court, in its discretion, may require either party to pay alimony for the suitable maintenance of the adverse party, * * * and to pay any sums necessary to enable the adverse party to carry on or defend the action, during its pendency."

The applicable court rule also requires that the party who moves for attorney fees shall allege facts showing that she or he is unable to bear the expense of the action without this aid. GCR 1963, 726.1.

In *Mixon v Mixon, supra,* the Court denied attorney fees to a party who "was in no financial stress". 51 Mich App at 703. There the Court properly considered as a factor those assets the moving spouse gained in the property settlement between the parties.

In *Gove v Gove, supra,* the Court found that the party who had been awarded attorney fees did not require them to proceed with her claim. The

award was not essential to the party's ability to carry on or defend the action. 71 Mich App at 435.

In awarding attorney fees, a court should be ever mindful of the guidelines of *Mixon* and *Gove.* Reliance on general equitable principles without articulating any specific factors is insufficient. *State Farm Mutual Automobile Insurance Co v Allen,* 50 Mich App 71; 212 NW2d 821 (1973). On remand the trial court must weigh the awarding of attorney fees against the backdrop of *Mixon, Gove,* the court rule and the statute. Only if the moving party required the fees to carry on her action, should the court award them to her.

Remanded for proceedings not inconsistent with this opinion. We retain no jurisdiction.

No costs.

PEOPLE v MARVIN WHITE

1. CRIMINAL LAW—ELEMENTS OF CRIME—BURDEN OF PROOF—PROSECUTORS.

   The burden is on the prosecution in a criminal case to prove every element of the crime charged.

2. CRIMINAL LAW—DEFENSES—INSANITY—PRESUMPTIONS—EVIDENCE—BURDEN OF PROOF.

   A defendant in a criminal action is presumed sane but this presumption can be rebutted by offering evidence to the contrary; when this is done, the prosecution has the burden of persuading the trier of fact beyond a reasonable doubt of the defendant's sanity.

3. CRIMINAL LAW—DEFENSES—INSANITY—SPECIAL VERDICTS—BURDEN OF PROOF—GENERAL VERDICTS.

   The not guilty by reason of insanity verdict is not a special verdict which relieves the prosecution of its burden to prove every element of the crime charged beyond a reasonable doubt; as long as the trier of fact is aware that there is an alternative of returning a general verdict of not guilty, there is no constitutional due process problem with returning a special verdict of not guilty by reason of insanity.

4. CONSTITUTIONAL LAW—EQUAL PROTECTION—INSANITY—STATUTES—TESTS.

   The statute providing for a not guilty by reason of insanity verdict is not violative of the constitutional principle of equal protection under law under the substantive-relation-to-the-object test (MCLA 768.29a; MSA 28.1052[1]).

Appeal from Recorder's Court of Detroit, George W. Crockett III, J. Submitted December 14, 1977,

REFERENCES FOR POINTS IN HEADNOTES

[1] 21 Am Jur 2d, Criminal Law § 449.
[2] 21 Am Jur 2d, Criminal Law §§ 45, 50, 52, 70.
[3, 4] 21 Am Jur 2d, Criminal Law § 46.

at Detroit. (Docket No. 77-2548.) Decided February 7, 1978.

Marvin White was found not guilty by reason of insanity of the crime of assault with intent to murder and committed to the Center for Forensic Psychiatry. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Principal Attorney, Appeals, and *Robert J. Sheiko,* Assistant Prosecuting Attorney, for the people.

Carl Ziemba, for defendant on appeal.

Before: N. J. KAUFMAN, P. J., and BRONSON and D. E. HOLBROOK, JJ.

PER CURIAM. Defendant was charged with assault with intent to commit murder, MCLA 750.83; MSA 28.278. Sitting without a jury, the trial court found that defendant was insane at the time of the crime charged and entered a verdict of "not guilty by reason of mental illness", and ordered that defendant be committed to the custody of the Center for Forensic Psychiatry for a period not to exceed 60 days pursuant to the provisions of MCLA 330.2050; MSA 14. 800 (1050). From that finding, defendant appeals by right.

Prior to trial, defendant filed a notice of intention to raise the defense of insanity. His motion for leave to retain the services of a psychiatrist was granted. The psychiatrist testified that defendant was legally insane at the time the crime was committed.

Defendant also filed a motion seeking an order declaring unconstitutional MCLA 768.29a; MSA

28.1052(1), which provides for a verdict of not guilty by reason of insanity. That motion was denied by the trial court. On appeal, defendant renews his challenge to the constitutionality of the statute.

Defendant first contends that the form of the verdict under MCLA 768.29a; MSA 28.1052(1) impliedly casts the burden of proving insanity on him. We cannot agree. In this state, in a criminal case, the burden is on the prosecution to prove every element of the crime charged. *People v Eddington,* 387 Mich 551; 198 NW2d 297 (1972).

The precise issue, about which defendant complains, was settled early in our jurisprudence. In *People v Garbutt,* 17 Mich 9, 23 (1868), the Supreme Court concluded:

> "[The jury] are at liberty to rest upon the presumption of sanity until proof of the contrary condition is given by the defense. *But when any evidence is given which tends to overthrow that presumption,* the jury are to examine, weigh and pass upon it with the understanding that although the initiative in presenting the evidence is taken by the defense, the burden of proof upon this part of the case, as well as upon the other, is upon the prosecution to establish the conditions of guilt." (Emphasis added.)

Accord: *People v Eggleston,* 186 Mich 510; 152 NW 944 (1915), *People v Krugman,* 377 Mich 559; 141 NW2d 33 (1966). This Court has also affirmed the validity of the rule. In *People v Fisk,* 62 Mich App 638, 641; 233 NW2d 684 (1975), this Court held:

> "A defendant is presumptively sane, but this presumption can be rebutted by offering evidence to the contrary; when this is done, the prosecution has the burden of persuading the trier of fact beyond a reasonable doubt of the defendant's sanity."

Thus, as the statute has been construed so as to avoid any impermissible shifting of the burden of proof, it cannot be said to violate due process on that ground.

Defendant next claims that the form of the verdict under the assailed statute is a special verdict, relieving the prosecution of its burden to prove every element of the crime charged beyond a reasonable doubt. Once again, we must disagree. This argument was also raised and rejected very early in this state's judicial history. In *Underwood v People,* 32 Mich 1, 2–3 (1875), the Supreme Court held:

"The finding of the jury is confined to the prisoner's condition at the time of the commission of the alleged criminal act. The indictment or information embraces, and can lawfully embrace, no issue except the prisoner's guilt as charged. The right of trial by jury is secured by constitutional provisions, and it would not be competent to make any substantial changes in its character. As suggested in *People v. Marion,* 29 Mich.R., 31, one of its substantial elements is the right of the jury to give a general verdict on the merits. Any collateral inquiry would be foreign to the issue. And as no insane person is subject to be put on trial, a finding that they had been trying such a person would be somewhat inconsistent with the notion that the trial could have been proper. The statute has avoided this error by confining their attention to the time of the offense; and while it is not competent to prevent an acquittal on a reasonable doubt of insanity, which would require a general verdict of not guilty, yet if the jury agree that the prisoner was insane, and that he would have been guilty if not so, they are undoubtedly at liberty, though they cannot be compelled, to find that fact specially. We cannot hold a special verdict or finding unauthorized, as the common law furnishes abundant precedents to the contrary.—1 Hale P.C., 38."

Thus, as long as the trier of fact can return a

general verdict of "not guilty", there is no constitutional due process problem with returning a special verdict of "not guilty by reason of insanity". See: *People v Woody,* 380 Mich 332; 157 NW2d 201 (1968).[1] Since, in this case, the trial court's findings of fact indicate that it was aware that it was not required to return a special verdict of not guilty by reason of insanity, but could have found defendant not guilty had the facts so warranted, we find no due process violation.

Finally, defendant argues that the "not guilty by reason of insanity" verdict deprives a defendant, who raises the defense of insanity, of equal protection of the law, since the verdict form does not pertain to any other type of defense which an accused may raise. We again disagree.

Employing the substantive-relation-to-the-object test enunciated in *Manistee Bank & Trust Company v McGowan,* 394 Mich 655; 232 NW2d 636 (1975), we believe that MCLA 768.29a; MSA 28.1052(1) is not violative of the principle of equal protection under law. The statute is merely a recognition of two basic principles. First, an insane person ought not be convicted of a crime when the person lacked the competency to form the intent to commit it. Second, where that person nevertheless poses a danger to others, protection should be afforded. By allowing a "not guilty by reason of insanity" verdict, the statute effectuates both principles.

The statute has thus survived all constitutional challenges posed by this appeal, and we affirm.

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[1] Note should also be taken of the myriad cases from this Court which reverse or remand because the jury was precluded from bringing in a not guilty verdict. *See e.g. People v Stockwell,* 52 Mich App 394; 217 NW2d 413 (1974), *People v Way,* 22 Mich App 473; 177 NW2d 729 (1970), *People v Deneweth,* 14 Mich App 604; 165 NW2d 910 (1968), *lv den* 381 Mich 810 (1969).

PEOPLE v KAIGLER

1. CRIMINAL LAW—MOTION FOR NEW TRIAL—FAILURE TO PRODUCE WITNESS—EVIDENTIARY HEARING.

   A defendant who desires reversal of his conviction or a new trial because of failure to produce a witness must, before filing his brief on appeal, move in the trial court for a new trial and should request an evidentiary hearing at which the prosecutor shall produce the witness or explain why he cannot produce the witness; the witness shall be examined regarding his knowledge of the crime and if a new trial is denied, the judge shall state the reasons.

2. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—PRODUCTION OF WITNESSES—STATUTES.

   A prosecutor has a duty to indorse and produce all res gestae witnesses; all witnesses whose names are indorsed on the information must be produced at trial unless production is excused by the trial court or is waived by the defense (MCLA 767.40; MSA 28.980).

3. WITNESSES—CRIMINAL LAW—PRODUCTION OF WITNESSES—JUDGE'S DISCRETION—CUMULATIVE TESTIMONY.

   A trial judge's decision to excuse production of a res gestae witness will not be reversed unless that decision represents an abuse of the judge's discretion; a trial judge did not abuse his discretion by excusing the producing of a former police officer who had taken the original report from the complaining witness where the former officer's testimony would have merely

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REFERENCES FOR POINTS IN HEADNOTES

[1] 75 Am Jur 2d, Trial § 65.
[2] 41 Am Jur 2d, Indictments and Informations § 60.
81 Am Jur 2d, Witnesses § 2.
[3] 75 Am Jur 2d, Trial § 65.
[4] 41 Am Jur 2d, Indictments and Informations, §§ 55, 56, 60, 153–157.
[5] 81 Am Jur 2d, Witnesses § 74.
[6] 81 Am Jur 2d, Witnesses §§ 75, 76.
[7] 75 Am Jur 2d, Trial § 131.
76 Am Jur 2d, Trial § 1075.

duplicated that of his partner, who did testify regarding the taking of the report, and by excusing another officer who was one of two officers who verified that a vehicle found at the scene of the crime was stolen, where that officer's partner also testified.

4. WITNESSES—CRIMINAL LAW—ACCOMPLICES—RES GESTAE WITNESSES—INDORSEMENT OF WITNESSES.

A prosecutor has no duty to indorse and produce a defendant's accomplice, even though the accomplice might otherwise be considered a res gestae witness.

5. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—POLICE OFFICERS—JUDGE'S DISCRETION—CUMULATIVE TESTIMONY.

A police officer who, after a defendant was arrested, arrived at the scene in order to drive away a stolen vehicle, was not a res gestae witness, and a trial court did not abuse its discretion by refusing to require the indorsement and production of the officer where the officer was not indorsed and where the officer's partner did testify and any further testimony would have been cumulative.

6. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES.

A trial court properly ruled that an individual was not a res gestae witness where that individual resided in a house adjacent to a defendant, the police knocked at his door and talked with him after they had arrested the defendant, and where he stated that he did not know the defendant or the defendant's companion, that he did not own either of the two automobiles that the defendant was working on and that he had not witnessed any of the preceding events.

7. CRIMINAL LAW—NEW TRIAL—JUDGE'S DISCRETION—ABUSE OF DISCRETION.

Rulings on a motion for a new trial are within the discretion of the trial court, and a denial of a new trial was not an abuse of discretion where the defendant claimed that he was entitled to a new trial because a juror had spoken to a spectator regarding the status of the jury's deliberations and the defendant's allegation was without supporting affidavits.

Appeal from Recorder's Court of Detroit, Joseph E. Maher, J. Submitted January 9, 1978, at Detroit. (Docket No. 30215.) Decided February 8, 1978.

Dennis M. Kaigler was convicted of receiving and concealing stolen property in excess of $100. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Principal Attorney, Appeals, and *Richard A. Neaton,* Assistant Prosecuting Attorney, for the people.

Barry E. Solomon, for defendant on appeal.

Before: ALLEN, P. J., and D. E. HOLBROOK, JR. and M. J. KELLY, JJ.

PER CURIAM. A Detroit Recorder's Court jury convicted the defendant of receiving and concealing stolen property in excess of $100. MCLA 750.535; MSA 28.803. The verdict was returned on July 2, 1976. Defendant was later sentenced to 40 months to 5 years in prison. His motion for a new trial was denied, and he appeals as of right.

The defendant's principal arguments on appeal concern the prosecution's failure to produce five witnesses. Two of the witnesses were endorsed on the information but were later stricken on the prosecutor's motion and argument that their testimony would be merely cumulative. The other three witnesses were neither endorsed nor produced. The defendant contends that they were res gestae witnesses and thus should have been endorsed and produced by the prosecution, pursuant to MCLA 767.40; MSA 28.980.

Although defendant did move for a new trial, based partly on the prosecution's failure to produce some of these five witnesses, he failed to request an evidentiary hearing which would have provided a complete record for review on appeal.

This procedure is required by *People v Robinson,* 390 Mich 629, 634; 213 NW2d 106 (1973).

> "In appeals filed after this opinion is published, a defendant desiring reversal or a new trial because of a failure to produce an unindorsed or an indorsed witness shall, before filing his brief on appeal, move the trial court for a new trial. The prosecutor shall produce or explain why he cannot produce the witness or, as the case may be, why he did not indorse and produce him at the trial. If the witness is produced at the hearing, he shall be examined regarding his knowledge of the crime. If a new trial be denied, the judge shall state his reasons."

As noted, no post-trial hearing was held. However, the defendant did move for a new trial. And we believe that the trial record itself provides a sufficient basis for reviewing the claims of error. We shall examine the arguments concerning each of the five witnesses separately, beginning with the two whose names were endorsed on the information.

Mark Schoof was one of two police officers who took the original theft report from the complaining witness. He did not witness the theft. Nor did he witness any of the events which led to the receiving and concealing stolen property charge. At the time of trial, Schoof had resigned from the Detroit police force and was living in Nevada. His partner, William Reid, did testify at trial about taking the original theft report. The prosecutor asked the trial judge to excuse production of Schoof on the grounds that his testimony would be merely cumulative in light of Reid's testimony. The trial judge granted the motion.

The prosecutor has a duty to endorse and produce all res gestae witnesses. MCLA 767.40; MSA 28.980; *People v Harrison,* 44 Mich App 578; 205

NW2d 900 (1973). *All* witnesses whose names are endorsed on the information must be produced at trial by the prosecutor unless production is excused by the trial judge or waived by the defense. *People v Connor,* 295 Mich 1; 294 NW 74 (1940).

Production may properly be excused if the endorsed witness's testimony would be merely cumulative. *People v Mays,* 64 Mich App 453; 236 NW2d 513 (1975). A trial judge's decision to excuse production of a witness will not be reversed unless that decision represents an abuse of the judge's discretion in such matters. *People v Bersine,* 48 Mich App 295; 210 NW2d 501 (1973).

We find no abuse of discretion in the judge's decision to excuse production of witness Schoof. From all indications, his testimony would merely have duplicated Reid's testimony. Further, the testimony itself was inconsequential in this case. There was no error.

The second witness who was endorsed but not produced was a Sergeant Ruhlig. He was one of two officers who proceeded to the scene after the defendant's arrest and verified that the car found at the scene was a stolen vehicle. This was done by examining the hidden vehicle identification number on the car. Ruhlig's partner, Officer Clayton, did testify at trial. The judge granted the prosecutor's motion to excuse Ruhlig's production on the grounds that his testimony would be cumulative. We agree and find no abuse of discretion. *People v Bersine, supra.*

The remaining three witnesses were not endorsed on the information. Defendant contends that they were res gestae witnesses and should have been endorsed and produced.

The first of these individuals was one Rahman Shah. Shah was arrested with the defendant at the

scene and later pled guilty to a similar charge. The prosecutor has no duty to endorse and produce a defendant's accomplice, even though the accomplice might otherwise be considered a res gestae witness. *People v Phillips,* 61 Mich App 138; 232 NW2d 333 (1975). The trial judge did not abuse his discretion by refusing to require Shah's production at trial. *People v Bersine, supra.*

The defense also sought endorsement and production of Officer Lattimer who, along with his partner Officer Atkinson, arrived at the scene following the defendant's arrest in order to drive away the stolen vehicle. In our opinion, Officer Lattimer was not a res gestae witness. In any event, Officer Atkinson testified at trial and it is apparent that Lattimer's testimony would have been cumulative. The trial judge did not abuse his discretion by refusing to require the production of Officer Lattimer. *People v Bersine, supra.*

Finally, defendant contends that the prosecution should have endorsed and produced at trial one Ronald Geyder.[1] Following the defendant's arrest, the arresting officers knocked at the door of an adjacent house. An individual who identified himself as Ronald Geyder appeared at the door. He looked as though he had just been awakened and, in response to the officers' questions, stated that he did not know the defendant or Shah and that he did not own any of the cars on which the defendant and Shah had been working.

At trial and on appeal, defendant argued that Geyder was a res gestae witness who should have been produced at the trial by the prosecution. The trial judge ruled that he was not a res gestae

[1] There is considerable uncertainty as to the correct spelling of this individual's name. With no indication as to which spelling is correct, we have arbitrarily chosen one of the several alternatives.

witness. We recognize that the definition of a res gestae witness is unsettled. See, *e.g., People v Harrison, supra.* However, based upon the testimony presented to the trial judge, we can find no abuse of discretion in his ruling that Geyder was not a res gestae witness. There are hints in the record that Ronald Geyder may not have been the individual's correct name. Further, it does seem strange that the defendant and Shah would have chosen Geyder's driveway in which to work on two or more stolen cars unless they knew the occupant of the adjacent house. However, Geyder's statement was that he did not own any of the cars, did not know the defendant or Shah, and had not witnessed any of the preceding events. Based on that testimony, the trial judge was justified in ruling that Geyder was not a res gestae witness.

In his motion for a new trial, the defendant alleged that one of the jurors had engaged in an improper conversation with a spectator during a trial recess. This allegation was purportedly supported by an affidavit attached to the new trial motion. However, our examination of the lower court file discloses no such affidavit. The prosecutor states that he has also been unable to find the affidavit. The mystery continues on appeal because defendant's appellate brief states that a copy of the affidavit is attached to the brief. However, examination of the briefs forwarded to this panel again discloses no such affidavit. Those failures alone are sufficient to reject the defendant's argument on appeal. But, assuming *arguendo* that a proper affidavit was presented to the trial judge, we nonetheless find no reversible error. Rulings on a motion for a new trial are entrusted to the discretion of the trial court. *People v Louis Williams,* 77 Mich App 119; 258 NW2d 68 (1977). As

alleged in the motion for a new trial, a juror reportedly stated that the jury was "hung up", that the juror was about to leave on a holiday, and that the jury would conclude its deliberations that afternoon. Without more (in fact there was less since it appears that no affidavit was submitted) the trial judge did not abuse his discretion by denying the motion for a new trial. Similarly, we find no error on appeal.

The conviction and sentence are affirmed.

PEOPLE v ROBERT G. THOMPSON

OPINION OF THE COURT

1. HOMICIDE—FIRST-DEGREE MURDER—FELONY MURDER—MALICE—INFERENCE OF MALICE—UNDERLYING FELONY—JURY QUESTION—INSTRUCTION TO JURY—APPEAL AND ERROR.

The presence or absence of malice in each first-degree murder case remains a question for jury determination, although malice may be inferred from the nature of an underlying felony in a felony-murder case and the circumstances surrounding the commission of the felony; therefore, a defendant's conviction of first-degree murder under a felony-murder theory should be reversed, and the matter remanded, where a trial judge, in his instructions to the jury, removed the essential element of malice from the jury's consideration.

2. HOMICIDE—FIRST-DEGREE MURDER—FELONY MURDER—UNDERLYING FELONY—PROSECUTOR'S OPTION.

A prosecutor may choose on remand after a defendant's conviction for felony murder has been reversed, where the defendant was convicted of both first-degree murder, under a felony-murder theory, and armed robbery, the underlying felony, either to have the defendant's armed robbery conviction and sentence stand or to have it vacated and retry the defendant on armed robbery and first-degree murder charges.

DISSENT BY M. J. KELLY, J.

3. HOMICIDE—FELONY MURDER—UNDERLYING FELONY—ARMED ROBBERY—CRIMINAL LAW—CONSTITUTIONAL LAW—DOUBLE JEOPARDY.

Punishing a defendant for the greater offense of first-degree

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REFERENCES FOR POINTS IN HEADNOTES

[1] 40 Am Jur 2d, Homicide §§ 247, 498–500.
[2] 40 Am Jur 2d, Homicide § 190.
[3] 40 Am Jur 2d, Homicide § 194.
[4] 40 Am Jur 2d, Homicide § 500.
[5] 40 Am Jur 2d, Homicide § 525.
[6] 75 Am Jur 2d, Trial §§ 91, 92.

felony murder and for the included offense of the underlying felony constitutes a violation of the double jeopardy clauses of the United States Constitution and the Michigan Constitution; therefore, a defendant's conviction for armed robbery should be reversed where the armed robbery was the felony upon which the jury based the defendant's conviction for felony murder (US Const, Am V, Am XIV, Const 1963, art 1, § 15).

4. HOMICIDE—FELONY MURDER—INSTRUCTIONS TO JURY—MALICE—UNDERLYING FELONY—PRESERVING ISSUE—MANIFEST INJUSTICE.

Failure of a defendant at his trial on a felony-murder charge to object to a trial judge's failure to instruct the jury on the elements of malice, and, in effect, letting the jury imply malice from the underlying felony to the killing precludes the Court of Appeals from reviewing the issue because there is no manifest injustice; whether the instruction uses the word murder or killing in connection with an underlying felony, an omission to instruct on malice should not be reversible error unless properly preserved for review by objection or by the trial court's refusal to give a properly requested instruction.

5. HOMICIDE—FELONY MURDER—COMMON-LAW FELONY MURDER—INSTRUCTIONS TO JURY—MALICE—UNDERLYING FELONY—STATUTES.

The common-law felony-murder rule does not require the giving of an instruction to the jury on malice because malice is imputed from a killing which takes place during the perpetration of or attempt to perpetrate one of the enumerated felonies (MCLA 750.316; MSA 28.548).

6. CRIMINAL LAW—INSTRUCTIONS TO JURY—ALLEN CHARGE.

A charge to the jury which instructs them that they must examine the question submitted to them with candor and with a proper regard and deference to the opinions of each other, and that the verdict must be that of each juror, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, and then urges them to reach a verdict if they can conscientiously do so, the so-called *Allen* charge, is not per se coercive; any claim of coercion must be determined on a case-by-case basis.

Appeal from Saginaw, Eugene Snow Huff, J. Submitted October 4, 1977, at Grand Rapids. (Docket No. 26215.) Decided February 22, 1978. Limited leave to appeal granted, 402 Mich 938.

Robert G. Thompson was convicted of armed robbery and first-degree murder. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert L. Kaczmarek,* Prosecuting Attorney, and *Peter C. Jensen,* Assistant Prosecuting Attorney, for the people.

Daniel J. Wright, Assistant State Appellate Defender, for defendant on appeal.

Before: M. F. CAVANAGH, P. J., and BRONSON and M. J. KELLY, JJ.

M. F. CAVANAGH, P. J. For the reasons stated in *People v Fountain,* 71 Mich App 491; 248 NW2d 589 (1976), in *People v Wright,* 80 Mich App 172; 262 NW2d 917 (1977), and in Judge RILEY's dissent in *People v Till,* 80 Mich App 16; 263 NW2d 586 (1977), we disagree with our brother's conclusion that reversible error did not result from the trial court's failure to instruct the jury on the element of malice in the felony-murder charge. We join, however, in his disposition of the other issues raised.

For this reason, we would reverse the first-degree murder conviction and remand to the trial court. Upon remand, as we find no error relating to the armed robbery conviction, we would allow the prosecutor to choose either to have the armed robbery conviction and sentence stand or to have it vacated and to retry the defendant on armed robbery and first-degree murder.

BRONSON, J., concurred.

M. J. KELLY, J. *(dissenting).* On August 18, 1975,

defendant was convicted by a Saginaw County Circuit Court jury of armed robbery, MCLA 750.529; MSA 28.797, and first-degree murder, MCLA 750.316; MSA 28.548. He was sentenced to two concurrent terms of life imprisonment on September 17, 1975. He appeals as of right. Three issues merit discussion.

First of all, the parties agree that the conviction and sentence for armed robbery, the lesser charge, should be vacated. I would so order. This Court held in *People v Anderson,* 62 Mich App 475, 482; 233 NW2d 620 (1975):

> "To punish defendant both for the greater offense, that is, first-degree (felony) murder, and for the included offense, which would be in this case armed robbery, would constitute double punishment in violation of the double jeopardy clauses of the United States Constitution and the Michigan Constitution."

Since the murder took place during the perpetration of the armed robbery, the armed robbery conviction must be reversed. See also *People v Stewart (On Rehearing),* 400 Mich 540, 549–550; 256 NW2d 31 (1977), *People v Martin,* 398 Mich 303, 309–310; 247 NW2d 303 (1976), *People v Longuemire,* 77 Mich App 17, 24; 257 NW2d 273 (1977), *People v Goodchild,* 68 Mich App 226, 236–237; 242 NW2d 465 (1976), *lv den,* 397 Mich 830 (1976).

Defendant next argues that the trial court committed reversible error by failing to instruct the jury on the element of malice, and, in effect, letting the jury imply malice from the underlying armed robbery to the killing. Defendant did not object. I would hold that the failure to object precludes this Court from reviewing the issue because there is no manifest injustice. *People v*

Dorrikas, 354 Mich 303, 316; 92 NW2d 305 (1958). I say that with full knowledge that there is abundant authority to the contrary. In *People v Fountain,* 71 Mich App 491; 248 NW2d 589 (1976), the Court implied that the issue need not be preserved for review by timely objection because it withdrew an essential element from jury consideration, namely, malice. There is now a split of authority in this Court as to the existence and the perimeters of the common law felony-murder doctrine in Michigan. Whatever the rule is determined to be by the Supreme Court in future precedent, I have little hesitation in saying what the rule ought to be. The rule ought to be that whether the instruction uses the word murder or killing in connection with the underlying felony, an omission to instruct on malice will not be reversible error unless properly preserved for review by objection or by the trial court's refusal to give a properly requested instruction.

The right to a trial by jury allows a defendant a common sense buffer between the complicated legalistic language of the law and the conscience of the community. Much of the debate between varying legalistic points of view is lost on a jury of laymen. Where legislatures and courts disagree, why do we posit reversible error on a surmise that a jury has been misled? It is possible for the layman to use murder and killing interchangeably even if incorrectly. It is conceivable that a Legislature could do likewise.

Our Court has recently issued conflicting opinions on this issue. *People v Till,* 80 Mich App 16; 263 NW2d 586 (1977), *People v Wright,* 80 Mich App 172; 262 NW2d 917 (1977). I would follow the *Till* Court in finding the existence of common law felony-murder in this state. The *Till* majority

found that such a common law felony-murder rule does not require the giving of an instruction on malice to the jury because malice is supplied (imputed) from a killing which takes place during the perpetration of or attempt to perpetrate one of the enumerated dangerous felonies. See *People v Allensworth,* 401 Mich 67, 75; 257 NW2d 81 (1977) (COLEMAN, J., dissenting). But see *People v Wright, supra, People v Fountain, supra, People v Terry Burton,* 74 Mich App 215, 226; 253 NW2d 710 (1977). The *Fountain* Court defined malice in accordance with the Michigan Proposed Criminal Jury Instructions, 16:3:01.[1] But malice is a state of mind and does not a jury which convicts for killing which takes place in the course of arson, robbery, rape, burglary, or kidnapping find a "life endangering state of mind"[2] on the part of the felon inherently inseparable from the killing? The very least we can say is that the law is not clear as the split between panels on our Court indicates. That being the case, trial judges, prosecuting attorneys and defense attorneys should not be held to a degree of sagacity superior to ours, and reversible error should not be predicated on failure to give an unrequested instruction.

The third issue raised by defendant alleges that the trial court's *Allen*[3] charge constitutes reversible error. Defendant did not object to the charges given.

The trial judge's *Allen* charge does not necessar-

[1] "Malice means the defendant intended to kill or that he knowingly created a very high risk of death with knowledge that it probably would result in death, and that he did so under circumstances which did not justify, excuse, or lessen the crime."

[2] *See* Perkins on Criminal Law (2d ed), p 46 (1969), for such a definition of malice. *See also People v Morrin,* 31 Mich App 301, 322, n 28; 187 NW2d 434 (1971), *lv den,* 385 Mich 775 (1971).

[3] *Allen v United States,* 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

ily mandate reversal, and must be reviewed on a case by case basis. *People v Sullivan,* 392 Mich 324, 332; 220 NW2d 441 (1974).

The record indicates that the trial court appeared willing to dismiss the jury, but defense counsel apparently wanted to have the jury continue deliberations. Furthermore, the jury deliberated for four hours after the *Allen* instruction before it returned a verdict of guilty. There was no objection and there does not appear to be a clear abuse of discretion by the trial court resulting in manifest injustice. I, therefore, find no reversible error in the charge. GCR 1963, 516.2. See *People v Newby,* 66 Mich App 400, 404; 239 NW2d 387 (1976), *lv den,* 397 Mich 867 (1976), *People v Tooks,* 55 Mich App 537, 540; 223 NW2d 63 (1974).

Defendant's other issues are without merit and do not require discussion.

I would affirm.

WILLIAMS & WORKS, INC. v SPRINGFIELD CORPORATION

1. MECHANICS' LIENS—NOTICE—INTENT TO CLAIM LIEN—DEALING WITH OWNER—STATUTES.

   Notice of intent to claim a mechanics' lien is not required where the lien claimant deals directly with the owner of the property subject to the lien; to permit an owner who has actual notice of a claim to defeat a lien on the basis that he did not receive statutory notice would be inconsistent with the purpose of the mechanics' lien act (MCLA 570.1 *et seq.;* MSA 26.281 *et seq.).*

2. MECHANICS' LIENS—LIBERAL CONSTRUCTION—ATTACHMENT OF LIEN—STATUTES.

   The mechanics' lien act is to be construed liberally as to the determination of whether a lien has attached (MCLA 570.1 *et seq.;* MSA 26.281 *et seq.).*

3. MECHANICS' LIENS—NOTICE—DEALING WITH OWNER—STATUTES.

   Mechanics' lienors dealt directly with the owner of the property subject to foreclosure and were thereby exempt from the requirement of serving upon the owner their statements of account and lien within 90 days of completing their work where the property was owned by a copartnership whose sole partners were an individual and a corporation wholly owned by that individual, and where all of the lienors' dealings were with that individual (MCLA 570.6; MSA 26.286).

4. MECHANICS' LIENS—SUBCONTRACTORS—OWNERS—STATUTES.

   Parties claiming mechanics' liens were subcontractors, not origi-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur 2d, Mechanics' Liens § 171.
[2] 53 Am Jur 2d, Mechanics' Liens § 23.
[3] 53 Am Jur 2d, Mechanics' Liens § 66.
[4] 53 Am Jur 2d, Mechanics' Liens § 67.
[5] 53 Am Jur 2d, Mechanics' Liens §§ 291, 400.
[6] 53 Am Jur 2d, Mechanics' Liens § 281.
[7] 16 Am Jur 2d, Constitutional Law §§ 119, 120.
[8] 53 Am Jur 2d, Mechanics' Liens § 26.
[9] 53 Am Jur 2d, Mechanics' Liens § 179.
[10] 53 Am Jur 2d, Mechanics' Liens §§ 11, 14.

nal contractors, for purposes of the mechanics' lien statute where a part owner of the property was also the general contractor on the construction project (MCLA 570.1 *et seq.;* MSA 26.281 *et seq.).*

5. MECHANICS' LIENS—EVIDENCE—PAROL EVIDENCE—WAIVER OF CLAIM—INTENT OF PARTIES.

Parol evidence was properly admitted to determine the intent of the parties where the waivers of claim of mechanics' lien executed by subcontractors were ambiguous.

6. MECHANICS' LIENS—PRIORITY—COMMENCEMENT OF BUILDING—ACTUAL CONSTRUCTION —STATUTES.

A mechanics' lien has priority over all encumbrances recorded subsequent to the commencement of building; "commencement" does not mean actual construction, but includes engineering services prior to actual construction (MCLA 570.1, 570.9; MSA 26.281, 26.289).

7. MECHANICS' LIENS—CONSTITUTIONAL LAW—STANDING—OWNERS—MORTGAGEES.

The owner of real estate subject to a mechanics' lien has standing to raise the issue of the constitutionality of the mechanics' lien statute; a mortgagee of the real estate does not.

8. MECHANICS' LIENS—STATE ACTION.

The placement of mechanics' liens upon property involves state action because mechanics' liens are created, regulated and enforced by the state.

9. MECHANICS' LIENS—POSSESSION OF PREMISES—RIGHT OF ALIENATION—DEPRIVATION OF PROPERTY INTEREST.

A mechanics' lien, although it clouds title, does not disturb possession or right of alienation until after a foreclosure action; in effect, a lien is merely notice to others of the existence of a potential foreclosure action, and the filing of a mechanics' lien does not constitute a significant deprivation of a property interest.

10. MECHANICS' LIENS—CONSTITUTIONAL LAW—DUE PROCESS—NOTICE OF LIENS.

Due process of law is a flexible concept not requiring any particular procedural requisites, and the mechanics' lien statute is not rendered unconstitutional for failure to provide for notice prior to filing of a lien or for a hearing prior to or immediately after filing of a lien.

Appeal from Genesee, Philip C. Elliott, J. Submitted December 8, 1977, at Lansing. (Docket Nos. 26617, 26618, 26619, 26625, 26626, 26628.) Decided February 22, 1978. Leave to appeal applied for.

Complaint by Williams & Works, Inc., against Springfield Corporation for foreclosure of a mechanics' lien, joining as defendants all parties with recorded interests in the property. Judgments of foreclosure were entered in favor of plaintiff and several other mechanics' lienors, and the mechanics' liens were held to be superior to a mortgage held by defendant Kelly Mortgage and Investment Company. Kelly Mortgage and Investment Company and Bristol Square Properties Group, the successor in title to Springfield Corporation, appeal. Affirmed.

Russell, Ward, Hodgkins & Heaney, for defendant Kelly Mortgage and Investment Company.

Smith, Miro, Hirsch, Brody & Zweig, (by *Martin C. Weisman),* for defendant Bristol Square Properties Group.

Brownell, Andrews, Philpott & Piper, for defendants Garno Brothers Heating and Cooling, Inc., PPG Industries, Inc., and Shank, Coupland & Long Company.

Before: R. B. BURNS, P. J., and ALLEN and R. M. MAHER, JJ.

R. B. BURNS, P. J. The trial court entered judgments of foreclosure against the owner of an apartment project, appellant Bristol Square Properties Group, in favor of mechanics' lienors and appellees Shank, Coupland & Long Co., PPG Industries, Inc., and Garno Brothers Heating and

Cooling, Inc., with priority over the mortgage held by appellant Kelly Mortgage and Investment Company. It is argued on appeal that appellees did not comply with the procedural requirements of the mechanics' lien act, MCLA 570.1 *et seq.;* MSA 26.281 *et seq.;* that they waived whatever liens they had; that the liens are not entitled to priority; that the act is unconstitutional; and that the award of attorneys fees was excessive. We affirm.

The property which is the subject of foreclosure underwent several changes of ownership during construction of the apartment complex. It was originally owned by Kelly Mortgage and Investment Company with LAW Development Co., Inc., with Springfield Corporation as an optionee. Springfield is a close corporation wholly owned by its president, Robert L. Foote, and was at all times the general contractor on the project. Springfield subcontracted engineering work to Williams & Works, Inc., which did the first work on the project in June, 1972. On January 4, 1973, Kelly Mortgage and LAW conveyed the property to Springfield, which in turn executed mortgages to City National Bank and Kelly Mortgage. City National Bank subsequently conveyed its mortgage to Kelly Mortgage. On December 27, 1973, Springfield conveyed the property to Bristol Square Properties Group, a limited copartnership in which Mr. Foote and Springfield Corporation are the sole general partners. Appellees are subcontractors who began supplying labor or materials while the project was owned by Springfield Corporation, and completed their work after Springfield conveyed to Bristol Square Properties Group. At all times they dealt with Mr. Foote. Williams & Works, Inc., brought suit to foreclose its mechanics' lien, joining as defendants all persons with recorded interests in

the property. See MCLA 570.10; MSA 26.290. The validity of the mechanics' lien of Williams & Works, Inc., is not before this Court.

Most of the issues raised on appeal concern the alleged failure of appellees to comply with the procedural requirements of obtaining a mechanics' lien. Appellees argue that the requirements were inapplicable or substantially complied with.

Appellants first argue that Garno Brothers Heating and Cooling, Inc. and PPG Industries, Inc. failed to provide Bristol Square Properties Group with written notice of their intent to claim liens within 90 days of first furnishing labor or materials. MCLA 570.1; MSA 26.281. However, the owner of the property at the time both appellees first started work or supplied materials was Springfield Corporation. Notice is not required where the lien claimants deal directly with the owner. *Wallich Lumber Co v Golds,* 375 Mich 323, 328–329; 134 NW2d 722 (1965), *Mielis v Everts,* 264 Mich 363, 364; 249 NW 875, 876 (1933), *J Altman Companies, Inc v Saginaw Plumbing & Heating Supply Co,* 42 Mich App 747, 753–754; 202 NW2d 707, 711 (1972). In *Burton Drywall, Inc v Kaufman,* 69 Mich App 85; 244 NW2d 367 (1976), *lv granted,* 399 Mich 875 (1977), a panel of this Court declined to follow the above cases, reasoning that *Mielis* was wrongly decided. Your author dissented because we are bound to follow Supreme Court precedent. In *P H I Construction Co v Riverview Commons Associates,* 80 Mich App 518; 264 NW2d 50 (1978), another panel declined to follow *Burton Drywall,* also explaining that it was bound by Supreme Court precedent, and observing that it would be inconsistent with the purpose of the act to permit an owner who has actual notice of the claim to defeat a lien on the basis that he did not receive statu-

tory notice. The decision of the Supreme Court in *Spartan Asphalt Paving Co v Grand Ledge Mobile Home Park,* 400 Mich 184; 253 NW2d 646 (1977), that the act is to be construed liberally as to the determination of whether a lien has attached strengthens the *PHI Construction Co* analysis, since a basic premise of the *Burton Drywall* decision was that the act must be construed strictly until the lien has attached. We therefore follow *Mielis* and *Wallich* and hold that notice of intent to claim a lien was unnecessary. The fact that ownership of the property changed within the 90-day period within which PPG Industries, Inc., was to provide notice cannot be the basis for defeating the lien, particularly where both of the general partners in Bristol Square Properties Group were themselves dealing directly with appellee. See *Williams & Works, Inc v Springfield Corp,* 76 Mich App 541, 549; 257 NW2d 160, 164 (1977).

All of the appellees filed their statements of account and lien within 90 days of completing their work. MCLA 570.5; MSA 26.285. However, appellants argue that all appellees failed to properly serve the statements upon the owner, Bristol Square Properties Group. MCLA 570.6; MSA 26.286. The service statute specifically exempts those persons dealing directly with the owner or part owner of the premises. MCLA 570.6; MSA 26.286. Since appellees were dealing directly with Mr. Foote, they were as a practical matter dealing directly also with Springfield Corporation and Bristol Square Properties Group. To fail to hold that appellees were dealing directly with the owner, Bristol Square Properties Group, or the part owners, Mr. Foote and Springfield Corporation, would be to elevate form over substance so as

to defeat the purpose of the statute. MCLA 570.27; MSA 26.307; *Williams & Works, Inc v Springfield Corp, supra.*

Appellants next argue that if Springfield Corporation and Bristol Square Properties Group are to be treated as the same entity for the purpose of notice, then Springfield Corporation should be treated as the owner under MCLA 570.4; MSA 26.284. This statute provides that an original contractor who desires to draw money from an owner must give the owner a statement under oath listing his subcontractors and the amounts due them. It is appellants' theory that, if Springfield Corporation is treated as the owner, then appellees are original contractors. This however ignores the fact that Springfield Corporation was wearing two hats throughout much of the construction, as owner and general contractor. Appellees were subcontractors of Springfield Corporation, general contractor. As such they were not original contractors and MCLA 570.4; MSA 26.284 is inapplicable.

During the course of construction Shank, Coupland & Long Co. and Garno Brothers Heating and Cooling, Inc., executed waiver forms supplied by Burton Abstract & Title Company, disbursement agent for Kelly Mortgage and Investment Company, whenever they received partial payment. These forms provided that appellees waived any claims of lien which they "now have or may have hereafter * * * ".

"Before one entitled to a lien under the statute should be declared to have waived it, it ought clearly and unequivocally to appear that he has expressly waived it." *Saginaw Lumber Co v Wilkinson,* 266 Mich 661, 665; 254 NW 240, 242 (1934), see *Williams & Works, Inc v Springfield Corp, supra.*

The waiver form was ambiguous,[1] and parol evidence was properly admitted to determine the intent of the parties. See, *e.g., In re Landwehr's Estate,* 286 Mich 698, 703; 282 NW 873, 875 (1938). The trial court's determination that the parties understood the payment and waiver procedure to waive any right to a lien only on work already completed is amply supported by the record. GCR 1963, 517.1. These liens were not waived.

It is next argued that the mortgages held by Kelly Mortgage and Investment Company have priority over the mechanics' liens held by appellees. MCLA 570.9; MSA 26.289 provides that mechanics' liens have priority over all encumbrances recorded subsequent to the "commencement" of building. Appellants argue that "commencement" means actual construction, and actual construction did not start until after Kelly Mortgage and City National Bank had recorded their mortgages. We cannot accept appellants' interpretation. Included within the act are engineering services. MCLA 570.1; MSA 26.281. Unless "commencement" means when engineering services are first performed, engineering firms will not be protected and receive all of the benefits of the act. The act must be liberally construed to carry out its intended purpose of benefiting subcontractors. MCLA 570.27; MSA 26.307; *Spartan Asphalt Paving Co v Grand Ledge Mobile Home Park,* 400 Mich at 188; 253 NW2d at 649. See *Bankers Trust*

[1] At the time at which each claimant signed waivers, it could be said that the claimant already had a right of lien for the work done, or it could be said the lien claimant had no right to a lien until he thereafter complied with the procedural requirements of the act. Under the former view, the right of lien which the claimant "may have hereafter" would refer to a lien for work subsequently done, whereas under the latter view, it would refer to a lien for work already done but for which the procedural requirements had not been met.

Co v El Paso Pre-Cast Co, — Colo —; 560 P2d 457, 460–461 (1977). Williams & Works, Inc. commenced work prior to the recording of the mortgages. Appellees' liens are therefore entitled to priority over the mortgages. MCLA 570.9; MSA 26.289; see *Kay v Towsley,* 113 Mich 281, 283; 71 NW 490, 491 (1897).

Appellants contend that the mechanics' lien act is repugnant to the due process clauses of US Const, Am XIV and Const 1963, art 1, § 17[2] for failure to provide for notice prior to filing of a lien and for a hearing prior to or immediately after filing of a lien. See *North Georgia Finishing, Inc v Di-Chem, Inc,* 419 US 601; 95 S Ct 719; 42 L Ed 2d 751 (1975), *Mitchell v W T Grant Co,* 416 US 600; 94 S Ct 1895; 40 L Ed 2d 406 (1974), *Fuentes v Shevin,* 407 US 67; 92 S Ct 1983; 32 L Ed 2d 556 (1972), *Sniadach v Family Finance Corp,* 395 US 337; 89 S Ct 1820; 23 L Ed 2d 349 (1969). We conclude that the mechanics' lien act is constitutional.

We must preliminarily dispose of two sub-issues. First, we find that Bristol Square Properties Group, as owner of the premises, has standing to raise this issue, although Kelly Mortgage and Investment Company, as mortgagee, does not. See *Williams & Works, Inc v Springfield Corp, supra* at 546–548; 257 NW2d at 163. Second, we find that placement of mechanics' liens upon the premises involved state action, because mechanics' liens are created, regulated, and enforced by the state. *Barry Properties, Inc v The Fick Brothers Roofing Co,* 227 Md 15; 353 A2d 222 (1976), *Connolly Development, Inc v Superior Court of Merced County,* 17 Cal 3d 803; 553 P2d 637; 132 Cal Rptr

[2] For purposes of analysis, we assume the due process protections of Const 1963, art 1, § 17 are equivalent to those of US Const, Am XIV. *See Dow v State of Michigan,* 396 Mich 192; 240 NW2d 450 (1976).

477 (1976), *appeal dismissed,* 429 US 1056; 97 S Ct 778; 50 L Ed 2d 773 (1977).

The United States Supreme Court summarily affirmed a decision by a three-judge district court that held the Arizona mechanics' lien act did not deprive a property owner of a significant property interest without due process of law. *Spielman-Fond Inc v Hanson's, Inc,* 417 US 901; 94 S Ct 2596; 41 L Ed 2d 208 (1974), *affirming* 379 F Supp 997 (D Ariz, 1973). Although a summary affirmance cannot necessarily be read as an affirmance of the reasoning of the lower court, it is nonetheless a resolution on the merits of the issues presented to the Supreme Court and is consequently precedent binding upon lower courts. See *Edelman v Jordan,* 415 US 651, 670–671; 94 S Ct 1347, 1359–1360; 39 L Ed 2d 662, 677 (1974), *Fusari v Steinberg,* 419 US 379, 391–392; 95 S Ct 533, 541; 42 L Ed 2d 521, 530–531 (1975) (Burger, C. J., concurring), *B & P Development v Walker,* 420 F Supp 704 (WD Penn, 1976). *Roundhouse Construction Corp v Telesco Masons Supplies Co, Inc,* 168 Conn 371; 362 A2d 778 (1975), *vacated and remanded,* 423 US 809; 96 S Ct 20; 46 L Ed 2d 29 (1975), *reaffirmed,* 170 Conn 155; 365 A2d 393 (1976), *cert den,* 429 US 889; 97 S Ct 246; 50 L Ed 2d 172 (1976), one of two cases which have held states' mechanics' lien acts unconstitutional, did so because it deduced a standard of due process from *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing, Inc,* and found that its state's act did not meet that standard. Its analysis failed to recognize the precedential significance of *Spielman-Fond.* We need not attempt to derive a standard of due process applicable to mechanics' lien acts from Supreme Court cases dealing with other creditor's remedies if *Spielman-Fond* is directly on point. Because a summary

affirmance does not explicate the reasons for affirmance, our task is to look to the opinion of the lower court and the opinions of other courts which have examined the constitutionality of various states' mechanics' lien acts in order to determine the possible reasons for affirmance, and then to determine whether those reasons apply to the instant case. *Cf., B & P Development v Walker, supra, In re Thomas A Cary, Inc,* 412 F Supp 667 (ED Va, 1976), *Barry Properties v Fick Brothers Roofing Co, supra.* There have been a sufficient number of such opinions that the issues are clearly drawn. We deduce that there can be but two possible reasons for the affirmance in *Spielman-Fond.*

The first reason is that advanced by the lower court in *Spielman-Fond.* Unless filing a mechanics' lien constitutes a taking of a significant property interest, the procedural requisites announced by the Supreme Court in *Sniadach, Fuentes, Mitchell* and *North Georgia Finishing, Inc* are inapplicable. Although a mechanics' lien clouds title, no disturbance of possession or right of alienation occurs until after a foreclosure action, and the inconvenience of the lien can be ameliorated by bonding. 379 F Supp at 999, accord, *In re Thomas A Cary, Inc, supra, Ruocco v Brinker,* 380 F Supp 432 (SD Fla, 1974), *Cook v Carlson,* 364 F Supp 24 (D SD, 1973), *Bankers Trust Co v El Paso Pre-Cast Co,* — Colo —; 560 P2d 457 (1977), *Tucker Door & Trim Corp v Fifteenth Street Co,* 235 Ga 727; 221 SE2d 433 (1975), *Carl A Morse, Inc v Rentar Industrial Development Corp,* 56 App Div 2d 30; 391 NYS2d 425 (1977), *Silverman v Gossett,* 553 SW2d 581 (Tenn, 1977). Theoretically, the amount of the lien is equivalent to the increase in value of the structure due to the work done, so that there is no

actual deprivation overall. *Cook v Carlson, supra, Carl A Morse, Inc v Rentar Industrial Development Corp, supra.* In effect, a lien is merely notice to others of the existence of a potential foreclosure action, analogous to a notice of *lis pendens. Tucker Door & Trim Corp v Fifteenth Street Co, supra.*

It is the majority view that no significant deprivation occurs upon filing a mechanics' lien, and this may have been the basis for the Supreme Court's affirmance in *Spielman-Fond.* But see *Connolly Development, Inc v Superior Court of Merced County, supra, Barry Properties v Fick Brothers Roofing Co, supra.* If so, this rationale would compel affirmance in the instant case.

Assuming that a significant deprivation had occurred, the second possible reason for the affirmance is that the mechanics' lien statute provided sufficient procedural requisites to pass constitutional muster. Due process is a flexible concept not requiring any particular procedural requisites. *Dow v State of Michigan,* 396 Mich 192, 204–205; 240 NW2d 450, 456 (1976). It may be argued that the taking, while significant, is relatively minor compared to the countervailing interests of mechanics' lienors, and that the procedural requisites in *Spielman-Fond* were adequate. See *Ruocco v Brinker, supra, Cook v Carlson, supra, Connolly Development, Inc v Superior Court of Merced County, supra, Silverman v Gossett, supra.* Although this reasoning is subject to attack, primarily because of the absence of the hearing prior to or soon after imposition of a lien that *Fuentes, Mitchell* and *North Georgia Finishing, Inc,* appear to require, see *Connolly Development, Inc v Superior Court of Merced County, supra,* (Richardson, J., dissenting), *Roundhouse Construction Corp v Telesco Masons Supplies Co, Inc, supra,* those Su-

preme Court cases are sufficiently inconsistent as to render this rationale for affirmance a substantial likelihood. *Barry Properties v Fick Brothers Roofing Co, supra,* the second of the two cases which have held mechanics' lien acts unconstitutional, did so because its act did not contain procedural requisites as rigorous as those contained in the *Spielman-Fond* act. Using a similar analysis, the Court in *Connolly Development, Inc v Superior Court of Merced County, supra,* found the California act substantially similar to the Arizona act, and therefore constitutional. Accord, *B & P Development v Walker, supra.* Because the Michigan act is substantially similar to the Arizona act, we find *Spielman-Fond* to be controlling precedent for affirmance in the instant case. See *Connolly Development, Inc, supra, B & P Development v Walker, supra.*

Finally, appellants argue that the award of attorney fees was excessive. The award of attorney fees was within the trial court's discretion, MCLA 570.12; MSA 26.292, and we detect no abuse of discretion.

Affirmed.

PEOPLE v McNEILL

1. WITNESSES—CRIMINAL LAW—IDENTIFICATION OF DEFENDANT—PHOTOGRAPHS—LINEUPS—ATTORNEY AND CLIENT.

   Generally, Michigan decisions specify: (1) except in exigent circumstances, photographs of an accused known to be in custody or who can be readily produced for a lineup may not be shown to witnesses for purposes of identification; (2) a lineup cannot be conducted without providing a defendant with proper representation.

2. CRIMINAL LAW—ATTORNEY AND CLIENT—CUSTODY—IDENTIFICATION—PHOTOGRAPHIC SHOWUPS—MUG BOOKS.

   The rule that a defendant is entitled to counsel at pretrial identification procedures does not apply to the pre-custody, pre-questioning, mere suspicion phase of a criminal investigation because it is not feasible to require appointment of counsel in cases of pre-custody photographic showups where there is no detention of the defendant since under such a rule each photograph arguably depicts a suspect and therefore each person whose photograph appears in the photographic display, or perhaps even the "mug book", would require the representation of counsel which would be both impossible and absurd.

REFERENCES FOR POINTS IN HEADNOTES

[1–4] 21 Am Jur 2d, Criminal Law §§ 313, 314, 368, 369.

Accused's right to counsel under the Federal Constitution-Supreme Court cases. 18 L Ed 2d 1420.

Accused's right to assistance of counsel at or prior to arraignment. 5 ALR3d 1269.

Admissibility, and prejudicial effect of admission, of "mug shot", "rouges' gallery" photograph, or photograph taken in prison, of defendant in criminal trial. 30 ALR3d 908.

Admissibility of evidence of photographic identification as affected by allegedly suggestive identification procedure. 39 ALR3d 1000.

[5] 5 Am Jur 2d, Appeal and Error § 611.

[6] 75 Am Jur 2d, Trial § 855.

81 Am Jur 2d, Witnesses §§ 88–93.

[7] 29 Am Jur 2d, Evidence §§ 321, 322.

Admissibility in prosecution for sexual offense, of evidence of other similar offenses. 77 ALR2d 841.

3. CRIMINAL LAW—ATTORNEY AND CLIENT—CUSTODY—PHOTOGRAPHIC SHOWUPS—RIGHT TO COUNSEL.

The mere fact that an investigation has focused on a defendant who is not in custody does not give him the right to counsel at a photographic showup.

4. CRIMINAL LAW—PHOTOGRAPHIC IDENTIFICATION—PRE-CUSTODY SITUATIONS—CORPOREAL LINEUPS.

Identification by photograph may not be used in pre-custody situations where the accused can be readily produced for a corporeal lineup.

5. WITNESSES—CRIMINAL LAW—APPEAL AND ERROR—TESTIMONY OF CHILD WITNESSES—FAILURE TO OBJECT—STATUTES.

Failure to object to the admission of the testimony of child witnesses as incompetent waives the right to assert the alleged error on appeal (MCLA 600.2163; MSA 27A.2163).

6. WITNESSES—CRIMINAL LAW—TESTIMONY OF CHILD WITNESSES—INSTRUCTIONS ON CREDIBILITY—WEIGHT OF TESTIMONY.

Instructions on the weight and credibility of testimony of child witnesses was adequate where both prosecution and defense counsel in opening argument directed the jury's attention toward carefully weighing the testimony of these witnesses and where the court itself gave an instruction couched particularly in terms of weighing the credibility of such young witnesses.

7. CRIMINAL LAW—EVIDENCE—SIMILAR DEFENSES—ADMISSIBILITY—PREJUDICE—PROBATIVE VALUE—STATUTES.

No abuse of discretion in a trial court's admission of evidence of prior sexual offenses has been shown in a trial for criminal sexual conduct where the acts were clearly similar and could serve as a positive basis for identification of the defendant and where the probative value of such acts as evidence outweighed any prejudicial effects (MCLA 768.27; MSA 28.1050).

Appeal from Washtenaw, Edward D. Deake, J. Submitted November 7, 1977, at Lansing. (Docket No. 27457.) Decided February 22, 1978.

Clifford F. McNeill was convicted of first-degree criminal sexual conduct. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William F. Delhey,* Prosecuting Attorney, and *Neil J. Juliar,* Assistant Prosecuting Attorney, for the people.

Mark G. Rogow, for defendant on appeal.

Before: QUINN, P. J., and V. J. BRENNAN and C. L. BOSMAN,* JJ.

V. J. BRENNAN, J. Defendant Clifford Floyd McNeill was charged with first-degree criminal sexual conduct, contrary to MCLA 750.520(b); MSA 28.788(2). He was convicted by jury in Washtenaw County Circuit Court on November 17, 1975. On December 4, 1975, he was sentenced to prison for a term of from 15 to 25 years. Defendant appeals as of right pursuant to GCR 1963, 806.1. He requests that his conviction be reversed and the case be remanded for new trial.

The record indicates the circumstances leading to defendant's conviction occurred on May 19, 1975. While playing in a wooded field behind his house in Ann Arbor, complainant, aged 5 years, was approached by a stranger wearing a green shirt and green pants. Complainant was in the company of two friends of approximately the same age. Offering to show the three boys a tree house, the stranger enticed them to a more secluded area. He offered them ice cream and money if one of them would allow him to place his penis in the mouth. He then placed his penis in complainant's mouth; ejaculated on the child's shirt; inserted an old chair leg, the tip of which was covered by a piece of plastic, into his own anus and then discarded the chair leg and plastic. Complainant testified that the stranger walked and talked

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

"funny". Defendant limped slightly from a foot operation and wore false teeth.

Shortly after the assault, the two other boys related the incident to their mother, who in turn advised complainant's mother. Complainant's mother called the police.

The police arrived at the complainant's residence at approximately 5 p.m. They interviewed the three boys, visited the scene of the crime with them and found the chair leg and piece of plastic. After obtaining a lead from another individual they encountered in the area, they drove to defendant's house, which was less than half a mile from the victim's house. They advised defendant of his *Miranda*[1] rights and asked him if he would accompany them to the police station to talk about an incident that had occurred in the neighborhood that day.

Defendant consented. Defendant was not placed under arrest. He was handcuffed as a routine precaution, but the cuffs were removed after a few minutes when he appeared uneasy. He was wearing a green shirt and bluejeans at this time. During the period between the time the police contacted defendant and the time they arrived with him at the station, defendant stated that he had changed his clothes and that he had been "skinny-dipping" in a local gravel pit, Killings Pond, at unspecified earlier points in the day.

Defendant was interviewed at the police station. He stated that he had been watching skinny-dippers and swimming at Killings Pond between 12:30 and 3:10 p.m. that day. He had returned home and worked on his bicycle and done some lawn and garden work. He denied any knowledge

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694; 10 ALR3d 974 (1966).

of the incident. He was photographed and fingerprinted. He was not placed under arrest.

All three boys selected defendant's picture at photographic showups conducted by the police on May 20, 1975. They later identified defendant in court as the man who committed the criminal sexual conduct.

At trial, a prosecution witness, aged 13 years, testified that one day late in April he had been walking through the same wooded area in which the complainant was assaulted. Defendant had approached him and asked him if he knew who had been pulling up construction markers the city had installed. Defendant offered the witness one dollar to try and find out who had pulled up the stakes and had taken him over near the creek to look at some stakes. He had then offered him one dollar to pull his pants down and display his genitals. The witness fled. This youth also selected defendant's picture at a photographic showup conducted by the police on May 20, 1975. He later identified defendant at trial as the man who had sexually solicited him.

A State Police Crime Laboratory scientist testified on the basis of his analysis of the semen stains found on complainant's shirt and blood and saliva samples taken from defendant. He stated that defendant was one of a group comprising about 36% of the population who could have deposited the semen on the shirt.

A *Walker*[2] hearing was held to determine the voluntariness of defendant's statements to the police that he had changed his clothing and gone "skinny-dipping" on the day in question. The voluntariness of these statements is not challenged

[2] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

on appeal. A *Wade*[3] hearing was held to determine the admissibility of the pretrial and in-court identification testimony.

On appeal, defendant raises several allegations of error. We will address those which merit discussion.

We must first determine whether defendant was entitled to have corporeal rather than photographic showups conducted or to have counsel present at the four pretrial photographic showups held.

Prior to trial, defendant moved to suppress evidence of photographic identification obtained at the photographic showup held without benefit of counsel prior to his arrest. A *Wade* hearing was held, the only testimony taken being from an Ann Arbor police officer and a Washtenaw County detective. Testimony of Detective Lawrence Hoffman indicated that police were led to defendant's house after the assault was reported on May 19, 1975. Several police cars arrived in front of defendant's house at the same time. Defendant did not attempt to run. He was asked his name and if he would mind accompanying the police officers to the station in order to discuss an incident that had occurred earlier in the day. Defendant consented. He was not placed under arrest and he could have refused to cooperate. Before defendant was asked to accompany the officers, he was advised of his right to an attorney and given *Miranda* warnings.

Officer William Canada interviewed defendant at the police station on the evening of May 19, 1975. He was advised that defendant had come in voluntarily and he interviewed him outside of the security area. He was not under arrest and could

[3] *United States v Wade,* 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

have left at any time. He was not in custody. Defendant did not have handcuffs on when he was interviewed. Defendant was not arrested because insufficient evidence against him existed. He was merely a suspect in the case. After the interview, Officer Canada took defendant's photograph and fingerprints. At the time defendant was advised that the photograph would be shown.

On May 20, 1975, Officer Canada separately showed defendant's photograph and seven other photographs to complainant and his two companions. All identified defendant as the man who confronted them on May 19, 1975. Officer Canada then went to the house of the 13-year-old prosecution witness on advice that the witness had been sexually accosted late in April. This witness also selected defendant's photograph as being the man who had accosted him. No attorney was present at any of these photographic identifications.

The trial court ruled that the factual question of whether defendant was in "actual custody" at the time the photograph was taken was dispositive of the propriety of the identification procedure. He held that defendant was not in custody, but had accompanied the officers to the police station voluntarily. The photograph thus was not the fruit of an illegal detention and defendant was not entitled to have counsel present at the photographic displays. The court made no separate finding regarding defendant's availability for a corporeal lineup on May 20, 1975. We will review defendant's claim of error solely on the basis of the *Wade* hearing record. *People v Kaigler,* 368 Mich 281, 288; 118 NW2d 406 (1962).

Generally, Michigan decisions specify that except in exigent circumstances, photographs of an accused "known to be in custody or who can

readily be produced for a lineup" may not be shown to witnesses for purposes of identification and that a line-up cannot be conducted without providing defendant proper representation. *People v Jackson,* 391 Mich 323, 338–339; 217 NW2d 22 (1974), *People v Anderson,* 389 Mich 155, 186–187; 205 NW2d 461 (1973).

Recently, the Michigan Supreme Court refused to extend these requirements to the pre-custody, pre-questioning, mere suspicion phase of the criminal investigation. *People v Lee,* 391 Mich 618, 625; 218 NW2d 655 (1974). In *Lee,* the Court recognized the problems which would attend requiring counsel in the circumstances:

> "It is not feasible to require appointment of counsel in cases of pre-custody photographic showups where there is no detention of the defendant since under such a rule each photograph arguably depicts a suspect and therefore each person whose photograph appears in the photographic display, or perhaps even the 'mug book' would require the representation of counsel. That would be impossible and absurd." *People v Lee, supra* at 625.

The Court stated in particular that where defendant was not in custody the mere fact that an investigation had focused on him would not give rise to the right to counsel. *People v Lee, supra* at 625. Consequently, for purposes of defendant's claim that counsel was required for the photographic showup, we need address only the question whether defendant was in custody on May 20, 1975.

The record is clear that defendant was not in custody on the date the photographs were displayed to the four boys. Defendant had voluntarily agreed to accompany police to the station in order to answer some questions concerning the incident

earlier in the day. He was not placed under arrest at that time and he could have refused to cooperate with the police. Certainly, the evidence as available at that point would have required more investigation before any further action could have been taken against defendant. Officer Canada had interviewed defendant with the understanding that defendant had appeared voluntarily, was not under arrest and could have left at any time. From the basis of this evidence, we can conclude without hesitation that defendant was not in custody. Therefore, defendant had no right to counsel at the point when photographs were shown to the four boys.

However, we must address the further question whether the photographic showup was legally justifiable at all in view of the fact that defendant might possibly have been available for corporeal lineup. Beyond the rule laid down in *Anderson* that photographic identification could not be used where the accused is in custody, this Court has established the corollary that identification by photograph may not be used in pre-custody situations where the accused can be readily produced for a corporeal lineup. *People v Smalls,* 61 Mich App 53, 59–60; 232 NW2d 298 (1975), *People v Beasley,* 55 Mich App 583, 585–586; 223 NW2d 77 (1974), *People v Cotton,* 38 Mich App 763; 197 NW2d 90 (1972). See also *People v Jackson,* 391 Mich 323, 338; 217 NW2d 22 (1974). One question we must address then regarding the propriety of holding a photographic rather than a corporeal showup is whether defendant was readily available for a lineup on that date. The trial court failed to make a specific finding of fact in this regard and we find this omission error.

We are not willing to infer that defendant was

readily available for a corporeal lineup on May 20, 1975. Though defendant had cooperated in the initial stages of the investigation, the proceedings up to that point had been simply investigative and nothing more. No indication appears from the facts as to what reaction defendant would have had had he been requested to participate in a corporeal lineup. Clearly, police had little evidence isolating defendant as a principal suspect. He had not been taken into custody nor detained in any other way. He was allowed to leave the station after being interviewed and photographed. In essence, the police had no legal means at that point to force defendant to participate in the corporeal lineup. Consequently, we do not find that defendant was "readily available" for a corporeal lineup or that the trial court was in error by failing to infer such availability. We thus hold that the photographic showup was a permissible means of identification at this early stage of investigation. See *People v Smalls, supra* at 59–60, *People v Beasley, supra* at 585–586. See also *People v Jackson, supra* at 339, fn 16.

Regarding defendant's second allegation, we would merely state that failure to object to the admission of the testimony of the three child witnesses as incompetent waived his right to now assert the alleged error on appeal. See MCLA 600.2163; MSA 27A.2163. See also *People v Gay,* 15 Mich App 484, 486; 166 NW2d 618 (1969).

We also believe the trial court adequately instructed the jury as to the weight and credibility to be given the testimony of the three child witnesses where both prosecution and defense counsel in opening argument directed the jury's attention toward carefully weighing the testimony of these witnesses and where the court itself gave an in-

struction couched particularly in terms of weighing the credibility of such young witnesses. See *People v Strunk,* 11 Mich App 99, 101; 160 NW2d 602 (1968).

Neither do we find an abuse of discretion in the trial court's admission into evidence pursuant to MCLA 768.27; MSA 28.1050 of testimony regarding the alleged prior sexual offense involving the 13-year-old witness where the acts were clearly similar and could serve as a positive basis for identification of defendant and when their probative value as evidence outweighed any prejudicial effect. See *People v Frank Johnson,* 58 Mich App 1, 4–5; 226 NW2d 730 (1975).

Having reviewed and addressed those questions raised by defendant which we feel merit discussion and finding none persuasive, we sustain the trial court.

Affirmed.

QUINN, P. J., did not participate.

ELSASSER v AMERICAN MOTORS CORPORATION

1. PRODUCTS LIABILITY—AUTOMOBILES—NEGLIGENCE—FORESEEABLE INJURY—REASONABLE CARE—IMPLIED WARRANTY.

An automobile manufacturer has a duty to so design and manufacture his product as to eliminate any unreasonable risk of foreseeable injury to the occupants of an automobile as a result of a collision; for the lack of reasonable care in the face of such duty, he may be answerable in a negligence action, and for the sale of a vehicle defective in such respect, he may be answerable for breach of implied warranty.

2. PRODUCTS LIABILITY—IMPLIED WARRANTY—PROOF OF DEFECT—INJURY—REASONABLE FITNESS—FORESEEABLE USES—MISUSE OF PRODUCT.

A product liability suit based upon an implied warranty theory requires proof of a defect in manufacturing or design and injury caused by or resulting from the defect; under the implied warranty theory a defect is established by proof that the product is not reasonably fit for its intended, anticipated or

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 8 Am Jur 2d, Automobiles and Highway Traffic §§ 646–649.

63 Am Jur 2d, Products Liability §§ 62, 63.

Manufacturer's or seller's duty as to product design as affecting his liability for product-caused injury. 76 ALR2d 91.

Liability of manufacturer or seller for injury caused by automobile or other vehicle, aircraft, boat, or their parts, suppliers, or equipment. 78 ALR2d 460.

Liability of manufacturer, seller, or distributor of motor vehicle for defect which merely enhances injury from accident otherwise caused. 42 ALR3d 560.

[2] 8 Am Jur 2d, Automobiles and Highway Traffic § 661.

[4] 63 Am Jur 2d, Products Liability §§ 26, 69.

[5] 63 Am Jur 2d, Products Liability § 22.

[6] 63 Am Jur 2d, Products Liability §§ 66, 79.

Admissibility in evidence, on issue of negligence, of codes or standards of safety issued or sponsored by governmental body or by voluntary association. 75 ALR2d 778.

[7] 74 Am Jur 2d, Torts §§ 76, 78.

[8] 31 Am Jur 2d, Expert and Opinion Evidence §§ 26, 29, 31, 32.

[9, 10] 46 Am Jur 2d, Judges §§ 220, 221.

reasonably foreseeable use; misuse of a product may be within the intended or foreseeable use upon which a cause of action for defective design or manufacture may be based.

3. PRODUCTS LIABILITY—AUTOMOBILES—COLLISIONS—REASONABLE FITNESS.

A manufacturer of automobiles is not required to manufacture a crash proof vehicle, but he must recognize the existence of accidents and build his product so that it is reasonably fit in case of a collision.

4. PRODUCTS LIABILITY—FORESEEABILITY—REASONABLE PREVENTIVE MEASURES—JURY.

The questions of foreseeability of injury and reasonableness of protective and preventive measures in products liability actions are for the trier of fact to decide.

5. PRODUCTS LIABILITY—DEFECTS—INJURY—PROXIMATE CAUSE.

A plaintiff in a products liability case needs only to establish that a defect was *a* proximate cause of his injury, not that it was *the* proximate cause.

6. PRODUCTS LIABILITY—INDUSTRY STANDARDS—REASONABLENESS OF STANDARDS.

A manufacturer may show compliance with an industry standard to indicate the reasonableness of the manufacture of his product, but the industry standard itself is always open to the question of reasonableness.

7. DAMAGES—PRODUCTS LIABILITY—APPORTIONMENT OF DAMAGES—INSTRUCTIONS TO JURY.

An instruction to a jury in a products liability action involving enhanced injuries that they must apportion damages between defendants is not necessary where the defendants have previously agreed to an apportionment between themselves.

8. WITNESSES—EXPERT WITNESSES—QUALIFICATION TO TESTIFY—DISCRETION OF COURT.

The determination of whether an expert witness is qualified to testify rests within the sound discretion of the trial court.

9. APPEAL AND ERROR—JUDICIAL RULINGS—PREJUDICE.

Numerous rulings in favor of one party to a legal action do not necessarily indicate a prejudice on the part of the court.

10. JUDGES—PREJUDICE OR BIAS—BURDEN OF PROOF.

A party alleging prejudice or bias on the part of a trial judge bears the burden of showing that prejudice or bias.

Appeal from Ingham, Donald L. Reisig, J. Submitted June 16, 1977, at Lansing. (Docket No. 27725.) Decided February 22, 1978.

Complaint by Richard Elsasser and Gayle Elsasser against American Motors Corporation for damages for breach of implied warranty arising from an automobile collision and against Susan K. Leighton for damages for negligence. Defendant Leighton was dismissed from the action as a result of a settlement agreement. Judgment for plaintiffs. Defendant American Motors Corporation moved for judgment notwithstanding the verdict, or in the alternative for a new trial or for remittitur. Motions denied. Defendant American Motors Corporation appeals. Affirmed.

Sinas, Dramis, Brake, Turner, Boughton, McIntyre and Boughton, P. C., for plaintiff.

Ronald R. Pawlak, P. C., for defendant.

Before: D. E. HOLBROOK, JR., P. J., and ALLEN and D. R. Freeman,* JJ.

D. R. FREEMAN, J. In this product liability case defendant appeals a jury verdict of $300,000 to plaintiff Gayle Elsasser and $175,000 to plaintiff Richard Elsasser. Following the November 6, 1975 jury verdict, defendant moved for a new trial, a judgment notwithstanding the verdict, and remittitur. These motions were denied in an opinion and order dated February 24, 1976.

On December 11, 1970, plaintiffs were driving on I-94 in their 1971 AMC Gremlin which they had purchased new from an American Motors Corporation (hereinafter AMC), dealer about two months

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

before. Due to inclement weather the driving conditions were very poor. A car was blocking one of the lanes. Jerome Burg, a motorist who had previously stopped, was flagging down traffic in the area of the blocked expressway lane. After seeing Burg, Richard Elsasser brought the plaintiffs' car to a halt and joined several other cars in the congestion caused by the blocked lane. Susan Leighton, operating a 1970 Plymouth Duster, approached the scene and saw Burg but did not see the line of stopped cars until a few short moments before she collided with the rear of plaintiffs' stopped vehicle. The parties disagreed as to the speed of the Leighton vehicle at impact, and testimony at trial gave estimates ranging from 20 miles per hour to 55 miles per hour.

The impact from the collision drove plaintiffs' car forward into the car in front of it. The Leighton car struck plaintiffs' car in the rear, to the left of center, and crushed plaintiffs' car approximately 30 inches on the left side. The gas tank of plaintiffs' car ruptured and the floor pan separated from the left side of the automobile. A fire broke out inside and outside of the plaintiffs' car.

Richard Elsasser escaped through a window. Gayle Elsasser, apparently dazed by the collision, was pulled from the burning car by bystanders. Both plaintiffs received severe burns, including burns to their hands and faces. Neither plaintiff was permanently disabled, although both were scarred and suffered severe pain. Plaintiffs' injuries required substantial surgery. Susan Leighton received only a superficial injury to her nose, which struck her steering wheel.

Plaintiffs sued defendant AMC for breach of implied warranty and Susan Leighton for negligence. Plaintiffs alleged four design defects—im-

properly located gasoline tank which was too large for the vehicle, inadequate protection of the gas tank, an inadequate connecting flange on the floor pan and inadequate fire wall protection between the gas tank and passenger compartment—and one workmanship defect—defective welds on the left side of the floor pan. Plaintiffs contended that gasoline from the ruptured tank entered the passenger compartment through the vacancy caused by separation of the floor pan from the side of the Gremlin. According to plaintiffs, the separation was the result of the defective welding.

During the course of the trial, plaintiffs reached a settlement with Susan Leighton in the amount of $75,000. All of the parties involved, including AMC, agreed that the jury would determine the damages necessary to compensate plaintiffs in full. From any such award the trial court would credit AMC with $50,000 against any judgment for Gayle Elsasser, and with $25,000 against any judgment for Richard Elsasser, reflecting the $75,000 settlement with Susan Leighton.

I

Defendant first contends that there is no duty owed by a manufacturer to build an automobile fit for a collision. Defendant urges us to adopt a rule, expressed in *Evans v General Motors Corp,* 359 F2d 822 (CA 7, 1966), and its progeny, that a manufacturer need only produce a vehicle fit for its intended use, which does not include collisions, despite the foreseeability of such collisions. We think a better rule was set forth in *Larsen v General Motors Corp,* 391 F2d 495 (CA 8, 1968), which was adopted in *Rutherford v Chrysler Motors Corp,* 60 Mich App 392, 400; 231 NW2d 413 (1975), *lv granted,* 394 Mich 823 (1975):

"Agreeing with *Larsen,* we hold that a manufacturer of any automobile has a duty to so design and manufacture his product as to eliminate any unreasonable risk of foreseeable injury to its occupants as a result of a collision for which the manufacturer may not be responsible. For the lack of reasonable care in the face of such duty, he may be answerable in a negligence action; and for the sale of a vehicle defective in such respect, he may be answerable for breach of implied warranty."

Larsen dealt with a negligence cause of action. Its reasoning, however, lends itself equally well to an implied warranty suit, as noted by the *Rutherford* Court. Adoption of the *Larsen* reasoning was not the dramatic judicial step that defendant indicates it was. *Rutherford* was consistent with the trend of prior Michigan cases holding that misuse of a product may be within the intended or foreseeable use giving rise to a cause of action for defective design or manufacturing. *Coger v Mackinaw Products Co,* 48 Mich App 113; 210 NW2d 124 (1973), *Byrnes v Economic Machinery Co,* 41 Mich App 192; 200 NW2d 104 (1972). Under *Larsen* and *Rutherford,* a manufacturer must recognize the existence of accidents. A manufacturer is not required to manufacture a "crash proof" automobile, but rather one that is reasonably fit in case of a collision.

A product liability suit based on an implied warranty theory requires proof of a defect in manufacturing or design and injury caused by or resulting from the defect. *Piercefield v Remington Arms Co,* 375 Mich 85, 96; 133 NW2d 129 (1965). Under the implied warranty theory a defect is established by proof that the product is not reasonably fit for its intended, anticipated or reasonably foreseeable use. *Dooms v Stewart Bolling & Co,* 68

Mich App 5, 14; 241 NW2d 738 (1976), *lv den* 397 Mich 862 (1976).

In the instant case plaintiffs alleged design defects and a manufacturing defect. These alleged defects arose from a failure on the part of defendant to eliminate unreasonable risks of injury in light of the intended and foreseeable use of the product. This blurring of the distinction between the concepts of implied warranty and negligence is not uncommon in product liability cases. See, for example, *Dooms v Stewart Bolling & Co, supra, Smith v E R Squibb & Sons, Inc,* 69 Mich App 375; 245 NW2d 52 (1976), *lv den,* 399 Mich 804 (1977), and *Rutherford v Chrysler Motors Corp, supra.* Defendant had a duty to produce a reasonably fit product under both negligence and implied warranty concepts.

II

Defendant's second contention is that the evidence presented by plaintiffs was insufficient to show a breach of an implied warranty or a legal duty.

Proofs were presented by plaintiffs to show that faulty welding and a flange of inadequate design permitted gasoline to enter the passenger compartment and cause plaintiffs' injuries. Plaintiffs showed that defendant was aware or should have been aware of the safety problems and the suggested remedies. Defendant produced countervailing testimony and evidence which, among other things, showed that some of plaintiffs' arguments *(e.g.,* the use of a fire wall) were impractical. Defendant also contends that plaintiffs failed to show the prevailing "state of the art".

The questions of foreseeability of the injury and

reasonableness of the protective and preventive measures taken are questions for the jury. *Casey v Gifford Wood Co,* 61 Mich App 208, 217–218; 232 NW2d 360 (1975), *lv den,* 395 Mich 810 (1975). We find that plaintiffs presented the issues of defect and injury therefrom in a sufficient manner for the questions of unreasonableness of the defect and foreseeability of the risk to go to the jury. Plaintiffs presented a prima facie case, *Smith v E R Squibb & Sons, Inc, supra* at 380, absent any inquiry concerning proximate cause. Since plaintiffs needed to establish only that the defect was *a* proximate cause and not *the* proximate cause, their proofs were sufficient to go to the jury. *Dooms v Stewart Bolling & Co, supra,* at 17–18.

A comment should be made concerning the "state of the art" or industry custom as evidence. It is hornbook law that a manufacturer may show compliance with industry standards to indicate reasonableness, but the industry standard itself is always open to the question of reasonableness. Prosser, Torts (4th Ed), § 33, 96, pp 166–168, 645. Reasonableness is ultimately a question for the jury.

III

Defendant next raises several alleged procedural errors concerning, for the most part, an instruction to the jury and expert testimony adduced by plaintiffs.

In a case such as this dealing with "enhanced injuries", or a "secondary collision", damages are usually apportioned between the defendant manufacturer and the negligent defendant who precipitated the initial collision. Defendant's contention that an apportionment instruction should have been given would usually be correct. In this case,

however, as part of the settlement with Susan Leighton, AMC agreed in open court that the jury would only make a determination as to total damages and that the trial court would then make set deductions from any award against AMC. It was not error to decline to instruct on apportionment.

The determination of whether an expert witness is qualified to testify rests within the sound discretion of the trial court. *National Pharmaceutical Services, Inc, v Harrison Community Hospital,* 67 Mich App 286, 293; 241 NW2d 76 (1976), *lv den* 397 Mich 824 (1976), *Coger v Mackinaw Products Co, supra,* at 123. There was no abuse of discretion here, where plaintiffs' expert was an engineer with extensive background in automobile collisions and had published articles which defendant's employees admittedly read. The expert's testimony as to the speed of the Leighton vehicle was not precluded due to eyewitness lay testimony on the same point. Under the facts of this case the lay testimony was subject to considerable doubt in light of the poor weather conditions and sudden nature of the collision. *People v Zimmerman,* 385 Mich 417; 189 NW2d 259 (1971), does not preclude such testimony.

IV

Defendant's final issue raises questions concerning the fairness of the trial in light of the trial court's alleged bias in favor of plaintiffs.

This was a long and complex case which required numerous rulings on the part of the trial court. Even if it were true that the rulings were for the most part favorable to plaintiffs, that would not necessarily indicate reversible prejudice. *Mahlen Land Corp v Kurtz,* 355 Mich 340, 350–351; 94 NW2d 888 (1959). We note that many

rulings were actually in favor of defendant. As the prior discussion indicated, we found no error in ruling made by the trial court.

At the outset of the case, defendant moved to disqualify the trial judge under GCR 1963, 405. The major ground was alleged bias due to the fact that Gayle Elsasser was employed by the Ingham County Friend of the Court. Pursuant to GCR 1963, 405.2, another judge held a hearing and ruled that disqualification was unnecessary. We find no error in this ruling. There was no relationship whatsoever between the trial judge and Gayle Elsasser, the two had never even met, and there was no indication of bias on the part of the trial judge.

More significant in this case is the fact that 48 days after rendering a decision on defendant's post-trial motions, the trial judge left the bench and became a partner in the law firm which represented plaintiffs throughout the proceedings of this case. While this action took place 48 days after the proceedings ended at the circuit court level, it occurred 4-1/2 years after plaintiffs' initial complaint was filed and six months after the trial itself began.

It is not enough to say that the defendant received an error-free trial. *People v Lobsinger,* 64 Mich App 284–286; 235 NW2d 761 (1975). However, where a party relies on alleged prejudice or bias of the trial judge, that prejudice or bias must be shown. *People v Rayford Johnson,* 68 Mich App 54, 58; 242 NW2d 35 (1976), *reversed on other grounds,* 397 Mich 686; 246 NW2d 836 (1976), *Meshriy v Sun Oil Co,* 67 Mich App 709, 712; 242 NW2d 497 (1976), *Wayne County Prosecutor v Doerfler,* 14 Mich App 428, 441; 165 NW2d 648 (1968). In the case at bar, defendant did not show

any actual bias or prejudice whatsoever, and our review of the record reveals none. In light of this lack of prejudice we cannot say that it was reversible error, if error at all, for the trial judge to preside over this jury trial. Defendant received a fair trial in all respects.

The employment agreement between the trial judge and the law firm expressly excluded the trial judge from any monetary benefits that might result from the instant case. We find that the instant circumstances did not create a pecuniary interest in the trial judge. Nor do we find that the trial judge was consulted or employed as counsel in regards to this case within the meaning of GCR 1963, 405.1(5).

Affirmed, costs to plaintiff.

PEOPLE v GAYTON

1. CRIMINAL LAW—TRIAL COURT—DUTY OF TRIAL JUDGE—DEFENDANT'S THEORY OF CASE—FAILURE TO OBJECT—APPEAL AND ERROR—COURT RULES.

   It is the duty of the trial court in a criminal case to present adequately the defendant's theory of the case to the jury; failure to do so is reversible error despite the fact that no request or objection is made (GCR 1963, 516).

2. CRIMINAL LAW—MISTRIAL—INSTRUCTIONS TO JURY—DEFENDANT'S THEORY OF CASE—ENTIRETY OF INSTRUCTIONS.

   A defendant was not entitled to a mistrial on the basis of the instructions given by the judge to the jury relating to the defendant's theory of the case where the instructions, when considered in their entirety, fairly presented the defendant's theory of the case to the jury.

3. CRIMINAL LAW—MOTIONS—DIRECTED VERDICT—ACQUITTAL—EVIDENCE—ELEMENTS OF CRIME CHARGED—MURDER—INFERENCES.

   The question presented in a criminal trial by a motion for a directed verdict of not guilty is whether there is sufficient evidence from which a jury can reasonably infer all of the elements of the crime charged; when determining whether there was sufficient evidence on each essential element of a charge of murder in the first degree so as to permit submission of that charge to the jury, the prosecutor's evidence must be taken as true, and it must be viewed in a light most favorable to the prosecution so that the prosecution may benefit from every reasonable inference to be drawn therefrom.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 75 Am Jur 2d, Trial § 699.

[3, 4] 75 Am Jur 2d, Trial §§ 548–558.

[5] 40 Am Jur 2d, Homicide §§ 263–266.

Homicide: presumption of deliberation or premeditation from circumstances attending the killing. 96 ALR2d 1435.

[6] 75 Am Jur 2d, Trial § 993.

Prejudicial effect of jury's procurement or use of book other than lawbook during deliberations. 54 ALR2d 738.

4. HOMICIDE—MOTIONS—DIRECTED VERDICT—ACQUITTAL—FIRST-DEGREE MURDER—EVIDENCE—ELEMENTS OF CRIME CHARGED.

A motion for a directed verdict of acquittal should be denied in a defendant's trial for first-degree murder if there is any evidence at all on each of the elements of murder in the first degree.

5. HOMICIDE—EVIDENCE—PREMEDITATION—DELIBERATION—FIRST-DEGREE MURDER—INFERENCES—CIRCUMSTANCES OF KILLING.

Evidence of premeditation and deliberation sufficient to sustain a conviction of first-degree murder may be inferred from the character of the weapon used, the wound inflicted and the circumstances surrounding the killing.

6. CRIMINAL LAW—MOTIONS—SETTING ASIDE VERDICT—JURY DELIBERATIONS—IMPROPER ITEMS IN JURY ROOM—DISCRETION.

The denial of a criminal defendant's motion to set aside a guilty verdict returned by a jury because one juror took two volumes of Collier's Encyclopedia into jury deliberations and another juror took in a slip of paper with the definitions of two words written on it was not an abuse of the trial court's discretion where the trial court held hearings on the issue at which the jurors testified and it was determined that the items did not enter into and were not considered in the jury verdict and where the defendant has not shown any prejudice sufficient to set aside the verdict; a showing of mere potential for prejudice from some article improperly in the jury room is insufficient to warrant granting a mistrial.

Appeal from Oakland, Robert B. Webster, J. Submitted January 9, 1978, at Lansing. (Docket No. 29330.) Decided February 22, 1978.

Clarence B. Gayton was convicted of second-degree murder. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Michael J. Modelski,* Assistant Appellate Counsel, for the people.

Lynn V. Hooe, Jr., for defendant on appeal.

Before: BRONSON, P. J., and R. B. BURNS and R. E. A. BOYLE,* JJ.

R. E. A. BOYLE, J. Defendant was convicted by a jury of murder in the second degree and was sentenced to 20 to 40 years in prison. He appeals as of right.

There is no marked dispute about the facts of this case. On the afternoon of November 15, 1975, several people had gathered together to socialize at 410 Central Street in Pontiac, Michigan. Among them were the defendant and the decedent, Mr. Willard Washington. At some point in time the defendant and the decedent began discussing an incident that had occurred the previous night and which had involved the defendant and the decedent's son, Jimmy Leroy Washington.

The defendant, when questioned by the decedent as to what had happened the previous night, stated, "You better check him [decedent's son], if that damn gun had gone off last night he would have been a dead son-of-a-bitch." As testified to by a witness to this discussion, the defendant further stated that, although the gun did not go off last night, it would go off today.

Later that afternoon, subsequent to this discussion, the defendant left the house and went to a grocery store and returned to the house approximately 15 minutes later to retrieve his coat. He remained in the house only a few minutes before again leaving.

The decedent followed him to the front door soon afterwards, opened it, and addressed the defendant. Although there is no agreement as to the exact words used by the decedent, the gist of decedent's statement to defendant is agreed upon.

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

A witness testified that the decedent opened the front door and said to the defendant, " '[Y]ou don't have to leave because nobody is mad at you, come on back.' " She further testified that the decedent had done nothing other than address the defendant.

Another witness testified that decedent said, " 'We know you got your gun; you don't have to run, you don't have to hide.' " A third witness testified that the decedent stated to the defendant, " 'You don't have to leave. No one is mad at you. We know you got your little ole gun.' "

A 12-year old witness testified he witnessed this scene from about five feet away from the defendant. He testified that he saw the defendant standing on the sidewalk and the decedent standing in the doorway. He heard the defendant say to the decedent, "If you say another word, I'll shoot you." To this, the decedent responded, "Nobody's going to hurt you. Come on back."

It is uncontroverted that the decedent had nothing in his hands at the time that he addressed the defendant. Immediately after the decedent made this statement, the defendant turned towards him and shot two times at him with a handgun.

At this, the decedent stepped back into the house, having been shot in his left hip. The defendant, with gun in hand, ran back up the steps to the porch and opened the front door. The decedent then grabbed the defendant's arm and they began to grapple for the gun. In the process of doing so, they fell off the front porch. The defendant fell to the ground and the decedent fell on top of him. When they got to their knees, face to face, the defendant's gun discharged three times.

Defendant raises three issues, each of which we will discuss. He initially contends that he had

argued the absence of premeditation and deliberation but that the trial court erroneously instructed the jury that one part of defendant's theory of the case was that there was an absence of premeditation and deliberation and that, therefore, the jury should consider only murder in the second degree and manslaughter.

It was the duty of the trial court to present adequately the defendant's theory of the case to the jury. GCR 1963, 516; *People v Savoie,* 75 Mich App 248; 255 NW2d 11 (1977), and a failure to do so is reversible error despite the fact no request or objection is made. *People v Stanley Jones,* 69 Mich App 459, 462; 245 NW2d 91 (1976). Here, the trial court did direct the attention of the jury to defendant's theory of self-defense. Defendant did not object to the substance of this charge by the trial court. It was the duty of defense counsel to submit to the trial court at the close of the evidence a statement of the issues and his theory of the case as to each issue. GCR 1963, 516.7. He failed to do so. The trial court on his own motion instructed the jury as follows:

"THE COURT: * * * Now, the Defendant in this case stated as I understand the situation two things:

"One that the act of the Defendant was without premeditation and deliberation and accordingly first degree murder should not be considered by you and that you should consider only second degree murder and manslaughter.

"Of course the Defendant strongly contends for a verdict of not guilty.

"One of those theories that the Defendant contends is that the actions of the Defendant were justifiable and excuseable *[sic]* by reason of the defense of self-defense."

Defendant contends that this instruction, in effect, told the jury that one of defendant's theories

in the case was that he was guilty of second-degree murder only. When this was brought to the attention of the trial court by defense counsel, the court denied such was the effect or intent of the instruction. The trial court offered to reinstruct the jury before they began deliberations to cure any possible misstatement of defendant's theory of the case. Defense counsel refused the judge's offer to reinstruct the jury—even though this action was one which defense counsel had requested.

At one point during their deliberations, the jury requested reinstruction on murder in the second degree and manslaughter. The trial court took this opportunity to reinstruct the jury on all charges against defendant, as well as on defendant's theory of the case. Defense counsel did not object to this instruction on defendant's theory of the case.

We find that, considering the instructions in their entirety, the trial court fairly presented defendant's theory of the case to the jury. Defendant was not entitled to a mistrial on the basis of such instructions.

Defendant next contends that the people did not present sufficient evidence of premeditation and deliberation to take the question of murder in the first degree to the jury, and that he was entitled to a directed verdict as to that charge.

The issue presented by a motion for a directed verdict of not guilty is whether there is sufficient evidence from which a jury can reasonably infer all of the elements of the crime charged. *People v Moore,* 51 Mich App 48; 214 NW2d 548 (1974). When determining whether there was sufficient evidence on each essential element of a charge of murder in the first degree so as to permit submission of that charge to the jury, the people's evidence must be taken as true, and it must be

viewed in a light most favorable to them so that they may benefit from every reasonable inference to be drawn therefrom. *People v Garcia,* 398 Mich 250, 256; 247 NW2d 547 (1976).

A motion for directed verdict must be denied if there is any evidence at all on each of the elements of murder in the first degree. *People v Wesley Brown,* 35 Mich App 153; 192 NW2d 281, *lv den,* 386 Mich 768 (1971). Evidence of premeditation and deliberation sufficient to sustain a conviction of first-degree murder may be inferred from the character of the weapon used, the wound inflicted, and the circumstances surrounding the killing. *People v Macklin,* 46 Mich App 297; 208 NW2d 62 (1973).

An examination of the record discloses sufficient evidence upon which a jury could find premeditation and deliberation.

Finally, defendant contends the trial court erred in denying defendant's motion to set aside the verdict, claiming one member of the jury took two volumes of Collier's Encyclopedia and another juror took the definition of two words written down on a piece of paper into the jury deliberations. He argues that the mere presence of such articles constituted prejudicial error and also contends the articles were in fact considered by the jury in arriving at their verdict as he believes the record indicates.

The trial court held hearings at which jurors testified as to the encyclopedia and the notes. The juror who took the encyclopedia into the jury room testified that she did not read the definitions of two words that she had looked up and marked with pieces of paper until after the jury verdict had been reached. Further, she stated that no other juror looked up the definitions of those two

words in the encyclopedia prior to the time that they had agreed upon a verdict. The trial court having found this to be true, defendant has suffered no prejudice by the presence of these two volumes of Collier's Encyclopedia in the jury room.

After testimony by jurors at a hearing before the trial court concerning one of the jurors having looked up the definitions of two words, written them down on a piece of paper, and taken the paper into the jury room, the judge apparently found the articles did not enter into and were not considered in the jury verdict, and that defendant suffered no prejudice.

In *People v McCrea,* 303 Mich 213, 266; 6 NW2d 489 (1942), the Supreme Court stated:

> " 'When by mistake or inadvertence on the part of a juryman or the court, or even through error of judgment on the part of the court, an article has been taken to their room by the jury which ought not to have been, then before a verdict will be set aside for that cause, it must appear, either from an examination of the objectionable article itself, or from facts properly presented by the bill of exceptions, that such article must have been, in the nature of the case, or in point of fact was, considered by the jury in arriving at the conclusion reached by their verdict.' " (Citations omitted.)

In *People v Parker,* 76 Mich App 432; 257 NW2d 109 (1977), a jury had been exposed to a newspaper article containing an account of the trial in which they were sitting. Only two jurors recalled having seen that article. The court in *Parker* questioned both of these jurors and determined that neither was prejudiced by the article. This Court stated in *Parker,* at 448, that a showing of mere potential for prejudice from some object improperly in the jury room is insufficient to warrant granting a

mistrial. This Court went on to state, at 449 of 76 Mich App:

"The mere probability or supposition that jurors may have read prejudicial accounts of the case on which they are serving is not sufficient to support a finding that the trial court abused its discretion in refusing to grant a mistrial. * * * Under the circumstances of this case, in which all jurors who were aware of the article's publication disclaimed any knowledge or recollection of its contents, we hold that the trial judge did not abuse his discretion in refusing to declare a mistrial." (Citations omitted.)

The defendant has not shown any prejudice sufficient to warrant granting a mistrial or to set aside the verdict. The trial court did not abuse its discretion in denying the motions. *People v Parker, supra, People v Iaconis,* 29 Mich App 443; 185 NW2d 609 (1971), *aff'd in People v Bercheny,* 387 Mich 431; 196 NW2d 767 (1972).

The conviction of defendant is affirmed.

PEOPLE v BLACHURA

OPINION OF THE COURT

1. CRIMINAL LAW—APPEAL AND ERROR—DEFENDANT'S THEORY OF CASE—COURT CLERK—VOICE PROBLEMS OF JUDGE.

   It was error for a trial judge in a criminal trial to allow the clerk of the court to read the defendant's theory of the case to the jury, but such error was harmless and reversal of the defendant's conviction is not required where (1) the trial judge explained to the jury that he was experiencing voice difficulty, and (2) the judge cautioned the jury that the instructions should be accepted as if he had read them; it is not error per se to allow a court clerk to read some or all of the instructions when the judge is experiencing voice problems.

2. CRIMINAL LAW—GRAND JURY—PERJURY—SECRET PROCEEDINGS—APPEAL AND ERROR—STATUTES.

   A short response by a grand jury foreman, at a defendant's trial for perjury arising from the defendant's testimony before the grand jury, answering a question posed by a prosecutor as to why the grand jury had called the defendant to testify does not violate a literal reading of the statute which cloaks a grand jury proceeding with secrecy; even if such testimony by the foreman violates the spirit of the statute, the error would be harmless error (MCLA 767.19; MSA 28.959).

3. CRIMINAL LAW—PROBATION—CONDITIONS—COSTS—EXPENSES OF PROSECUTION.

   A trial court may require that a defendant pay costs as a condition of his probation; however, the costs must bear a reasonable relationship to the expenses of prosecution; where the record bears no indication that the costs so levied were

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REFERENCES FOR POINTS IN HEADNOTES

[1, 7] 5 Am Jur 2d, Appeal and Error §§ 791, 810.
[2] 38 Am Jur 2d, Grand Jury §§ 39–41.
[3] 21 Am Jur 2d, Criminal Law §§ 564, 565.
[4] 41 Am Jur 2d, Indictment and Information §§ 19, 20.
[5] 60 Am Jur 2d, Perjury § 28.
[6] 38 Am Jur 2d, Grand Jury § 34 *et seq.*

reasonably related to the expense of the prosecution, the cause should be remanded for findings with regard to the taxed costs (MCLA 771.3; MSA 28.1133).

DISSENT BY D. E. HOLBROOK, JR., P. J.

4. GRAND JURY—INDICTMENT—CRIMINAL LAW—PRELIMINARY EXAMINATION—CASE PRECEDENT.

A person indicted by a citizen's grand jury is entitled to a preliminary examination; however, the Michigan Supreme Court case which established this rule made it applicable to pending and future cases, therefore, where a defendant was convicted prior to the establishment of the rule, he was not entitled to a preliminary examination and the trial court's failure to conduct a requested preliminary examination was not error.

5. CRIMINAL LAW—PERJURY—GRAND JURY—PROSECUTORIAL MISCONDUCT—DUE PROCESS.

A defendant's indictment for perjury arising from the defendant's testifying before a citizen's grand jury must stand, even if the defendant's alleged perjury may have resulted from prosecutorial misconduct which may have denied the defendant due process of law; prosecutorial misconduct does not permit a person to lie under oath.

6. GRAND JURY—WITNESSES—RIGHT TO COUNSEL—EQUAL PROTECTION.

The significant differences between proceedings before a one-man grand jury and a citizens' grand jury are ample justification for granting a witness before a one-man grand jury the right to have counsel present in the room where the inquiry is held and the denial of that right to a witness before a citizens' grand jury.

7. CRIMINAL LAW—APPEAL AND ERROR—INSTRUCTIONS TO JURY—DEFENDANT'S THEORY OF CASE—COURT CLERK—VOICE PROBLEMS OF JUDGE.

It was reversible error for a trial judge in a defendant's trial on charges of perjury to have the clerk of the court read the defendant's theory of the case to the jury because the judge had a cold and wanted to save his voice where the judge read the instructions to the jury, then stopped to save his voice and had the clerk read the defendant's theory, and then the judge continued to address the jury after the clerk had finished the defense theory which may have given the appearance to the jury that the defendant's theory was so unimportant or so

without merit that the judge could not waste his voice reading it.

Appeal from Oakland, Arthur E. Moore, J. Submitted June 14, 1977, at Lansing. (Docket No. 29403.) Decided February 22, 1978. Leave to appeal applied for.

Leon Blachura was convicted of perjury. Defendant appeals. Affirmed, but remanded for further proceedings.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, and *Marvin S. Shwedel,* Special Prosecuting Attorney, for the people.

Leitman & Roeser, for defendant on appeal.

Before: D. E. HOLBROOK, JR., P. J., and ALLEN and D. R. FREEMAN,* JJ.

ALLEN, J. We agree with all of Judge HOLBROOK, JR.'s dissenting opinion except his ultimate conclusion that the defendant's conviction must be reversed because the trial judge allowed his court clerk to read the defendant's theory of the case to the jury. We agree that error occurred, but believe the error was harmless. *People v Robinson,* 386 Mich 551; 194 NW2d 709 (1972), MCLA 769.26; MSA 28.1096, GCR 1963, 529.1.

It is not error per se to allow the clerk to read some or all of the instructions when the judge is experiencing voice problems. At least two circuit judges in Michigan have undergone throat surgery or are handicapped by voice problems and have their clerks read all of the instructions. In the present case, there is no evidence that the trial

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

judge was not in fact suffering from a severe cold which affected his voice. Finding that he could not continue, he might have taken a brief recess until he recovered. In retrospect, that would have been the preferred course. Alternatively, he might have allowed his clerk to read some other portion of the instructions, and we would probably not find error. The problem, as Judge HOLBROOK, JR., points out, is that he selected the worst possible moment to defer to his clerk. For that reason, we must agree that the judge erred.

However, the trial judge carefully explained to the jury the reason for the substitution and cautioned them that the instructions should be accepted as if he had read them. Further, the court instructed the clerk to "sound like me". Under these circumstances we cannot believe the trial judge was *sub silentio* signaling the jury that the defendant's theory was to be given little weight. And review of the record convinces us beyond a reasonable doubt that—*in this case*—the result would have been the same even if the disputed procedure had not been followed. *People v Robinson, supra.*

Defendant raises three issues which Judge HOLBROOK, JR., correctly felt required no discussion because of his finding of reversible error on the question discussed above. We refer to defendant's issues II, III and VI.[1] In *People v Blachura,* 396

[1] The three issues are stated in defendant's brief as follows:

"II. Whether this court erred when in *People v Blachura,* 59 Mich App 664 (1975), it reversed the trial court's discretionary grant of a motion for a new trial?"

"III. Whether the trial court erred in taxing costs in the amount of $5,000.00 against Leon Blachura when the amount bears no reasonable relationship to the true expense of the prosecution?"

"VI. Whether the trial court committed reversible error by allowing the foreman of the grand jury to testify to an opinion expressed by the individual members of the grand jury, in violation of MCLA 767.19; MSA 28.959?"

Mich 723; 242 NW2d 390 (1976), the Supreme Court dismissed defendant's appeal of this Court's decision in *People v Blachura,* 59 Mich App 664; 229 NW2d 877 (1975). We are precluded from going further on issue II. As to issue VI, the alleged error occurred when the grand jury foreman, in response to a question by the prosecutor, testified as to why the grand jury called the defendant.

"Q. (By Mr. Newcomer, continuing): Mr. Reynolds, can you tell us why you felt that the line of questioning that you asked Mr. Blachura was material to the inquiry regarding the Drain Commission Office?

"A. Yes. At that point in time I think we had a conflict in the minds of the jurors whether in fact Mr. Barry and Mr. Nicholes had an interest in the M-59 property.

"MR. NEWCOMER: I have no further questions."

This three-line response by the foreman does not violate MCLA 767.19; MSA 28.959 when that statute is literally read. Assuming, *arguendo,* that the foreman's response violated the spirit of the statute, *viz.:* total protective secrecy of the grand jury proceedings, we find such error harmless. *Cf. People v Kert,* 304 Mich 148; 7 NW2d 251 (1943).

Issue III, while not demanding reversal of defendant's conviction, does require remanding to the trial court for further findings as to costs. As a condition of defendant's probation, defendant was required to "pay costs in the amount of $1,000 for each count, or a total of $5,000". Under MCLA 771.3; MSA 28.1133, the trial court had the power to assess costs. But costs must bear a reasonable relationship to the expenses of prosecution. *People v Teasdale,* 335 Mich 1; 55 NW2d 149 (1952), *People v Barber,* 14 Mich App 395; 165 NW2d 608

(1968). In the instant case there is no indication that the costs levied were reasonably related to the expense of the prosecution. On this issue the record is blank. Therefore, this cause is remanded for findings with regard to the taxed costs. In all other respects, the defendant's conviction and sentence is affirmed.

Affirmed and remanded in accordance with this opinion.

D. R. FREEMAN, J., concurred.

D. E. HOLBROOK, JR., P. J. *(dissenting).* This perjury conviction has a long history in Michigan courts. *People v Blachura,* 390 Mich 326; 212 NW2d 182 (1973), and *People v Blachura,* 59 Mich App 664; 229 NW2d 877 (1975), *appeal dismissed,* 396 Mich 723; 242 NW2d 390 (1976). However, the instant case represents defendant-appellant Blachura's first appeal as of right from his November 4, 1971, conviction.

On June 24, 1971, appellant was indicted on six counts of perjury by an Oakland County citizens' grand jury investigating corruption in the county drain commissioner's office. After trial a jury found appellant guilty of five of the six counts and procedural skirmishing followed, represented in part by the above cited appellate opinions.

Defendant alleges numerous errors in the grand jury proceedings which led to his indictment and in the conduct of the trial. Our careful review of the record reveals no reversible error in the pretrial stages and Part I, below, represents the majority opinion as to the pre-trial issues. However, I believe the trial judge reversibly erred by allowing his court clerk to read defendant's theory to the jury and Part II, below, is my dissent.

I

First, defendant assigns error to the trial court's failure to conduct a requested preliminary examination after defendant's indictment. In *People v Duncan,* 388 Mich 489; 201 NW2d 629 (1972), the Michigan Supreme Court provided that a person indicted by a citizens' grand jury is entitled to a preliminary examination. However, the Court limited this right to "pending" and "future" cases. Defendant Blachura was convicted on November 4, 1971; *Duncan* was decided October 31, 1972. We note the apparent conflict between several Court of Appeals panels on the applicability of *Duncan.* In *People v Harris,* 47 Mich App 757; 209 NW2d 793 (1973), the panel remanded for a preliminary examination on authority of *Duncan,* since an exam was requested prior to trial and even though Harris was convicted approximately a year before *Duncan* was handed down. Subsequent decisions by various panels have analyzed the applicability of *Duncan* in terms of "retroactivity". *People v Carter,* 54 Mich App 69; 220 NW2d 330 (1974), *lv den,* 394 Mich 802 (1975), *People v Lazaroff,* 50 Mich App 84; 212 NW2d 743 (1973), *lv den,* 390 Mich 815 (1973), and *People v Valoppi,* 61 Mich App 470; 233 NW2d 41 (1975). While we confess some uncertainty as to what our Supreme Court meant when it used the phrase "all *pending* cases"[1] we believe the better view is expressed by *Carter, Lazaroff* and *Valoppi* for the reasons set forth in *Carter, supra,* at 71–72. Defendant was not entitled to a preliminary examination.

[1] There is surprisingly little authority defining the term "pending", *see Hartman v Edwards,* 260 Mich 281, 285; 244 NW 474 (1932), and it is not clear whether our Supreme Court means any stage before the right must be exercised *(i.e.,* in this case, after indictment but before trial), pending final judgment or pending exhaustion of appellate procedures.

Secondly, defendant contends that he was denied due process of law as a result of the prosecutor's improper advice and comments during the grand jury proceedings. Specifically defendant claims that the prosecutor's warnings not to reveal grand jury testimony to "anyone" so inhibited defendant from communicating even with his attorney that he was effectively denied access to counsel. Next defendant claims that these warnings coupled with inquiries and comments about defendant's requests to see his attorney and inquiries about defendant's conversations with his attorney breached the attorney-client privilege. Finally defendant contends the prosecutor's warnings to defendant and other grand jury witnesses not to reveal testimony to "anyone" prevented him from preparing a defense. Because of these alleged due process violations defendant urges this Court to apply an exclusionary rule suppressing defendant's grand jury testimony which forms the basis of the perjury indictment.

In essence defendant argues that if he is not properly advised of his rights he has a license to lie[2] to the grand jury and not suffer the penalties for perjury. The record clearly shows that the defendant was given an instruction as to his Fifth Amendment privilege, the consequence of the general grand jury oath, a specific warning not to perjure himself and his privilege to consult his attorney outside the grand jury room. The record also reveals many improprieties on the part of the prosecutor in "advising" the defendant. While we cannot condone such prosecutorial conduct, it does not permit defendant to lie under oath.

Defendant was indicted for perjury. Two recent

[2] For the sake of argument only we may occasionally refer to defendant's grand jury statements as "lies" or "perjury"; I do not express any opinion as to defendant's guilt or innocence.

United States Supreme Court cases make it clear that perjury convictions will be upheld despite flagrant government abuses or defects in grand jury proceedings which effectively deprive a defendant of his constitutional rights. *United States v Wong,* 431 US 174; 97 S Ct 1823; 52 L Ed 2d 231 (1977), *United States v Mandujano,* 425 US 564; 96 S Ct 1768; 48 L Ed 2d 212 (1976). Although these cases involve convictions under Federal perjury statutes for lying before Federal juries, the principles are applicable to a prosecution under state law.[3]

In *Mandujano* the Supreme Court briefly outlines the history and purpose of grand juries in our jurisprudence. The grand jury is an old and useful tool in the investigation of various types of criminal activity.

"In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative." *Mandujano* at 576.

Later, at 577, the Court said:

"[O]ur cases have consistently—indeed without exception—allowed sanctions for false statements or perjury; they have done so even in instances where the perjurer complained that the Government exceeded its constitutional powers. See *e.g., United States v Knox,* 396 US 77 [90 S Ct 363; 24 L Ed 2d 275] (1969); *Bryson v United States,* 396 US 64 [90 S Ct 355; 24 L Ed 2d 264] (1969); *Dennis v United States,* 384 US 855 [86 S Ct 1840; 16 L Ed 2d 973] (1966); *Kay v United States,* 303 US 1 [585 S

[3] We express no opinion as to the incorporation or application of other Federal grand jury principles or procedures to the conduct of grand jury proceedings in Michigan.

Ct 468; 82 L Ed 607] (1938); *United States v Kapp,* 302 US 214 [58 S Ct 182; 82 L Ed 205] (1937)."

In *Wong, supra,* the petitioner claimed that her limited command of the English language prevented her from understanding the Fifth Amendment warnings given to her. The government did not challenge the lower court's finding that in legal effect petitioner was unwarned of her Fifth Amendment privilege. The Court held that even absent a Fifth Amendment warning, there is no license for one who testifies to commit perjury.

"Finally, to characterize these proceedings as 'unfair' by virtue of inadequate Fifth Amendment warnings is essentially to say that the Government acted unfairly or oppressively by asking searching questions of a witness uninformed of the privilege. But, as the Court has consistently held, perjury is not a permissible way of objecting to the Government's questions. 'Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them.' * * * *Bryson v United States,* 396 US 64, 72 (1969), *United States v Mandujano,* 425 US at 577, 585. * * * Indeed, even if the government could, on pain of criminal sanctions, compel an answer to its incriminating questions, a citizen is not at liberty to answer falsely. *United States v Knox, supra,* 396 US, at 82–83. If the citizen answers the question, the answer must be truthful." *Wong, supra,* at 180.

In light of these controlling principles we briefly address defendant's specific allegations of prosecutorial misconduct. Defendant was not physically denied access to counsel; indeed he consulted with his attorney outside the grand jury chamber on several occasions. *People v Blachura,* 396 Mich at 724, *People v Blachura,* 59 Mich App at 667. Even if he was denied access to counsel he would have

no right to perjure himself. See *People v Blachura,* 59 Mich App at 667. Next, even if the prosecutor's comments and questions improperly inquired into the attorney-client relationship[4] or defendant's exercise of his Fifth Amendment privilege,[5] lying is not a permissible way of objecting to the prosecutor's questions. *Bryson, supra,* at 72. Finally, defendant's unsubstantiated assertions that other grand jury witnesses would not talk to defense counsel are not properly before this Court on appeal. Defendant Blachura was provided with transcripts of his grand jury testimony and we find defense counsel's claimed inability to prepare a defense to be without merit.

We believe *Mandujano* and *Wong* and cases cited therein express a firm commitment to punish those who perjure themselves even in the face of government improprieties and denials of constitutional rights. As in *Mandujano,* defendant Blachura was under oath to tell the truth and was clearly warned not to perjure himself. As the *Mandujano* Court summarized:

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[4] To the extent that defendant's claim is grounded on some compulsion to testify as to his conversations with his attorney, his claim fails because no attorney-client privilege was ever asserted. Defendant did testify as to the substance of conversations with counsel and thus is deemed to have waived the privilege. The attorney-client privilege belongs to the client and the client may waive it if he chooses. *Schaibly v Vinton,* 338 Mich 191, 196; 61 NW2d 122 (1953), *In re Arnson Estate,* 2 Mich App 478, 485; 140 NW2d 546 (1966), *Agee v Williams,* 17 Mich App 417, 423; 169 NW2d 676 (1969).

[5] It is difficult to read emotion into the grand jury transcripts. While defendant urges us to view the prosecutor as an overbearing aggressor making snide comments about defendant's exercise of his Fifth Amendment right, an equally plausible interpretation is that the prosecutor was properly asking whether defendant was exercising a privilege not to answer or whether defendant was merely being evasive. Absent the assertion of some privilege a person has an absolute duty to testify before a grand jury, *Mandujano, supra,* at 581, *United States v Calandra,* 414 US 338, 343; 94 S Ct 613; 38 L Ed 2d 561 (1974), and if defendant Blachura was not asserting a privilege he had no excuse for not answering a question.

"In any event, a witness sworn to tell the truth before a duly constituted grand jury will not be heard to call for suppression of false statements made to that jury." 425 US at 582.

Even if we accept defendant's argument that prosecutorial misconduct resulted in the denial of due process of law, defendant's indictment for perjury must stand.[6]

Finally, defendant urges us to find the so-called citizens' grand jury act, 1970 PA 9, MCLA 767.7a *et seq.;* MSA 28.947(1) *et seq.,* unconstitutional because it denies equal protection of the law to witnesses who appear before a citizens' grand jury. Defendant contends that the statutory provisions which create one-man and citizens' grand juries unfairly discriminate against witnesses who appear before a citizens' grand jury because they, unlike those who appear before a one-man grand jury, are not entitled to have counsel present in the grand jury chamber. Only those granted immunity may have counsel present in a citizens' grand jury proceeding. MCLA 767.19e; MSA 28.959(5). *People v Blachura, supra,* 59 Mich App at 666.

We decline defendant's invitation to address an equal protection argument which has already been decided adversely to defendant. *People v Blachura, supra,* 59 Mich App at 667. The great difference in the power of the one-man juror—the powers of summary contempt and immediate grants or denials of immunity—make the presence of counsel in

[6] Defendant has made no showing that there was any causal connection between the prosecutorial misconduct and the perjured statements. If defendant intended to imply that the perjured statements were somehow coerced by the prosecutorial misconduct, he should have argued "duress" at trial, rather than constructing a due process challenge on appeal. *See* concurring opinion of Justice Brennan in *Mandujano, supra,* at 585.

the grand jury chamber mandatory. Counsel is necessary to balance the awesome power of the judge-inquisitor. In view of the significant differences between one-man and citizens' grand juries, defendant has not met the heavy burden placed on him to overcome the presumption of statutory validity. *Manistee Bank & Trust Co v McGowan,* 394 Mich 655, 667; 232 NW2d 636 (1975).

II

At this point I part company with my fellow judges. I believe the trial judge reversibly erred by allowing his court clerk to read defendant's theory of the case to the jury.

After counsel submitted their requested instructions and after counsel had an opportunity to discuss the instructions, the trial judge began his charge to the jury. He first gave a general overview of the duties of the jury, explained the indictment and the elements of the crime of perjury, and, as requested, gave the prosecution's theory of the case; these matters comprise about 20 pages of transcript.[7]

Then the judge came to defendant's theory of the case:

"So much for the contention of the Prosecutor in this case. Now the contention of the Defendant or the Defendant's theory of the case is as follows.

"I will let you do a little reading here, to save my voice. The Clerk will read from my notes. They will go on the record as if I were charging you, and see if you can sound like me Mr. Clerk."

[7] For purposes of illustrating the relative length of various parts of the jury instructions it is convenient to refer to the number of pages of transcript.

The court clerk proceeded to read the defendant's theory which comprises about four pages of transcript. The judge then proceeded to finish charging the jury; this accounts for the next 20 pages of transcript. In short, the judge managed to read 20 pages of instructions, stopped to save his voice when it was time to read defendant's theory, and continued for another 20 pages after defendant's theory was read by the court clerk.

Once the jury was excused defense counsel objected to this curious procedure, contending that the judge seemed to be giving partiality to the people's case by having the clerk read the defendant's theory to the jury. The judge overruled the objection, reasoning,

> "That is a techinicality *[sic]* that a lawyer might note, and your objection is overruled. I think his voice, was on the record, was as good as mine, maybe better under my cold conditions."

While I cannot fault the judge for having a cold and consequently wanting to save his voice, I believe that he chose a critically inappropriate time to allow his clerk to partially instruct the jury.

This is a rather unique situation and a case of first impression in Michigan. The applicable court rule, GCR 1963, 516.7, provides in part:

> "It is the *duty* of the *court* to present to the jury the issues in the case and the *theories of the parties.* * * * The Court need not give any statement to the jury in the form submitted if the court presents to the jury the material substance of the issues and of the theories of each party." (Emphasis supplied.)

Subsection 516.7, added in 1970, requires the trial

judge to instruct the jury on defendant's theory of the case if the defendant so requests. *People v Reed,* 393 Mich 342; 224 NW2d 867 (1975). There can be little dispute that the term "court" in this context means the judge. See *State Board of Education v von Zellen,* 1 Mich App 147, 158; 134 NW2d 828 (1965).

As a general proposition the charge to the jury is especially crucial in a criminal case. Although GCR 1963, 516.1 authorizes the trial judge to make comments on the evidence, the testimony and character of witnesses as "the interests of justice require", this is not a license for the trial judge to impose his or her opinion as to the verdict on the jury. *People v Padgett,* 306 Mich 545, 552–555; 11 NW2d 235 (1943), *People v Barmore,* 368 Mich 26, 28; 117 NW2d 186 (1962), *People v Oates,* 369 Mich 214, 216–217; 119 NW2d 530 (1963), *People v Wichman,* 15 Mich App 110; 166 NW2d 298 (1968).

In *Wichman, supra,* now Justice LEVIN wrote:

> "A trial judge desiring to see that the case goes to the jury without disclosure of his personal views in the matter should be able, no matter how overwhelming the people's case, to preserve an appearance of impartiality in his instructions. By presenting the defendant's theory, presumably just argued to the jury, the judge can avoid creating the impression that he has stepped out of his role of impartial judicator and is now plugging for his own point-of-view." 15 Mich App at 115.

It has long been recognized that the words and actions of a trial judge may weigh heavily with a jury. *People v King,* 384 Mich 310, 315; 181 NW2d 916 (1970), *Snyder v United Benefit Life Insurance Co,* 371 Mich 36, 44–45; 123 NW2d 234 (1963), citing *McDuff v The Detroit Evening Journal Co,* 84 Mich 1, 10; 47 NW 671 (1890). Even inadvertent

or thoughtless remarks by a judge may prove exceedingly prejudicial in a criminal trial. *People v Neal,* 290 Mich 123, 129; 287 NW 403 (1939).

A defendant is entitled to a fair and impartial instruction on his or her theory of the case, although not in the exact form requested.[8] The leading commentators on Michigan court rules state:

"The theories of each party and issues raised thereby must be stated fairly, giving *equal stress* to the positions of each party." (Emphasis supplied.) 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), at 562.

See also 88 CJS, Trial, § 275, p 736. The trial judge should avoid the appearance of favoring one party by giving undue emphasis to that party's theory.

"Since instructions should not draw the attention of the jury to particular facts, it is error to give instructions * * * which unduly emphasize issues, theories, defenses * * * whether by repetition or by singling them out and making them unduly prominent, or instructions which in any way unduly favor one party, although the instructions may be correct as legal propositions." 88 CJS, Trial, § 340, pp 903–906.

See also 88 CJS, Trial, § 299, p 811; 75 Am Jur 2d, Trial, § 643, pp 603–604; *Fields v Rutledge,* 284 SW2d 659, 662 (Ky App, 1955), *Martin Flying Service v Martin,* 233 NC 17; 62 SE2d 528 (1950).

[8] The caveat in GCR 1963, 516.7 that the trial judge need not deliver a party's theory in the requested "form" does not save the judge's procedure. This section of the rule allows the judge to exercise some discretion in presenting an aspect of an issue or theory which has been requested but is not justified for one reason or another. It does not allow unlimited discretion in presenting a party's theory and certainly does not authorize the judge to improperly influence a jury's verdict. A judge may not choose a "form" which gives unequal and unfair stress to one party's theory.

I conclude that the judge's unfortunate choice of timing in allowing his clerk to read defendant's theory is reversible error. Had the judge chosen to save his voice during the reading of the prosecution's theory, defendant's convictions would probably stand. Here, however, the judge read instructions comprising 20 pages of transcript both before and after the clerk read defendant's theory. This lack of equal stress on defendant's theory singled it out from the rest of the instructions. Were the jurors to infer that the defendant's theory was so unimportant or so without merit that the judge could not waste his voice reading it? If a trial judge's words weigh heavily with a jury, *King, supra,* at 315, his decision not to speak would weigh as, if not more, heavily.

This Court reviews the charge as a whole, *Shreve v Leavitt,* 51 Mich App 235; 214 NW2d 739 (1974), and although technically the jury was instructed on defendant's theory, the judge's decision to save his voice at that critical point failed to accord defendant's theory equal prominence and credibility in the eyes of the jury. I cannot say this error was harmless beyond a reasonable doubt and I would reverse and remand for a new trial.

PEOPLE v COUSINO

(CITY OF UTICA v COUSINO)

1. COSTS—COURTS—TAXATION OF COSTS.

The power of a court to tax costs is wholly statutory.

2. COSTS—TAXATION OF COSTS—REGULATION OF COSTS—STATUTES.

Except as otherwise provided by statute, the Supreme Court may by rule regulate the taxation of costs (MCLA 600.2401; MSA 27A.2401).

3. PLEADING—COSTS—UNREASONABLE ALLEGATIONS AND DENIALS—LITIGATION EXPENSES—ATTORNEY FEES—COURT RULES.

A party making an unreasonable allegation or denial of fact in his pleadings may be required to pay reasonable expenses incurred by the adverse party in proving or preparing to prove or disprove such fact as the case may be, including reasonable attorney fees (GCR 1963, 111.6).

4. COSTS—ASSESSMENT OF COSTS—CONSTITUTIONAL LAW—APPEAL AND ERROR—COURT RULES.

A circuit court's assessment of costs against an unsuccessful appellant from the district court in a criminal case who is exercising his constitutional right to appeal is reversible error and the award of such costs should be vacated where the assessment of the costs impermissibly threatens the defendant's right to appeal by attempting to chill the exercise of a constitutional right (Const 1963, art 1, § 20, GCR 1963, 111.6).

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 20 Am Jur 2d, Costs § 5.

[3] 7 Am Jur 2d, Attorneys at Law § 235 *et seq.*

20 Am Jur 2d, Costs § 78.

Amount of attorneys' compensation in absence of contract or statute fixing amount. 57 ALR3d 475.

False statements: construction and application of state statute or rule subjecting party making untrue allegations or denials to payment of costs or attorneys' fees. 68 ALR3d 209.

[4] 4 Am Jur 2d, Appeal and Error §§ 128, 129.

20 Am Jur 2d, Costs § 94.

Appeal from Macomb, Hunter D. Stair, J. Submitted October 4, 1977, at Detroit. (Docket No. 29425.) Decided February 22, 1978. Leave to appeal denied, 402 Mich 950e.

Paul W. Cousino was convicted in district court of violating a speeding ordinance in the City of Utica. Defendant appealed to circuit court which affirmed defendant's conviction and assessed additional costs for initiating a vexatious appeal. Defendant appeals by leave granted. Affirmed in part, reversed in part.

William J. McGrail, Jr., Assistant City Attorney, for the people.

Paul W. Cousino, *in propria persona.*

Before: D. F. WALSH, P. J., and V. J. BRENNAN and BEASLEY, JJ.

V. J. BRENNAN, J. Proceeding *in propria persona,* defendant Paul W. Cousino appeals an order of Macomb Circuit Judge Hunter D. Stair June 14, 1976, affirming on appeal defendant's conviction of speeding and assessing costs of $350 for initiating a vexatious appeal.

Defendant was ticketed March 17, 1975, for driving 40 miles per hour in a 25 mile per hour zone in the City of Utica, County of Macomb. On March 21, 1975, he signed an appearance form, entering a plea of not guilty and requesting a trial on the charge.

The trial was held January 15, 1976, before visiting Judge Richard C. Stavoe, sitting in the 41st District Court. At the commencement of trial, defendant, representing himself *in propria persona,* moved to dismiss on two grounds: denial of the constitutional right to a speedy trial, and lack

of jurisdiction on grounds the offense occurred in Sterling Heights rather than Utica. The motions were denied and testimony was received from the ticketing officer, Utica City Police Officer Russell Wilson. Defendant neither cross-examined the officer nor testified in his own behalf. Following final argument by both sides, the court found defendant guilty and imposed a $25 fine, including costs.

Defendant appealed as of right to Macomb County Circuit Court, and filed a brief of 12 pages raising nine issues. The prosecution responded with a brief of nine pages.

In an opinion dated May 25, 1976, Macomb Circuit Judge Stair affirmed the conviction and ordered costs assessed against defendant pursuant to GCR 1963, 111.6, based on a finding that "this appeal was motivated solely by a vexatious and bad faith desire to harass legitimate judicial process". Judge Stair's final order, dated June 14, 1976, ordered defendant to pay costs to the Utica City Clerk in the sum of $350, which amount includes actual attorney fees billed by the assistant city attorney representing the city on appeal.

Pursuant to the order of this Court dated September 27, 1977, we limited the parties to the issue whether the trial court erred reversibly in ordering defendant to pay $350 costs, representing attorney fees for the city attorney in defendant's appeal as of right from his district court speeding conviction. We address this issue alone.

The power to tax costs is wholly statutory. *Gundersen v Bingham Farms,* 1 Mich App 647, 648; 137 NW2d 763 (1965). Nonetheless, except as otherwise provided by statute, the Michigan Supreme Court may by rule regulate the taxation of costs. MCLA 600.2401; MSA 27A.2401. The several statutes and court rules making provision for recovery

of attorney fees as costs or damages under specified circumstances are collected in *State Farm Mutual Automobile Insurance Co v Allen,* 50 Mich App 71, 75; 212 NW2d 821 (1973). Included are GCR 1963, 526.7, 116.5, and 117.3 (filing an affidavit opposing a motion for summary or accelerated judgment without good faith and for purposes of delay); GCR 1963, 111.6 (unwarranted allegations and denials in pleadings); and GCR 1963, 816.5 (vexatious proceedings in the Court of Appeals).

Judge Stair relied upon GCR 1963, 111.6, which reads as follows:

> "Unwarranted Allegations and Denials. If it appears at the trial that any fact alleged or denied by a pleading ought not to have been so alleged or denied and such fact if alleged is not proved or if denied is proved or admitted, the court may, if the allegation or denial is unreasonable, require the party making such allegation or denial to pay to the adverse party the reasonable expenses incurred in proving or preparing to prove or disprove such fact as the case may be, including reasonable attorney fees. GCR 1963, 111.6."

The historical derivation of this rule is explored in *Harvey v Lewis,* 10 Mich App 23, 34–40; 158 NW2d 809 (1968) (LEVIN, J. dissenting). See also 1 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), 1975 Supp, pp 52–53.

Our review of this matter convinces us that GCR 1963, 111.6, may not be employed against unsuccessful appellants in criminal cases exercising their constitutional appeal as of right. The trial court's assessment of costs in this case impermissibly threatens defendant's right to appeal. Because of this disposition of plaintiff's claim, we need not consider what would have been in fact vexatious within the context of the actual pleadings in this case.

In short, we find the trial court's assessment of $350 costs against a defendant attempting to appeal his speeding ticket constitutes an attempt to chill exercise of the right to appeal guaranteed by 1963 Michigan Constitution, art 1, § 20. GCR 1963, 111.6, may not be extended to the lengths the trial court sought to reach in assessing these costs against defendant. No other provision appears in Michigan statutes or court rules to justify the measure proposed here, especially in view of defendant's constitutional right to appeal.

We affirm defendant's conviction and reverse the decision of the trial court as to the award of costs and vacate the award of costs assessed.

ALVARADO v SCUTT

1. APPEAL AND ERROR—MOTIONS—NEW TRIAL—ABUSE OF DISCRETION.

   Review by the Court of Appeals of a trial court's denial of a motion for a new trial is to determine whether the denial was an abuse of discretion.

2. APPEAL AND ERROR—JURY VERDICT—DEFECTIVE VERDICT—REDELIBERATION—GROUNDS FOR REVERSAL.

   There is no ground to reverse a jury verdict even where the verdict must, upon redeliberation, be substantially reassessed after discovery of a defect where the trial court does not seriously compromise the jury's free exercise of judgment on the factual merits.

3. TRIAL—JUDGE'S DISCRETION—JURY—REDELIBERATION—FORM OF VERDICT.

   A trial judge did not abuse his discretion in asking a jury to redeliberate in order to correct the form of their verdict where the judge made no comment to the jury which compromised their determination of the facts, the judge's response to the initial verdict was addressed solely to the improper form of the verdict, and the verdict ultimately returned was in the form the judge orginally requested.

4. JUDGMENT—JURY VERDICT—DEFECTIVE JUDGMENT—COURT RULES.

   A jury verdict upon which no judgment was rendered may not be attacked by use of a court rule which provides for a post-trial proceeding to remedy defective judgments (GCR 1963, 527).

5. DAMAGES—EVIDENCE—JURY VERDICT—GREAT WEIGHT OF EVIDENCE.

   A jury's verdict that a plaintiff was entitled only to minimal damages following an automobile accident was not contrary to the great weight of the evidence where there was evidence to indicate that the injury of which the plaintiff complained was

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REFERENCES FOR POINTS IN HEADNOTES

[1] 4 Am Jur 2d, Appeal and Error § 123 *et seq.*
58 Am Jur 2d, New Trial § 212 *et seq.*
[2–4] 76 Am Jur 2d, Trial § 1208 *et seq.*
[5] 76 Am Jur 2d, Trial § 1166.

work-related and existed prior to the automobile accident, that the injury may have been psychological rather than physical, and that the plaintiff was on sick leave from her employment at the time of the accident.

Appeal from Ingham, Ray C. Hotchkiss, J. Submitted November 8, 1977, at Lansing. (Docket No. 31140.) Decided February 22, 1978. Leave to appeal applied for.

Complaint by Anita Alvarado against Melissa M. Scutt for damages for injuries received in an automobile accident. Judgment for plaintiff. The plaintiff's motions for a mistrial and for a new trial were denied, and the plaintiff appeals. Affirmed.

Dunnings & Canady, P. C., for plaintiff.

Foster, Swift, Collins & Coey, for defendant.

Before: QUINN, P. J., and V. J. BRENNAN and C. L. BOSMAN,* JJ.

V. J. BRENNAN, J. On February 15, 1974, plaintiff Anita Alvarado filed a complaint charging defendant Melissa M. Scutt with negligent operation of an automobile. The case arose out of an automobile accident in Lansing, Michigan, on February 2, 1973. Plaintiff was traveling north on Washington and stopped at a railroad crossing when the signal started flashing. While stopped at the crossing, plaintiff's vehicle was struck from the rear by a car driven by defendant. Plaintiff experienced no pain at the time of the accident and indicated to a policeman at the scene that she was unhurt.

Plaintiff experienced pain and stiffness in her neck, shoulders and arms on the day after the

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

accident and visited Ingham Medical Hospital. X-rays were taken and muscle relaxants prescribed. Plaintiff was employed at Oldsmobile at the time of the accident. However, she was on sick leave for a leg condition. Dr. DeBruin, the physician treating plaintiff's leg condition, examined plaintiff regarding her complaints of pain in her neck and upper extremities, but found no evidence of organic disease. Nevertheless, during the next three years, plaintiff was forced by these injuries to undergo various treatment and hospitalization, as well as various reassignments in her employment due to her disability. Detailed testimony to this effect was elicited at trial.

At the conclusion of trial, the trial court instructed the jury as to the elements of negligence, burden of proof, and the measure of damages. The trial court further instructed the jury that their verdict should be in either of two forms: (1) verdict for the plaintiff with damages assessed in a dollar amount, or (2) verdict of no cause of action for defendant.

The jury rendered their verdict in the following manner:

> "We find Miss Scutt guilty of negligence and we award Miss Alvarado recovery costs limited to medical expenses incurred to date which are not covered by Miss Alvarado's insurance program plus $1,000 for pain and suffering."

The trial court requested counsel to approach the bench and, after a conference out of the hearing of the jury and the court reporter, advised the jury that their verdict was not in the form which he had requested. The trial court remanded the jury for further deliberations after reinstructing them that they may find on behalf of the plaintiff

and assess damages or find on behalf of the defendant.

After the jury retired, plaintiff's counsel moved for a mistrial on the basis of the improperly returned verdict. The trial court took the motion under advisement. The jury returned and found on behalf of the plaintiff, awarding her a lump sum verdict of $2,579.40. The trial court then denied plaintiff's motion for a mistrial. Plaintiff later moved for and was denied a new trial on the same ground. Plaintiff appeals as of right under GCR 1963, 806.1.

On appeal, plaintiff raises several issues for consideration. We will discuss at length only one of those claims.

Plaintiff contends that the trial court erred by denying her motion for a new trial because the court was forced to remand the jury to redeliberate after the jury had rendered an initial verdict in a form inconsistent with his instructions.

GCR 1963, 527.1 permits a new trial to be granted to all or any of the parties on all or part of the issues whenever their substantial rights are materially affected for any one of nine enumerated causes. Neither plaintiff's motion for a new trial nor her brief on appeal avers to any one of the specific grounds for granting a motion for new trial. The error plaintiff claims could be covered either by GCR 1963, 527.1(1), referring to irregularity in the proceedings of the court, or by GCR 1963, 527.1(7), concerning errors of law which occur during the proceedings. In any event, we review the court's denial of plaintiff's motion by determining whether an abuse of discretion occurred. *Yaklin v Stanley,* 42 Mich App 157, 159; 201 NW2d 347 (1972).

Michigan decisions indicate that even verdicts

which on redeliberation must be substantially reassessed after discovery of a defect do not create ground for reversal where the court does not seriously compromise the jury's free exercise of judgment on the factual merits. See *Jakubiec v Hasty,* 337 Mich 205, 212; 59 NW2d 385 (1953). See also *McCormick v Hawkins,* 169 Mich 641, 648–649; 135 NW 1066 (1912) (no error in a case where the trial court instructed the jury to redeliberate and eliminate from their original verdict an order that defendant retract a certain defamatory article); *Loranger v Loranger,* 115 Mich 681, 686; 74 NW 228 (1898) (no error where the trial court required the jury to reconsider its verdict because the verdict did not conform with an applicable statute which required separation of the items of injury); *Olcott v Hanson,* 12 Mich 452, 454–455 (1864) (no error in an action on a promissory note where the jury was instructed to redeliberate in order to express its verdict in terms of a specific sum).

Plaintiff's reliance on another recent case is misplaced. *McTaggart v Kurys,* 318 Mich 627; 29 NW2d 114 (1947). In that case, plaintiff sought to recover from defendant wife of deceased the sum of $5,350, the contents of a metal box. Uncontroverted testimony appeared that at least $1,000 of the total sum belonged to defendant. The jury awarded the contents of the box to plaintiff less $1,000 which they awarded to defendant. Upon hearing the verdict the trial court replied, "Well, now, that is not it". He then directed the jury to find a certain amount and remanded them for further deliberation. The jury's second verdict awarded the entire contents of the box to plaintiff. The Court reversed on the basis that the trial court's initial reply to the jury's verdict was evidently construed by the jury as a statement that

defendant was not entitled to *any* damage at all in *any* form. In essence, the jury's ability to determine the factual merits of the case was taken from them. *McTaggart, supra,* at 631–632.

We find the present case distinguishable simply because the trial court made no comment to the jury which compromised their determination of the factual merits of the case. The trial court's response to the initial verdict addressed solely the improper form of the verdict. The verdict ultimately returned was properly in the form the trial court originally requested. We find no error in the court's initial instruction and no abuse of discretion in his returning the jury to redeliberate in order to correct the form of the verdict. See *Jakubiec v Hasty, supra* at 212; *McCormick v Hawkins, supra* at 648–649. Plaintiff's claim is without merit.

Having carefully considered the plaintiff's remaining allegations of error, we might only note that because GCR 1963, 527 is a post-trial proceeding designed to remedy defective judgments and because judgment was entered only on the second verdict, the initial verdict, upon which no judgment was rendered, cannot be attacked under GCR 1963, 527.

Further, under plaintiff's final contention that the jury's verdict was contrary to the great weight of the evidence, we would eliminate any possible review of the jury's initial verdict on the grounds just mentioned. Regarding the second verdict, evidence appeared to indicate that plaintiff's injury was work-related and existed prior to the auto accident, that the injury may have sprung from psychological rather than physical etiologies, and that plaintiff was on sick leave at the time of the accident. Such evidence would support the theory

that plaintiff's injury and inability to work could have been due to causes other than the accident, allowing the jury to properly find wages lost subsequent to the accident not a result of the accident itself. The verdict was not contrary to the great weight of the evidence and the court did not abuse its discretion by denying plaintiff's motion for a new trial on that ground. See *People v Stephens,* 58 Mich App 701, 703; 228 NW2d 527 (1975).

Affirmed.

QUINN, P. J., not participating.

RAATIKKA v JONES

1. APPEAL AND ERROR—PRESERVING ERROR—JURY INSTRUCTIONS—TIMELY OBJECTIONS—MANIFEST INJUSTICE.

   Plaintiffs fail to preserve claims of error to the jury instructions given by a trial court where they did not make timely objections to the instructions, but the Court of Appeals will reverse to prevent manifest injustice where the instructions given by the trial court on the controlling issue of the case were erroneous.

2. LANDLORD AND TENANT—COMMON LAW—DUTY TO REPAIR—LATENT DEFECTS.

   The common-law rule regarding the extent of a landlord's duty to repair defective premises provides that the landlord is liable to his tenant only for latent defects of which he knows or has reason to know.

3. LANDLORD AND TENANT—MICHIGAN HOUSING LAW—GOOD REPAIR—COMMON LAW—STATUTES.

   The Michigan housing law provides that every dwelling and all parts thereof be kept in good repair by the owner; the Michigan housing law abrogates the common-law rule regarding the landlord's duty to repair in the localities where it applies (MCLA 125.471; MSA 5.2843).

4. LANDLORD AND TENANT—MICHIGAN HOUSING LAW—CITY ORDINANCES—DUTY TO REPAIR—DUTY TO INSPECT—STATUTES.

   A landlord may, under provisions of the Michigan housing law and city ordinances enacted under that law, be under a duty to repair all defects in the premises of which he knew or should

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error § 891.
75 Am Jur 2d, Trial §§ 906, 908, 909.

[2–4] 49 Am Jur 2d, Landlord and Tenant §§ 774, 775, 778.

Statute requiring property to be kept in good repair as affecting landlord's liability for personal injury to tenant or his privies. 17 ALR2d 704.

Latent defect: modern status of rule requiring actual knowledge of latent defect in leased premises as prerequisite to landlord's liability for injury resulting therefrom. 88 ALR2d 586.

have known; this does not impose a duty upon the landlord to inspect the premises on a regular basis to determine if any defects exist, but it does require him to repair any defects brought to his attention by the tenant or by his casual inspection of the premises (MCLA 125.401, 125.471; MSA 5.2771, 5.2843, Durand Ordinances, ch 83, 8.121, 8.172).

Appeal from Shiawassee, Bruce A. Fox, J. Submitted November 3, 1977, at Lansing. (Docket No. 31509.) Decided February 22, 1978.

Complaint by Anna M. Raatikka and Theodore R. Raatikka against Robert W. Jones for damages for injuries incurred when Anna Raatikka fell on premises leased from the defendant. Judgment of no cause of action for defendant. Plaintiffs appeal. Reversed and remanded.

Draper, Daniel, Ruhala & Seymour, P. C., for plaintiffs.

Charles L. Jones, for defendant.

Before: J. H. GILLIS, P. J., and BASHARA and H. L. HEADING,* JJ.

H. L. HEADING, J. Plaintiffs were no-caused by a jury following trial of their negligence action against defendant. They moved for judgment notwithstanding the verdict or, in the alternative, for a new trial, alleging several errors in the charge to the jury. From the trial court's denial of that motion, they bring this appeal.

We find that plaintiffs failed to preserve their claims of error by timely objections to the instructions. However, we find that the instruction on the controlling issue of the extent of a landlord's duty

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

to repair defective premises was erroneous, and we reverse for a new trial to prevent manifest injustice, *Hunt v Deming,* 375 Mich 581; 134 NW2d 662 (1965).

The trial court instructed the jury that a landlord is liable to his tenant for injuries resulting from defects existing at the time the tenant leases the premises only if the landlord knew or should have known of the defect and it was not open to the observation of the tenant. In other words, the landlord is liable only for latent defects of which he knows or has reason to know. This has long been and continues to be the common-law rule, *Heward v Borieo,* 35 Mich App 362; 192 NW2d 668 (1971).

However, prior to the date upon which defendant landlord in this case rendered the subject premises to plaintiff tenants, the City of Durand, in which the premises are located, enacted as an ordinance the Michigan housing law, 1917 PA 167, as authorized by MCLA 125.401; MSA 5.2771, Durand Ordinances, ch 83, § 8.121. The Michigan housing law requires that every dwelling and all parts thereof be kept in good repair by the owner, MCLA 125.471; MSA 5.2843. In addition, the Durand housing code specifically requires that interior floors be kept in good repair, Durand Ordinances, ch 83, § 8.172.

It is well-established that the Michigan housing law, in localities where it applies, abrogates the common-law rule regarding the landlord's duty to repair, *Annis v Britton,* 232 Mich 291; 205 NW 128 (1925), *Crawford v Palomar,* 7 Mich App 21; 151 NW2d 236 (1967).

We therefore conclude that the landlord was under a duty to repair all defects of which he knew or should have known. This does not impose

a duty upon the landlord to inspect the premises on a regular basis to determine if any defects exist.[1] It does require him to repair any defects brought to his attention by the tenant or by his casual inspection of the premises.

Accordingly, the trial court's instruction on the extent of the landlord's duty to repair did not accurately state the law on this crucial issue, and may well have been the determining factor in the jury's verdict. To guard against the possibility of manifest injustice, we must reverse.

Reversed and remanded for a new trial. Costs to plaintiffs.

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[1] *Cf. Hockenhull v Cutler Hubble, Inc,* 39 Mich App 163; 197 NW2d 344 (1972), *lv den,* 387 Mich 809 (1972).

OAKLAND NATIONAL BANK v ANDERSON

1. BILLS AND NOTES—ACCELERATION CLAUSES—CLAIM AND DELIVERY—ACCELERATED BALANCE.

   Acceleration of the balance of the payments on a note may be commenced by filing a complaint for claim and delivery based on the accelerated balance.

2. BILLS AND NOTES—ACCELERATION CLAUSES—LATE INSTALLMENTS—ACCEPTANCE—WAIVER OF ACCELERATION—CLAIM AND DELIVERY.

   The acceptance of a late installment payment on a note containing an acceleration clause serves to reduce a defendant's indebtedness, but it does not cure all existing defaults; where an acceleration action has already been brought through a complaint for claim and delivery acceptance of a single late payment does not constitute a waiver of the acceleration of the balance of the note.

3. BILLS AND NOTES—ACCELERATION CLAUSE—LATE PAYMENTS—CURRENT ACCOUNT—ACCELERATION OF PAYMENTS.

   Accepting late payments on an installment note containing an acceleration clause, where the payments were not timely made but the account was current at the time a complaint for claim and delivery was filed, prevents subsequent acceleration after acceptance of the late payments.

4. CONTRACTS—SALES—INSTALLMENT SALES—VEHICLE SALES ACT—ACCELERATION CLAUSES—CREDITOR INSECURITY—STATUTES.

   The Motor Vehicles Sales Finance Act prohibits the inclusion of an acceleration clause for the reason that the lender deems itself insecure in any installment sales contract; an attempt to accelerate payment because of creditor insecurity, which was

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 11 Am Jur 2d, Bills and Notes §§ 179, 181, 183, 294–296.
67 Am Jur 2d, Sales §§ 420, 421.
What is essential to exercise of option to accelerate maturity of bill or note. 5 ALR2d 968.

[2, 3] 11 Am Jur 2d, Bills and Notes § 296.

[5] 67 Am Jur 2d, Sales §§ 416, 417.

[6] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 42, 43, 45.

written into an agreement, is invalid and the seizure of an automobile for that reason is unlawful (MCLA 492.114[b]; MSA 23.628[14][b]).

5. SALES—INSTALLMENT SALES—MOTOR VEHICLES—DEFINITION—STATUTES.

An installment sales contract is defined as including any contract for the retail sale of a motor vehicle in the Motor Vehicles Sales Finance Act and including any loan or other form of contract which has a similar purpose or effect (MCLA 492.102[9]; MSA 23.628[2][9]).

6. CONVERSION—MOTOR VEHICLES—UNLAWFUL SEIZURE—SALES CONTRACTS—ACCELERATION CLAUSES—DAMAGES.

The remedy for the unlawful seizure and sale of an automobile in violation of the Motor Vehicles Sales Finance Act is damages for conversion; a defendant is entitled to recover the value of the automobile at the time of conversion, less any amount due the lender at the time of sale, plus any incidental damages arising from the conversion.

Appeal from Oakland, Steven N. Andrews, J. Submitted November 14, 1977, at Detroit. (Docket No. 31510.) Decided February 22, 1978. Leave to appeal applied for.

Complaint by Oakland National Bank against Walter D. Anderson and others to accelerate payment of certain notes for default and for claim and delivery of the collateral used to secure the notes. Cross-claim by defendants for damages for unlawful seizure and sale of collateral. Judgment for plaintiff. Defendants appealed to the Court of Appeals which reversed and remanded for an adversary hearing in which the probable validity of the creditor's claim of repossession must be established (Docket No. 15788, decided August 1, 1973 [unreported]). Plaintiffs appealed to the Supreme Court which affirmed the Court of Appeals decision, 390 Mich 815 (1973). On remand, the circuit court entered judgment for plaintiff. Defendants appeal. Affirmed in part, reversed in part and remanded.

Radner, Radner, Shefman, Bayer & Berlow, P. C., for plaintiff.

Curtis G. Rundell II, P. C., for defendant.

Before: BRONSON, P. J., and ALLEN and T. M. BURNS, JJ.

T. M. BURNS, J. In 1971, plaintiff made two loans to defendant in exchange for a security agreement on certain chattels and notes. The notes and security agreements included acceleration clauses in the event of a default. Also in 1971, plaintiff claimed default on the loans, instituted an action for claim and delivery, and seized the collateral without notice or hearing as then allowed by MCLA 600.2920; MSA 27A.2920 and GCR 1963, 757.

Defendant raised certain defenses to the claim and delivery action and claimed that the seizure without notice or hearing was unconstitutional. These points were rejected by the circuit court. The collateral was then sold at a sheriff's sale pursuant to a court order entered after the parties stipulated to the sale. The sale was confirmed by the circuit court.

In the appeal to this Court which followed, it was determined that the seizure of collateral was unconstitutional because done without notice or hearing. *Oakland National Bank v Anderson* (Docket No. 15788, decided August 1, 1973 [unreported]). The Supreme Court affirmed. 390 Mich 815 (1973). The hearing after remand from those decisions focused on whether defendant had a meritorious defense to the action for claim and delivery which would have allowed him to retain the collateral. See, Supreme Court Administrative Order, 1973-3.

Because the collateral had been sold, the issue actually was whether defendant could maintain his cross-complaint for damages arising out of the claimed illegal seizure and sale. The trial court determined that the bank was justified in accelerating the notes and determined that defendant had not presented a meritorious defense. The trial court ordered the proceeds of the 1972 sale delivered to the bank and dismissed all other claims in this suit. Defendant appeals from that judgment.

I

There are two loans and two sets of loan documents involved in this case. In each, the actual borrower was the corporate defendant, U-Auto Lease Division, Bible Press, Inc. In the first, the bank loaned $52,783.80 and received a security agreement covering two scraper-tractors which were then at work in construction of a mobile home park. This loan was granted on April 16, 1971, and was to be repaid in 10 monthly installments, payments beginning July 15, 1971. The second loan, in the amount of $5,301.72, was given on May 12, 1971, and secured by a new station wagon. These transactions will be treated separately because of the different payment histories and the status of the loans at the time the action for claim and delivery was begun on September 3, 1971.

II

The first payments due on the first loan, July 15 and August 15, had not been received when the initial complaint for claim and delivery was filed. A sum covering the July 15 payment plus interest and late charges was accepted by the bank on

September 3 or shortly thereafter. The defendant claims that by accepting this payment, the bank waived its right to accelerate the balance on the note, relying on *Theatre Equipment Acceptance Corp v Betman,* 259 Mich 245, 242 NW 903 (1932).[1]

In *Betman* the debtor had signed a series of notes, each of which included an acceleration clause for the subsequent notes in the series upon default. The debtor made only a partial payment on the first note but the creditor did not accelerate the other notes at that time. Thereafter, the debtor paid the full balance of the next two notes. Before the fourth note matured, the creditor attempted to accelerate all remaining notes because of the unpaid balance due on the first note. The Supreme Court found that the creditor had waived his right to accelerate based on default on the first note by accepting payment on the second and third notes.

Betman does not control here. The bank had properly accelerated the entire balance of the note by filing a complaint for claim and delivery based on the accelerated balance. *Cf. Hawes v Detroit Fire & Marine Insurance Co,* 109 Mich 324; 67 NW 329; 63 Am St 581 (1896). The acceptance of defendant's check by the bank served to reduce defendant's indebtedness on the note but it did not cure all the defaults which existed at the time, including the August 15 payment, nor did it waive the acceleration of the balance which had already occurred. See, *Paul Londe & Associates, Inc v Rathert,* 522 SW2d 609 (Mo App, 1975), *US Savings Bank v Continental Arms, Inc,* 338 A2d 579 (Del, 1975).

[1] Defendant also relies upon *Cable Co v Wasegizig,* 130 Mich 387, 90 NW 24 (1902), in his waiver argument. That case actually involves a question of estoppel. The debtor was told that if a payment were made, the collateral would not be seized. There is no claim of such an agreement here.

The trial court properly concluded that defendant did not state a meritorious defense to the bank's action on the first note. That matter is properly concluded.

III

Different considerations apply in regard to the note covering the automobile. At the time the complaint was filed, the three payments which had become due had been paid. Although these payments had not been timely when made, this account was current at the time the complaint was filed. *Betman* properly applies here and prevents the subsequent acceleration after acceptance of the late payments.

The only other reason for invoking the acceleration clause of this security agreement appears to be that the bank deemed itself insecure.[2] If this transaction was subject to the Motor Vehicle Sales Finance Act, MCLA 492.101 *et seq.;* MSA 23.628(1) *et seq.,* then the "insecure" clause is invalid, MCLA 492.114(b); MSA 23.628(14)(b), and the bank's seizure of the automobile was unlawful. The trial court determined that the act was inapplicable.

MCLA 492.114(b); MSA 23.628(14)(b) prohibits the inclusion of the clause in question here in any "installment sales contract". Installment sales contract is defined in the act as including any contract for the retail sale of a motor vehicle and

[2] The security agreement provided: "The occurrence of any of the following events shall constitute a default: * * * (g) the bank deems itself insecure for any reason whatsoever." The note itself provided for acceleration only upon default in payment. The note, on the facts of this case, could not have been accelerated. The validity of the acceleration must rest on the security agreement.

The trial court dismissed various other "defaults" claimed by the bank because they had existed at the time the loan was given.

"shall include any *loan* * * * and any other form of *contract* which has a similar purpose or effect". MCLA 492.102(9); MSA 23.628(2)(9).

The security agreement here is covered by those provisions.[3] The form in which the security agreement and note are printed shows that this is a direct loan for a new automobile. The trial court erred in finding the act inapplicable.

The problem of a remedy remains since the automobile was sold many years ago. We hold that defendant is entitled to recover damages for conversion. Here, defendant can recover the value of the car at the time of the conversion, less any amount due to the bank at that time. *Wright v Dwight,* 209 Mich 678; 177 NW 209 (1920). Defendant may also recover incidental damages arising from the conversion. 22 Michigan Law & Practice, Trover and Conversion, § 15.

IV

The other issues raised do not require extended discussion. The bank in no way deprived defendant of his right to post counter-bond and retain the collateral during the suit in 1971. See GCR 1963, 757.3 and MCLA 600.2920; MSA 27A.2920. Defendant never attempted to post bond and retain the collateral, but rather, decided to litigate the question on its merits.

The original sale of the collateral was done in a commercially reasonable manner. MCLA

[3] The bank makes two arguments to support its conclusion that the act does not apply, neither of which is persuasive. First, contrary to the bank's assertion, the Motor Vehicles Sales Finance Act was in effect when this transaction occurred on May 21, 1971. Second, MCLA 487.491(c); MSA 23.710(191)(c) regulates only the amount of interest allowable on installment loans. Other terms of such loans may be supplied by other legislation and, in this case, are in fact supplied by the Motor Vehicles Sales Finance Act.

440.9507(1); MSA 19.9507(1). The sale was pursuant to court order entered after a stipulation by defendant's attorney. It is not the manner in which the collateral was sold, but the fact that it was sold which resulted in defendant's recoverable loss.

Judgment affirmed as to the first note and reversed and remanded as to the second note. No costs, neither party having prevailed in full.

DeSANTIS v MICHIGAN BASIC PROPERTY INSURANCE ASSOCIATION

1. INSURANCE—WORDS AND PHRASES—PREMISES—BUILDING—CONTENTS—ELECTION TO REPAIR.

   The word "premises" has been construed to be synonymous with the word "building"; therefore, a trial court did not err in determining that a fire insurer's election to repair the premises owned by an insured, as set forth in a letter to the insured, did not include an election to repair the contents of the building.

2. INSURANCE—STATUTES—BUILDING—CONTENTS—ELECTION TO REPAIR.

   The statutory language of a standard fire insurance policy may be interpreted to allow an insurer to elect, and the parties are free to agree upon, different methods of adjustment of losses to buildings and their contents; therefore, a trial court did not err by finding that an insurer should repair a building which it insured but should pay for the building's contents within the policy limits (MCLA 500.2832; MSA 24.12832).

Appeal from Wayne, Horace W. Gilmore, J. Submitted December 7, 1977, at Detroit. (Docket No. 31558.) Decided February 22, 1978. Leave to appeal applied for.

Complaint by Jerome DeSantis and Mildred DeSantis against the Michigan Basic Property Insurance Association requesting appointment of an umpire-appraiser to determine the extent of loss to a building and its contents owned by the plaintiffs and insured by the defendant. An umpire-appraiser was appointed, and the defendant agreed to repair the building. The trial court ordered defendant to repair the building and to pay the

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 44 Am Jur 2d, Insurance §§ 1800, 1802.

policy limits for the contents. Plaintiffs appeal. Affirmed.

Bacalis & Associates, P. C., for plaintiffs.

Joseph Crystal, P. C., for defendant.

Before: M. F. Cavanagh, P. J., and J. H. Gillis and D. C. Riley, JJ.

J. H. Gillis, J. In April, 1976, a fire caused extensive damage to a funeral home owned by plaintiffs and insured by defendant. Plaintiffs commenced a suit in Wayne County Circuit Court after the parties could not agree on the amount of the loss. Plaintiffs' complaint requested the trial court to appoint an umpire-appraiser, which it did on August 16, 1976. Shortly thereafter, defendant elected to repair the premises pursuant to MCLA 500.2832; MSA 24.12832 which provides the following options to the insurer:

"It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required."

Defendant's election was sent to plaintiffs within the 30-day limit in a letter which stated that:

"The Michigan Basic Property Insurance Association and the Metropolitan Detroit Loss Bureau have instructed me to advise you that Michigan Basic Property Insurance Association intends to exercise its option under the Standard Fire Insurance Contract, MCLA 500.2832, Paragraphs 141 through 147, to repair the *premises* at 26670 Charlevoix, Detroit, Michigan. In

view of this election, the necessity for appraisal is obviated. This election has been made in accordance with the above provisions." (Emphasis supplied.)

Defendant sent another letter to plaintiffs dated September 28, 1976, clarifying its repair election:

"The issue was raised at our initial appraisal meeting, as to whether or not if Michigan Basic elected to repair the building, an election to replace the contents or repair the contents would necessarily follow. After researching the issue and reading the provisions of the policy again, and noting the separate premiums charged, that it is the position of Michigan Basic that an election to repair the building necessarily creates a duty to repair or replace the contents. In the above captioned loss, the $30,000 limit of liability for contents is noted and there is no disagreement that the loss suffered was in that amount. If therefore Michigan Basic decides to exercise its option to repair the building, it will be for the building only."

As a result of this letter, plaintiffs filed affidavits claiming that defendant had breached its contract to repair both the building and its contents.

The trial court found no question of fact concerning whether or not defendant had made a valid election to repair under the statute. The trial court ruled that defendant had made an unequivocal election to repair the premises. However, the trial court also ruled that defendant's election to repair the premises did not include repairing the contents.

Hence, defendant was ordered to repair the building and pay the policy limits in respect to the contents.

Plaintiffs appeal, contending that 1) the trial court erred in ruling on a factual issue without

sufficient fact finding, and 2) the trial court erred in allowing defendant to repair the building and pay for the contents.

Plaintiffs' first allegation of error involves the issue of what defendant had elected to repair. Defendant's original election to repair concluded that,

> "Michigan Basic Property Insurance Association intends to exercise its option under the Standard Fire Insurance Contract, MCLA 500.2832, Paragraphs 141 through 147, to repair the *premises* at 26670 Charlevoix, Detroit, Michigan." (Emphasis supplied.)

Plaintiffs interpret the aforementioned portion of defendant's letter as an election to repair both the building and its contents. Such an interpretation is clearly erroneous. The word "premises" has been construed to be synonymous with the word "building". Courts in other jurisdictions have held the words interchangeable.[1]

It appears that the trial court simply construed defendant's election to repair in accordance with the clear language set forth in defendant's letter, and determined that the election to repair the premises did not include an election to repair the contents.

Under such circumstances, no question of fact was presented to the trial court for determination. Therefore, plaintiffs' first allegation of error must fail.

Plaintiffs next contend that MCLA 500.2832; MSA 24.12832, lines 141–147, requires an insurer to elect to repair all or none of the damaged

[1] *See Everett v Patrons & Farmers Mutual Fire Insurance Co of Jackson County,* 222 Mo App 1010, 1018–1019; 7 SW2d 463, 468 (1928), and *Kenefick v Norwick Union Fire Insurance Co,* 205 Mo 294; 103 SW 957 (1907).

property. Hence, defendant could not elect to repair the building and pay for its contents.

As noted earlier, the Michigan Standard Fire Insurance Policy, MCLA 500.2832; MSA 24.12832, provides in part that:

"It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required."

Defendant contends in its brief on appeal that:

"The language of the statute states it is optional with the insurance company to take all, *or any part,* of the property at the agreed or appraised value, *and also* to repair, rebuild or replace the property destroyed. The company may take all, or any part, *and* repair or replace. The legislature in writing the statute has chosen to use the words 'and also', a conjunction, to join the clauses defining the insurance companies' options. 'And' is defined as:

" 'Expressing the general relation of connection or addition, esp. accompaniment, participation, *combination,* contiguity, continuance, *simultaneity,* sequenu; thus; along or together with; added to or linked to; *as well as;* as without ceasing; *as at the same time;* in addition to being * * * .' Webster's New Int'l Dictionary, Second Edition (Unabridged).

* * *

"The options of the insurance company under the plain meaning of the statute indicate that it may take all, or any part of the property as well as repair or rebuild. It may elect to do so simultaneously, each in combination with the other."

Defendant's interpretation of the statute seems

consistent with the language contained therein even though other jurisdictions have held that an insurer may not split its method of adjustment.[2]

This Court has construed MCLA 500.2832; MSA 24.12832, lines 141–147, in *Ijames v Republic Insurance Co,* 33 Mich App 541; 190 NW2d 366 (1971), *lv den,* 385 Mich 775 (1971):

> "We hold that where, as here, an election of one method of adjustment has been agreed to by the parties for 'contents only' the company is not barred from exercising its option 'to repair or * * * replace' the building insured in the same policy.
>
> "The statute, or the contract *[viz.,* the policy], does not prohibit it; hence, the parties must be considered free to agree upon the differing methods as to the different coverages." 33 Mich App at 546.

Our reading of the *Ijames* case, *supra,* leads us to the conclusion that the insurer and the insured may agree upon different methods of indemnification in respect to different coverages pursuant to MCLA 500.2832; MSA 24.12832.

Hence, when a building and its contents are insured for separate amounts under one policy, the parties may agree upon different methods of adjustment for the building and its contents.

Accordingly, the trial court's order requiring defendant to repair the building and pay for its contents in accordance with the policy limits is affirmed. Costs to appellee.

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[2] "Nor can the insurer elect to replace part of the property insured, and pay for the rest." 6 Appleman, *Insurance Law and Practice,* § 4003, p 702 (1972), citing *Globe & Rutgers Insurance Co v Prairie Oil & Gas Co,* 248 F 452 (CA 2, 1917), *Gowan v Homestead Mutual Insurance Co,* 272 Wis 127; 74 NW2d 634 (1956).

PEOPLE v ROBERTSON

OPINION OF THE COURT

1. APPEAL AND ERROR—CRIMINAL LAW—SUPPRESSION OF EVIDENCE—CLEARLY ERRONEOUS RULE.

A trial court order granting a defendant's motion to suppress evidence will be affirmed by the Court of Appeals unless the trial court was clearly erroneous in granting the motion.

2. SEARCHES AND SEIZURES—AUTOMOBILES—PROBABLE CAUSE—GUNS—SUPPRESSION OF EVIDENCE.

Suppression of a loaded pistol from evidence was erroneous where the pistol was seized under circumstances where the only sensible thing for a police officer was to determine if an object dropped in a hole in an automobile where a radio speaker had once been installed was a weapon that could be used against him or illegal contraband.

3. SEARCHES AND SEIZURES—AUTOMOBILES—FURTIVE GESTURES—SUPPRESSION OF EVIDENCE.

A furtive gesture in removing from a man's waistband and secreting a dark colored object, in a high crime area, in the early hours of the morning, after a lawful stop of an automobile, gave the police a reason to search and seize and a loaded pistol seized under such circumstances should not be suppressed from trial evidence.

4. SEARCHES AND SEIZURES—EVASIVE ACTIONS—FURTIVE GESTURES—PROBABLE CAUSE—LIMITED PROTECTIVE SEARCH.

Evasive action, such as an attempt to flee, coupled with furtive

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REFERENCES FOR POINTS IN HEADNOTES

[1] 5 Am Jur 2d, Appeal and Error §§ 602–605.

[2–4] 29 Am Jur 2d, Evidence § 425.
68 Am Jur 2d, Searches and Seizures §§ 41–45, 62, 99.

[3, 4, 8] "Furtive" movement or gesture as justifying police search. 45 ALR3d 581.

[5, 6, 8, 9] 68 Am Jur 2d, Searches and Seizures §§ 43–45, 99.

[5–9] Lawfulness of search of motor vehicle following arrest for traffic violation. 10 ALR3d 314.

[7] 68 Am Jur 2d, Searches and Seizures §§ 39, 40.

gestures, such as removing a dark colored object from a man's waistband and secreting it, is sufficient justification for an officer to conduct a limited protective search.

DISSENT BY D. E. HOLBROOK, JR., J.

5. SEARCHES AND SEIZURES—CRIMINAL LAW—AUTOMOBILES—WITHOUT WARRANT—PROBABLE CAUSE.

There must be probable cause to believe that a felony has been or is being committed to justify the search of an automobile without a warrant.

6. SEARCHES AND SEIZURES—CRIMINAL LAW—PROBABLE CAUSE—BURDEN OF PROOF—EXIGENT CIRCUMSTANCES.

The burden is on the people to show the police acted with probable cause and in response to exigent circumstances, thus bringing the search under one of the specific exceptions to the warrant requirement before a search without a warrant can be sustained.

7. SEARCHES AND SEIZURES—AUTOMOBILES—PROBABLE CAUSE—IRRELEVANT TRAFFIC VIOLATIONS.

The fact that a driver committed several traffic violations is totally irrelevant to a determination of whether an officer has probable cause to search his automobile; the lawfulness of a traffic stop is not a factor in determining whether there was probable cause to search.

8. SEARCHES AND SEIZURES—AUTOMOBILES—PROBABLE CAUSE—FURTIVE GESTURES—MERE SUSPICIONS—SPECIFIC KNOWLEDGE—JUSTIFICATION FOR SEARCH.

A mere furtive gesture does not create probable cause to search an automobile; furtive gestures which raise a mere suspicion, without some additional specific knowledge on the part of an officer, are insufficient to justify a search without a warrant because mere suspicion is not probable cause.

9. SEARCHES AND SEIZURES—PROTECTIVE SEARCHES—SUPPRESSION OF EVIDENCE—SAFETY OF OFFICERS.

A search cannot be characterized as a "protective" search where there is no testimony that the officer knew what the object which was later seized was or that he feared for his safety; evidence is illegally seized and should be suppressed where the record is barren as to any fears which would justify an immediate protective search of an automobile.

Appeal from Recorder's Court of Detroit, Susan D. Borman, J. Submitted November 3, 1977, at Detroit. (Docket No. 77-102.) Decided February 22, 1978.

Scott Robertson was charged with carrying a pistol in a motor vehicle. Defendant's motion to suppress evidence was granted. The people appeal. Reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Research, Training and Appeals, and *Don W. Atkins,* Assistant Prosecuting Attorney, for the people.

John C. Mouradian, for defendant.

Before: BEASLEY, P. J., and D. E. HOLBROOK, JR. and M. J. KELLY, JJ.

M. J. KELLY, J. Plaintiff appeals from a trial court order granting defendant's motion to suppress evidence and dismiss the proceedings.

Defendant was charged with carrying a pistol in a motor vehicle, contrary to MCLA 750.227; MSA 28.424. The evidence presented below at the preliminary examination revealed circumstances under which a limited protective search was allowable.

The arresting officer testified that on September 29, 1976, at approximately 2 a.m., he and his partner were conducting a routine scout car patrol in the area of John R. and Erskine in the City of Detroit. He observed a green Maverick, in which defendant was a passenger, double-parked on Erskine. The occupant of the Maverick appeared to be

talking to two black males in a blue Thunderbird. The officer turned his patrol car around to investigate. Upon seeing the patrol car, apparently the driver of the Maverick made a U-turn on Erskine and sped away. The officer pursued the Maverick at a speed of 45–50 miles-per-hour in a 25 mile-per-hour zone, finally pulling the car over. The driver of the car was unable to produce a driver's license or car registration, whereupon she was arrested for driving without a license.

Defendant was seated in the right rear passenger's seat. As the driver exited the vehicle, the officer observed defendant take a dark-colored object from the right waistband of his pants. Defendant placed the object in a hole, approximately four inches in diameter, where a radio speaker had once been installed. The officer then ordered defendant and a front seat passenger out of the car. He then proceeded to conduct a search of the car, limited to the area of the rear seat where he had observed defendant drop the object. The only object found in the hole was a .32-caliber blue steel automatic, which defendant did not have a permit to carry. The pistol and a live round of ammunition were taken as evidence.

The trial court order suppressing the pistol will be affirmed by this Court unless we find the trial court to be clearly erroneous in granting defendant's motion. *People v Terrell,* 77 Mich App 676, 679; 259 NW2d 187 (1977). We hold that the trial court ruling was clearly erroneous. Under the circumstances the only sensible thing for a police officer was to determine if the object dropped in the well hole was a weapon that could be used against him or illegal contraband. A furtive gesture in removing from the waistband and secreting a dark colored object, in a high crime area, in the

early hours of the morning, after a lawful stop, should not result in suppression of a loaded pistol.

Furthermore, the defendant and his companions rapidly departed from the scene where they were first observed by the police, apparently upon seeing the police turn around and come in their direction. *Cf. People v Nelson Pitts,* 40 Mich App 567, 576; 199 NW2d 271 (1972), *lv den,* 388 Mich 791 (1972), *People v Evans,* 3 Mich App 1; 141 NW2d 668 (1966). This apparently evasive action, coupled with the furtive actions of defendant, is sufficient evidence to justify the limited protective search. Certainly, the facts and circumstances involved more than a mere furtive gesture on the part of defendant. See generally *People v Terrell, supra, People v Hall,* 40 Mich App 329, 337; 198 NW2d 762 (1972), *Pennsylvania v Mimms,* 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977).

The order to suppress the evidence is reversed and the proceedings against the defendant are reinstated.

Reversed.

BEASLEY, P. J., concurred.

D. E. HOLBROOK, JR., J. *(dissenting).* In granting defendant's motion to suppress, the trial judge noted that the preliminary examination transcript revealed no testimony by the police officer that he had any idea what the "dark colored object" was nor any testimony that the officer feared for his safety. Under these circumstances there was no probable cause for a warrantless automobile search and the evidence should be suppressed.

To justify a warrantless automobile search, there must be probable cause to believe that a felony has been or is being committed. *People v Kuntze,* 371 Mich 419; 124 NW2d 269 (1963), *Peo-*

ple v Strong, 77 Mich App 281, 284; 258 NW2d 205 (1977), *People v Iverson,* 34 Mich App 519, 526; 191 NW2d 745 (1971). To sustain a warrantless search, the burden is on the people to show the police acted with probable cause and in response to exigent circumstances, thus bringing the search under one of the specific exceptions to the warrant requirement. *People v White,* 392 Mich 404, 410; 221 NW2d 357 (1974), *People v Strong, supra* at 285.

The fact that the driver committed several traffic violations is totally irrelevant to a determination of whether the officer had probable cause to search the automobile. *People v Ridgeway,* 74 Mich App 306, 312; 253 NW2d 743 (1977), *People v Strong, supra* at 285. The lawfulness of the traffic stop is not a factor in determining whether there was probable cause to search. *People v Nelson Pitts,* 40 Mich App 567, 571–572; 199 NW2d 271 (1972), *lv den* 388 Mich 791 (1972).

The only possible basis for the search, therefore, is the fact that the defendant dropped an unidentified dark colored object into a hole in the backseat area. Such a mere "furtive gesture" does not create probable cause to search an automobile. *People v Pitts, supra* at 576. In the instant case, as in *Pitts,* the officer had no reason to believe the occupants of the auto possessed any contraband. The defendant could have been hiding any number of things from the police. As in *Pitts,* the officer here had to infer that the defendant's actions were evasive and the officer had to infer the dark colored object was contraband. At most, the officer had a mere suspicion and mere suspicion is not probable cause. *People v Pitts, supra* at 579. Furtive gestures which raise a mere suspicion, without some additional specific knowledge on the part of

the officer, are insufficient to justify the warrantless search. *People v Terrell,* 77 Mich App 676, 680; 259 NW2d 187 (1977).

As noted above, the testimony of the police officer at the preliminary examination reveals he did not know what the object was. Further there was no testimony that the officer feared for his safety, so the search cannot be characterized, as the majority has done, as a "protective" search. If anything the placing of the pistol into a hole in the side of the car placed the officer in less danger than had the defendant kept the pistol in his waistband. I am aware of the potential dangers facing police officers in even routine traffic stops, *Pennsylvania v Mimms,* 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977), but here the record is barren as to any fears which would justify an immediate protective search of the auto.

I would affirm the trial court's suppression of the illegally seized evidence.

PEOPLE v CASTANEDA

1. WITNESSES—CRIMINAL LAW—UNAVAILABLE WITNESSES—PRIVILEGE AGAINST SELF-INCRIMINATION—STATUTES.

A witness who refuses to testify at trial, asserting his privilege against self-incrimination, may properly be found to be unavailable for purposes of a statute which allows introduction of an unavailable witness's preliminary examination testimony, and no prejudice resulted to a defendant from introduction of such a witness's prior testimony where defense counsel had been present at the earlier hearings at which the testimony was given and where defense counsel admittedly communicated with the witness prior to trial and was not surprised at the witness's assertion of privilege (MCLA 768.26; MSA 28.1049).

REFERENCES FOR POINTS IN HEADNOTES

[1, 8] 29 Am Jur 2d, Evidence § 758.

Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination. 45 ALR2d 1354.

[2] 81 Am Jur 2d, Witnesses § 74.

[3] 81 Am Jur 2d, Witnesses § 518 *et seq.*

[4] 81 Am Jur 2d, Witnesses §§ 569–586.

Prior conviction: effect of prosecuting attorney asking defense witness other than accused as to prior convictions where he is not prepared to offer documentary proof in event of denial. 3 ALR3d 965.

[5] 81 Am Jur 2d, Witnesses §§ 432, 433.

[6] 81 Am Jur 2d, Witnesses §§ 500–504.

[7] 75 Am Jur 2d, Trial § 724.

[9] 75 Am Jur 2d, Trial §§ 775–779.

Propriety under Griffin v. California and prejudicial effect of unrequested instruction that no inferences against accused should be drawn from his failure to testify. 18 ALR3d 1335.

Comment or argument by court or counsel that prosecution evidence is uncontradicted as amounting to improper reference to accused's failure to testify. 14 ALR3d 723.

Violation of Federal constitution rule (Griffin v. California) prohibiting adverse comment by prosecutor or court upon accused's failure to testify, as constituting reversible or harmless error. 24 ALR3d 1093.

2. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—INDORSEMENT—PRODUCTION—DUE DILIGENCE—APPEAL AND ERROR.

Failure of the prosecution to indorse and produce a res gestae witness may be excused when the prosecutor makes a showing of due diligence in searching for the witness, and a trial judge's finding of due diligence will not be overturned on appeal unless a clear abuse of discretion is shown.

3. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—IMPEACHMENT—STATUTES.

The people are obligated to call res gestae witnesses to testify in a criminal trial, whether their testimony is favorable or unfavorable, and a res gestae witness so called may be impeached by the prosecution the same as though the witness had been called by the defendant (MCLA 767.40a; MSA 28.980[1]).

4. WITNESSES—CRIMINAL LAW—IMPEACHMENT—PRIOR FELONY CONVICTIONS—PREJUDICE.

A witness may be impeached by inquiry about prior felony convictions, but a prosecutor should present the witness for whatever testimony he has to give before attempting to impeach him; a defendant was not prejudiced by the prosecutor asking a witness, as his first question, about a prior conviction where the question was objected to before it was answered, the witness did not answer and a curative instruction was given.

5. WITNESSES—CRIMINAL LAW—CHARACTER WITNESSES—DEFENDANT'S PRIOR CONVICTIONS—PREJUDICE.

A defendant was not prejudiced where the prosecutor asked the defendant's character witness whether she knew of a prior conviction of the defendant where the question was objected to, the objection was sustained, and the jury was instructed to disregard it because there was no such prior conviction and where the record shows no bad faith on the part of the prosecutor because there was an error in the conviction record.

6. WITNESSES—CHARACTER WITNESSES—CROSS-EXAMINATION—MISCONDUCT OF DEFENDANT.

Prior clearance should be obtained from the trial judge as to the questioning on cross-examination of any character witness regarding any alleged misconduct of a defendant.

7. DRUGS AND NARCOTICS—AIDING AND ABETTING—INSTRUCTIONS TO JURY.

A trial court properly instructed a jury on aiding and abetting

where the defendant, who was charged with delivery of heroin, maintained that another person was the drug dealer and where from the testimony at trial it would be reasonable for the jury to believe that the other person was the dealer or supplier and that the defendant had assisted in effecting the sale for which he was charged.

8. WITNESSES—CRIMINAL LAW—REFUSAL TO TESTIFY—OPPORTUNITY TO CROSS-EXAMINE.

A defendant was not prejudiced by a witness's refusal to answer certain questions at trial because of a claim of Fifth Amendment rights and by the subsequent reading to the jury of the witness's testimony from the preliminary examination and at a guilty plea revocation hearing where the defendant vigorously cross-examined the witness at the preliminary examination and presented evidence in his own behalf at the hearing, the testimony which the witness did give at trial exculpated the defendant, and the witness did appear before the jury.

9. CRIMINAL LAW—INSTRUCTIONS TO JURY—ADVERSE INFERENCES—WITNESSES—FAILURE TO TESTIFY—APPEAL AND ERROR—PRESERVING QUESTION.

A *sua sponte* instruction that the jury may not draw any adverse inference because of a witness's refusal to testify need not be given, and where a defendant did not request such an instruction the issue of whether the trial court erred by not giving such an instruction is not properly preserved for appeal.

Appeal from Ingham, Michael G. Harrison, J. Submitted January 9, 1978, at Lansing. (Docket No. 77-676.) Decided February 22, 1978.

Guadalupez B. Castaneda was convicted of delivery of heroin. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,* Prosecuting Attorney, and *Michael G. Woodworth,* Chief Appellate Attorney, for the people.

Earl J. Fretz and *H. Eugene Bennett,* for defendant on appeal.

Before: BRONSON, P. J., and R. B. BURNS and R. E. A. BOYLE,* JJ.

R. E. A. BOYLE, J. Defendant was convicted by a jury of delivery of heroin in violation of MCLA 335.341(1)(a); MSA 18.1070(41)(1)(a), and was sentenced to 5 to 20 years imprisonment. He appeals as of right.

The pertinent facts are as follows: On July 28, 1975, in the City of Lansing in this state, an undercover police officer was working with one Alfredo (Freddy) Velasquez, a paid informant, who was to set up a drug deal with defendant. After the deal was arranged, according to the testimony, the officer left Velasquez with defendant while the officer went to get the necessary money for the buy and also police assistance. The officer had been assured by defendant that the heroin would be delivered upon his return.

When the officer returned to the arranged meeting place at 500 East Grand River in Lansing, he was met by Velasquez, who showed him the heroin, which was in a bag in the nearby bushes. Defendant was nearby, and the officer testified he never saw this bag in defendant's possession. When the officer attempted to pay defendant, he refused receipt of the money and the arrest was then made.

At the preliminary examination, Velasquez testified as to arranging with defendant for the drug sale to the officer; that he had known defendant for five or six years and had previously dealt with him in drug transactions; that initially defendant was reluctant to deal with him on this occasion because of rumors Velasquez was a police informant; that defendant eventually agreed to deal

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

with Velasquez and provided a sample for him to try. He testified further that after the officer left to get some money to pay for the drug, defendant took the heroin from his possession and placed it in some bushes. Velasquez identified the heroin as that placed in the bushes by defendant. On the basis of the testimony by the officer and Velasquez, defendant was bound over for trial.

On May 10, 1976, pursuant to a plea agreement, defendant entered a plea of guilty to possession of heroin. However, on May 24, 1976, after a hearing, defendant's motion to vacate the plea was granted. At this hearing, Velasquez repudiated his testimony at the preliminary examination, stating defendant had never given him a sample to try and that the heroin that caused the arrest of defendant actually belonged to Velasquez and had been placed there earlier. He referred to one Jesse Garcia as the person who was the real drug dealer.

The trial judge ordered the guilty plea of defendant vacated and recommended perjury charges against Velasquez. After a motion to dismiss because of entrapment and a motion to quash the information were filed and denied, trial was had before a jury as a result of which defendant was convicted.

Defendant raises a number of issues, each of which we will discuss. We note from the record at the outset that the trial was marked with frequent wrangling between counsel and that the trial judge had the difficult task of keeping the trial under control.

Defendant contends the informant, Velasquez, was improperly declared an unavailable witness—thus permitting the introduction of his testimony from the preliminary examination—when he claimed his Fifth Amendment privilege because of

pending perjury charges against him arising out of his repudiation of his testimony at the preliminary examination. Defendant claims he was denied an adequate opportunity to prepare for argument about his unavailability, and that he should not have been declared unavailable because the prosecutor should have either granted Velasquez immunity or agreed to continue the case in order to dispose of the pending perjury charges against the witness.

We find no merit in defendant's claim as to this issue. Defense counsel was present at the hearing on defendant's plea withdrawal where the trial court recommended perjury charges be considered against Velasquez, who there repudiated his preliminary examination testimony. Moreover, defense counsel admitted having communicated with Velasquez prior to trial. He could not have been surprised that he would assert his Fifth Amendment rights.

MCLA 768.26; MSA 28.1049 clearly permits testimony of a witness at a preliminary examination to be read at the trial.

The trial judge permitted Velasquez's testimony at both the preliminary examination and at the hearing to vacate the guilty plea to be read at the trial. We note here defendant took advantage of the opportunity to examine Velasquez at the hearings. The trial judge properly ruled that in asserting his Fifth Amendment privilege, Velasquez had made himself "unavailable" to testify at trial. MCLA 768.26; MSA 28.1049. The propriety of using former testimony of a witness who asserts his Fifth Amendment privilege has been recognized, *People v Pickett,* 339 Mich 294, 306; 63 NW2d 681 (1954), and also that of a witness who merely refuses to testify. *People v Szeles,* 18 Mich

App 575, 577; 171 NW2d 550 (1969). A witness's physical unavailability is not required. Nor was it required that the prosecutor grant Velasquez immunity under MCLA 780.701; MSA 28.1287(101). See *People v Towlen,* 66 Mich App 577, 579–580; 239 NW2d 668 (1976). There was no showing by defendant of prejudice on this issue.

Defendant further contends that the production of two res gestae witnesses was not properly excused by the trial court. It appears from the record that when the arrest of defendant was made, it was while he was in a group of his friends and acquaintances. Some of these wanted to be elsewhere at the time and took off without the police being able to find out who were present or where they could be located. The identity of two of them, William Lile and Rudy Vella, was learned. Efforts made to contact Lile for trial included phone calls within and beyond this state, and contacts with an undercover unit which was believed to have means to locate him. It developed Lile could not be located several months previously in connection with another case of which circumstance defense counsel was aware. The court ruled that the people had used due diligence to locate him and excused his production.

Vella's name came into the case as someone allegedly present at the arrest of defendant, and defendant demanded he be produced as a res gestae witness. A continuance was granted until the next day by the court to give the prosecutor time to determine whether Vella could be located. The undercover officer then testified as to his efforts which included police department record checks, known addresses, known associates, phone and postal records. This was testified to the court outside the presence of the jury, which testimony

included the statement that Vella was not at the point where Velasquez was arrested and that Vella apparently had been picked up in all the confusion by an officer who could not remember Vella's name.

The trial court, observing that there was a conflict in the testimony as to whether Vella was present at the arrest, ruled that because sufficient reasonable efforts had been made to locate Vella, due diligence had been shown and his production excused.

It is well settled that failure to endorse and produce res gestae witnesses may be excused when the prosecutor makes a showing of diligence in searching for witnesses. *People v Rimson,* 63 Mich App 1; 233 NW2d 867 (1975). A trial judge's findings of due diligence will not be overturned on appeal unless a clear abuse of discretion is shown. *People v Bell,* 74 Mich App 270, 274–275; 253 NW2d 726 (1977). The efforts to locate the witnesses satisfied the requirement of due diligence. *People v Blacksmith,* 66 Mich App 216, 220–221; 238 NW2d 810 (1975). We find no abuse of discretion in this area by the trial judge and no prejudicial error in those rulings.

Defendant contends there was reversible error committed by the prosecutor in impeaching the res gestae witness, Rodriguez, by the use of a prior conviction as the first question to him even though the jury was instructed to disregard the question.

The people were obligated to call res gestae witnesses to testify, whether their testimony be favorable or unfavorable. They may be impeached the same as though such witnesses had been called by the defendant. MCLA 767.40a; MSA 28.980(1). In this instance, Rodriguez was present at the time of defendant's arrest and also was in jail with

informant Velasquez when the latter stated defendant was not involved in the drug transaction for which he was being prosecuted. He was a res gestae witness and it was obvious to the prosecutor his testimony was going to be favorable to defendant. He was subject to impeachment by the people, and, in the discretion of the court, such may be done by inquiring about prior felony convictions. *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974). The prosecutor began his examination with a question regarding a prior conviction. This question was objected to before it was answered, the objection was sustained, and the jury instructed to disregard it. It would have been better practice for the prosecutor to present the witness for whatever testimony he was to give before attempting to impeach him. However, we find no prejudicial error in view of the fact the question pertained to the witness—not to the defendant—the witness did not answer and a curative instruction was given. *People v Chambers #1,* 64 Mich App 311; 236 NW2d 702 (1975).

Another contention of defendant is that the prosecution committed reversible error in asking defendant's character witness whether she knew of defendant's possession of marijuana conviction. The question was objected to and the objection sustained. The jury was instructed to disregard the question totally, because the court determined there was no such conviction. It appears from the record that there was no bad faith on the part of the prosecutor but that the law enforcement conviction record was erroneous.

Instead of its being harmful to defendant, it seems clear it would more likely be harmful to the prosecution in view of the trial court's assertion that no such conviction existed and the instruction

to disregard it totally. Accordingly, the directives in *People v Stedman,* 41 Mich App 393; 200 NW2d 370 (1972), relating to the form of the question and in *People v Robinson,* 70 Mich App 606; 247 NW2d 308 (1976), relating to prior clearance with the trial judge as to such questioning need not here be considered in view of the prompt action of the trial judge.

We do, however, recommend that the rule in *Robinson, supra,* be henceforth extended to include general character witnesses and not be limited to those witnesses to defendant's reputation for truth and veracity, so that in every case involving cross-examination of *any* character witness as to any alleged misconduct of a defendant, prior clearance must be obtained from the trial judge. Thus, the possibility of prejudicing a jury may be avoided.

Defendant asserts the prosecution improperly argued to the jury it was the jury's duty to convict defendant. Our examination of the prosecutor's argument in its entire context persuades us that he in no way suggested the jury should relinquish its fact-finding function to defer to any demand of his. In addition, the trial judge recalled the jury after defense counsel objected to the passages in the prosecutor's final argument, and instructed them they had no duty to find defendant guilty unless the evidence convinced them of his guilt beyond a reasonable doubt. There was no error.

Defendant argues that the trial judge was in error in instructing the jury on aiding and abetting. We have examined the record and are unable to agree. It was the theory of the defense that Jesse Garcia was the drug dealer, and that informant's testimony against defendant was the result of his fear of Garcia.

The testimony of Velasquez at both the prelimi-

nary examination and the plea revocation hearing was placed before the jury, as was the testimony of the undercover officer who testified as to his direct communications with defendant and the arrangement to buy from defendant. It was reasonable for the jury to believe Garcia was the actual drug dealer or supplier and that defendant had assisted in effecting the sale, which would constitute the necessary concert of action for aiding and abetting. See *People v Mann,* 395 Mich 472; 236 NW2d 509 (1975). On the basis of all the evidence and the logical and reasonable inference therefrom, we think the instruction in this case was proper.

Defendant's claim that the informant Velasquez waived his Fifth Amendment privilege when he answered questions relating to defendant's lack of involvement in the crime is without merit. We are mindful that the record discloses defense counsel agreed with the prosecution that Velasquez would be put on the stand even though defense counsel had earlier communicated with him and that at this trial Velasquez was represented by counsel who advised him to rely on the Fifth Amendment. We do not think that he waived his privilege. But whether he did or not, we think that defendant was not prejudiced by Velasquez's failure to testify at trial.

Defendant did not, as he contends, have his right to confront and right to secure witnesses in his favor violated because Velasquez's prior testimony at the preliminary examination and at the guilty plea revocation hearing was read to the jury. Defendant vigorously cross-examined at the preliminary examination and at the guilty plea revocation hearing presented evidence in his behalf. Moreover, the testimony given at trial was favorable to and exculpated defendant, and Velas-

quez appeared before the jury. We find that defendant was not prejudiced.

Defendant asserts the trial judge should have *sua sponte* instructed the jury not to draw any inference adverse to defendant from Velasquez's failure to testify. Inasmuch as defendant did not request the instruction, the issue has been waived and is not properly preserved for appeal. *People v Barbeaux,* 73 Mich App 327, 329–330; 251 NW2d 307 (1977). We have been cited to no authority that such an instruction must be given. Manifest injustice will not result from any failure to consider the issue. Since Velasquez had given testimony favorable to and exculpating defendant, it is unlikely any inference adverse to defendant would result from his taking the Fifth Amendment. *People v Giacalone,* 399 Mich 642; 250 NW2d 492 (1977), cited by defendant, is not in point. There Giacalone's *charged accomplice* was the person asserting the privilege.

Lastly, defendant claims the trial court should have found entrapment as a matter of law. We disagree. An examination of the record does not disclose any conduct on the part of the police or the informant that would be considered entrapment. There is no evidence the informant in any way coerced or played upon the sympathies of defendant, or that defendant ultimately agreed to do an act which he otherwise would not do. Defendant did not sustain his burden of proof on this issue.

We find no prejudicial error. The defendant had a fair trial. His conviction is affirmed.

SHEPHERD v SHEPHERD

1. DIVORCE—CHILDREN—PRESUMPTION OF LEGITIMACY—STATUTES.

It is presumed, by statute and by case law, that any child conceived or born to a married couple prior to the commencement of a suit for divorce is legitimate; this presumption may be rebutted only by clear and convincing evidence (MCLA 552.29; MSA 25.107).

2. EVIDENCE—CLEAR AND CONVINCING EVIDENCE—DEFINITIONS.

Clear and convincing evidence is more than a preponderance of evidence; such evidence must be "very convincing", "of such cogency as to render belief necessary" and "beyond all reasonable doubt".

3. DIVORCE—CHILDREN—PRESUMPTION OF LEGITIMACY—EVIDENCE—BLOOD TESTS.

A husband in a divorce action who contests his paternity of a child born to his wife nine months, ten days after the parties separated is entitled to present his best evidence to rebut the presumption of legitimacy; therefore, a trial court erred in denying the husband's request that he, his wife, and the child be required to submit to blood tests, the results of which would be filed with the court.

4. EVIDENCE—PATERNITY—BLOOD TESTS—BASTARDS—DIVORCE—ADMISSIBILITY.

The results of blood tests disclosing only that an alleged father might have sired the child are irrelevant and inadmissible in determining paternity, but results of properly conducted tests

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 10 Am Jur 2d, Bastards § 15.

Presumption of legitimacy of child born after annulment, divorce, or separation. 46 ALR3d 158.

[2] 30 Am Jur 2d, Evidence §§ 1163, 1166–1168.

[4] 10 Am Jur 2d, Bastards § 32.

24 Am Jur 2d, Divorce and Separation § 878.

Blood grouping tests. 46 ALR2d 1000.

Determination of paternity, legitimacy, or legitimation in action for divorce, separation or annulment. 65 ALR2d 1381.

which preclude paternity are conclusive and sufficient to rebut the presumption of legitimacy.

Appeal from Calhoun, Paul Nicolich, J. Submitted February 8, 1978, at Grand Rapids. (Docket No. 77-960.) Decided February 22, 1978.

Complaint by David A. Shepherd against Cynthia L. Shepherd for divorce. The defendant counterclaimed for divorce, alleging that the plaintiff was the father of a child born after the couple had separated. Divorce granted, and plaintiff ordered to pay support for the child. Plaintiff appeals. Remanded for further proceedings.

F. Jack Neller, for plaintiff.

Before: J. H. GILLIS, P. J., and R. B. BURNS and ALLEN, JJ.

ALLEN, J. In a divorce action where paternity of an infant child is raised as an issue, may blood grouping tests of the parents and the child be introduced in evidence in order to rebut the presumption of legitimacy? The trial court denied plaintiff-husband's petition for such tests and, on February 23, 1977, entered a judgment of divorce ordering plaintiff-husband to pay $30 per week for the child's support. From that judgment, the husband appeals of right.

The parties were married December 11, 1971, and while still living together, one child, Eric, was born. The parties separated June 15, 1975, and, on July 8, 1975, the husband filed for divorce. Within a few days the wife filed a counterclaim for divorce. On March 26, 1976, 9 months and 10 days following the parties' separation, a second child, Daniel, was born. The wife then amended her counterclaim for divorce to allege the birth of

Daniel, and the husband answered denying paternity of said child. On October 4, 1976, the husband filed a petition denying paternity of Daniel and asking for an order requiring the parties and the child to submit to blood grouping tests, the result of which would be filed with the court. Following a hearing on January 24, 1977, the petition was denied but no transcript of the hearing accompanies this appeal and we are without knowledge as to the precise reasons the trial judge entered an order of denial. However, at the trial for divorce, the wife testified she had sexual relations with her husband as recently as the date of separation, June 15, 1975. Though this fact was denied by the husband, the trial court at the conclusion of said trial stated:

"Now, as regards the child Daniel, the evidence indicates that the parties ceased cohabitation on June 16, 1975, that the child Daniel was born March 26, 1976, a period of nine months and ten days from the date of separation. Up to that time, there was access, although Mr. Shepherd says he did not have sexual relations with his wife. His wife testified that she had sexual relations with him as late as June 15th. There is further testimony that the parties had not engaged in sexual relations from the 16th of June, 1975. The presumption, and that is strong, that the child born during the period that the parties are married, that it is the child of the marriage. The testimony needed to rebut such a presumption has to be great. If one takes a practical look, although there is not enough testimony to establish just exactly how many months it takes for a period of gestation to the time of the childbirth, it would be unreasonable to think that it couldn't be nine months and ten days. It is not a fixed period or fixed amount of time that it cannot deviate. So as far as reviewing the evidence, the evidence in the Court's mind does not rebut that presumption that the child is Mr. Shepherd's and so, therefore, I do find that the

child is a child of the marriage, and I award custody to Mrs. Shepherd of the child Daniel Shepherd."

In 1954, Michigan enacted into law the Uniform Act on Blood Tests. 1954 PA 128; MCLA 692.751 *et seq.;* MSA 25.471 *et seq.* That act provided that "*In a civil action,* in which paternity is a relevant fact, the court, upon request made by or on behalf of the alleged father whose blood is involved, *shall* order the mother's, child's and alleged father's blood to be tested" (emphasis added). One year later, for reasons which we are unable to determine, the statute was amended by 1955 PA 155 to read: "*In any bastardy case,* the court, upon application made by or on behalf of the alleged father whose blood is involved, shall order that the mother, child and alleged father submit to 1 or more blood tests" (emphasis added). In 1956, the Legislature enacted The Paternity Act, a comprehensive statute governing proceedings to compel support of children born out of wedlock and prescribing the procedure for determination of such liability. MCLA 722.711 *et seq.;* MSA 25.491 *et seq.* This statute dropped all reference to "bastardy cases" but § 6 thereof incorporated in language substantially the same as appeared in 1955 PA 155 the provisions, quoted above, pertaining to mandatory blood tests to determine paternity.[1] However, such mandatory tests were limited to proceedings

[1] "Sec. 6. (a) In any proceeding under this act before trial, the court, upon application made by or on behalf of the alleged father, shall order that the mother, child and alleged father submit to 1 or more blood tests to determine whether or not the defendant can be excluded as the father of the child.

* * *

"(d) The result of the tests shall be receivable in evidence in the trial of the case but only in cases where definite exclusion is established." MCLA 722.716; MSA 25.491.

under the act, *viz.:*—paternity proceedings rather than divorce proceedings.

Because the instant case is not a paternity proceeding the compulsory blood test mandates of neither the 1955 statute[2] nor the present Paternity Act apply. The absence of any statute covering the action before him is probably the reason the trial judge declined to grant plaintiff's petition. Be this as it may, plaintiff contends that the trial court erred in not granting his petition. The issue raised is one of first impression in this state. For the reasons set forth below, we agree with plaintiff.

By statute and case law, it is presumed that any child conceived or born to a married couple prior to the commencement of a suit for divorce is legitimate. MCLA 552.29; MSA 25.107. *Maxwell v Maxwell,* 15 Mich App 607, 616; 167 NW2d 114 (1969). The presumption, "one of the strongest presumptions known to the law" may be rebutted by clear and convincing evidence. *Maxwell, supra,* 617, *People v Case,* 171 Mich 282, 284; 137 NW 55 (1912). As is eloquently pointed out by Justice COLEMAN in her concurring opinion in *Serafin v Serafin,* 401 Mich 629, 637; 258 NW2d 461 (1977), "clear and convincing" evidence means something more than a preponderance of evidence. Such evidence of rebuttal must be "very convincing", "of such cogency as to render belief necessary" and "beyond all reasonable doubt". 401 Mich at 640. This being so, Justice COLEMAN concluded her opinion by saying:

"Two other minor aspects of this case deserve some attention. First, the trial judge refused to order a blood

[2] Even though The Paternity Act, for practical purposes, replaced 1955 PA 155, that statute remained on the books until formally repealed by Chapter 692 of the Judicature Act of 1961. MCLA 692.15; MSA 27.1235.

test for the purpose of determining whether Mr. Serafin could be the father of the child. *Such an order should be granted on remand* if Mrs. Serafin continues to allege that Mr. Serafin is the father *and if such an order is requested."* (Emphasis supplied.) *Id.* at 640.

While a majority of the Court did not join in that portion of Justice COLEMAN's opinion pertaining to blood tests,[3] the majority did rule that in rebutting the presumption of legitimacy the husband was entitled to present his best evidence:

"Neither is the peace of the general society fostered by continued adherence to Lord Mansfield's rule. Rather, we are convinced, it is best fostered by lifting the veil of incompetency imposed upon a husband and wife by the rule. In our view the public peace and respect for the law are enhanced, not by arbitrarily assigning the duty of support to a man who is not the father of the child, but by allowing him to contest paternity by *his best evidence."* (Emphasis supplied.) *Id.* at 635.

In our opinion, *Serafin* which, like the case before us, was a divorce action requires reversal of the trial court's denial of plaintiff's petition for blood group tests. Deprived of such tests, plaintiff is totally unable to present his potential best evidence[4] required to overcome the presumption of legitimacy.

We have already noted that § 6 of the Paternity Act of 1956 is virtually identical with § 1 of 1955 PA 155 relating to bastardy proceedings. In *People*

[3] Justice WILLIAMS joined in Justice COLEMAN's concurring opinion.

[4] The "potential best evidence" of nonpaternity is blood test results establishing nonpaternity. Such tests are irrelevant and inadmissible as proving paternity. *See People v Nichols,* 341 Mich 311; 67 NW2d 230 (1954).

v Stoeckl, 347 Mich 1; 78 NW2d 640 (1956), the trial court had denied defendant's motion for a blood test in accordance with the statute. On appeal, the Supreme Court interpreted the statute as mandating tests if requests for such tests were made by the putative father.[5] We acknowledge that the so-called bastardy proceeding is not identical with a divorce action but believe, by analogy, there remains some precedential value for the purposes of this case in the *Stoeckl* ruling.

Finally, we should note that under the holdings in Michigan and a majority of jurisdictions the results of blood tests, disclosing only that the alleged father might have sired the child, are irrelevant and inadmissible. But properly conducted tests which preclude paternity are conclusive and sufficient to rebut the presumption of legitimacy. *People v Nichols,* 341 Mich 311; 67 NW2d 230 (1954), *Kusior v Silver,* 54 Cal 2d 603; 7 Cal Rptr 129; 354 P2d 657 (1960), *Commonwealth v Stappen,* 336 Mass 174; 143 NE2d 221 (1957), Anno: 46 ALR3d 158.

In our opinion the blood tests requested in the instant case should have been ordered. Accordingly, the judgment of divorce is remanded to the trial court for conducting the requisite tests. Should such tests disclose nonpaternity, then that portion of the judgment pertaining to support for the minor child, Daniel, is reversed. Should such test results inconclusively disclose paternity, the judgment of divorce is affirmed.

Remanded, in accordance with this opinion. No costs.

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[5] In *Stoeckl, supra,* the Court divided 4–3. However, the minority agreed that the statute was mandatory except for the fact that the request for such tests came on the day of trial. In the opinion of the minority this was too late. Unlike *Stoeckl,* the request for group tests in the present case was made well in advance of trial.

CLAVENNA v HOLSEY

1. COURTS—JURISDICTION—CONSEQUENCES OF INJURY—LIMITED PERSONAL JURISDICTION—NONRESIDENTS—STATUTES.

The consequences of a plaintiff's injury, namely her medical and surgical treatment in Michigan, the suffering in Michigan and her husband's loss of consortium in Michigan are not sufficient to give a Michigan court limited personal jurisdiction over a Canadian resident in an action for damages for injuries sustained in a boating accident in Canadian waters under the statute regarding limited jurisdiction over individuals (MCLA 600.705[2]; MSA 27A.705[2]).

2. COURTS—JURISDICTION—LONG-ARM JURISDICTION—NON-RESIDENTS—DUE PROCESS—MINIMAL CONTACTS—FORUM STATE—CONSTITUTIONAL LAW.

A state's exercise of long-arm jurisdiction over a non-resident is limited by the Due Process clause of the United States Constitution; due process requires that a defendant have certain minimal contacts with the forum state before jurisdiction may be acquired (US Const, Am XIV).

3. COURTS—JURISDICTION—LIMITED JURISDICTION—CONSEQUENCES OF INJURY—EVENT IN MICHIGAN—TORTS—PERSONAL INJURY CASES—STATUTES.

The statute regarding limited jurisdiction over an individual that speaks of causing consequences to occur within the state applies to situations in which an act or conduct of the defendant outside of Michigan leads to an event in Michigan which gives rise to a tort claim; in the context of personal injury cases that event occurs when the injury results (MCLA 600.705[2]; MSA 27A.705[2]).

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 20 Am Jur 2d, Courts §§ 123, 143, 146.

Tort: construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on the commission of a tort within the state. 24 ALR3d 532.

[3] 73 Am Jur 2d, Statutes §§ 356, 357.

Appeal from Macomb, Frank E. Jeannette, J. Submitted December 20, 1977, at Detroit. (Docket No. 77-1262.) Decided February 23, 1978. Leave to appeal applied for.

Complaint by Diane Clavenna and Peter Clavenna against Hewitt E. Holsey and Donald J. Purdie for damages for injuries sustained by Diane Clavenna in a boating accident. Accelerated judgment of dismissal as to defendant Holsey only. Plaintiffs appeal. Affirmed.

Buell A. Doelle, P. C., for plaintiffs.

Foster, Meadows & Ballard (by *Robert N. Dunn),* for defendant Hewitt E. Holsey.

Before: BASHARA, P. J., and BEASLEY and D. E. HOLBROOK, JR., JJ.

D. E. HOLBROOK, JR., J. Plaintiffs appeal from an order of accelerated judgment in favor of defendant Holsey. We affirm.

On September 7, 1974, plaintiffs, Michigan residents, were passengers on a 38-foot cruiser owned and operated by defendant Purdie, also a Michigan resident, in Canadian waters of the Detroit River between Belle Isle and Peche Island. At about 10:40 p.m., the Purdie boat collided with a 36-foot cruiser owned and operated by defendant Holsey, a citizen and resident of Ontario, Canada. When the operators of the two boats turned sharply in opposite directions in an attempt to avoid collision, plaintiff-wife grabbed the port (left) handrail of the Purdie boat, and segments of her middle, ring, and small fingers were injured to near amputation when the two boats struck each other at that same point.

Following the collision; plaintiff-wife received

emergency medical service from the Detroit Police Department on Belle Isle. She also underwent surgery at St. John Hospital in Detroit, Michigan, on September 8, 1974, returning to her home in St. Clair Shores on September 10, 1974. She was subsequently treated by her Michigan doctor and underwent two more surgical procedures in May and November, 1975, at the Grace Main Hospital in Detroit.

Plaintiffs filed a tort action in Macomb County Circuit Court against both defendants, alleging personal jurisdiction over defendant Holsey under MCLA 600.705(2); MSA 27A.705(2). Defendant Holsey was personally served in Canada and entered an appearance challenging the jurisdiction of the court, contending he was a Canadian resident and that the collision occurred in Canadian waters. Defendant Holsey's initial motion for accelerated judgment was denied since the trial court found there was a question of fact as to the location of the accident.

Defendant Holsey answered the complaint, still challenging jurisdiction, and pretrial discovery followed. In their depositions both defendants testified the accident occurred in Canadian waters; plaintiffs testified they had no independent knowledge of the accident site and on appeal concede that the accident occurred in Canadian waters. The trial judge granted defendant Holsey's renewed motion for accelerated judgment and plaintiff appeals.

The issue is whether the so-called "consequences" of plaintiff-wife's injury—medical and surgical treatment in Michigan, her suffering in Michigan and her husband's loss of consortium in Michigan—are sufficient to give a Michigan court limited personal jurisdiction over a Canadian resi-

dent based on MCLA 600.705(2); MSA 27A.705(2)? That statutory section reads:

> "The existence of any of the following relationships between an individual or his agent and the state shall constitute a sufficient basis of jurisdiction to enable a court of record of this state to exercise limited personal jurisdiction over the individual and to enable the court to render personal judgments against the individual or his representative arising out of an act which creates any of the following relationships:
>
> * * *
>
> "(2) The doing or causing an act to be done, or consequences to occur, in the state resulting in an action for tort."

Plaintiffs argue that although the injury occurred in Canadian waters, the "consequences" of that injury occurred in Michigan and therefore the statutory requirements have been met. We disagree.

While we certainly recognize the necessity of providing a convenient forum for Michigan residents, the reach of our long-arm statute is not unlimited. The scope of a state's exercise of long-arm jurisdiction over a nonresident is limited by the Due Process clause of the Fourteenth Amendment to the United States Constitution. Due process requires that a defendant have certain minimal contacts with the forum state. *International Shoe Co v State of Washington,* 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945), *Woods v Edgewater Amusement Park,* 381 Mich 559, 564–565; 165 NW2d 12 (1969), *Cole v Doe,* 77 Mich App 138, 141–142; 258 NW2d 165 (1977), *Kiefer v May,* 46 Mich App 566, 571; 208 NW2d 539 (1973).

Initially we note that the instant action is based on a tort and thus distinguishable from cases

finding jurisdiction based on MCLA 600.705(1); MSA 27A.705(1)—the "transaction of any business" in Michigan. In the business contacts setting the jurisdictional inquiry is somewhat different since a nonresident transacting business in the state usually can be said to be purposefully availing himself or herself of the privilege of conducting business in Michigan. Fundamental fairness requires one who chooses to transact business in the state to be subject to the restrictions as well as the protections of state law. When a nonresident chooses not to maintain any contacts with the forum state and jurisdiction is alleged solely on the basis of a tort which occurred outside of the state, the jurisdictional inquiry narrows.

We turn to three recent Federal court decisions analyzing the reach of Michigan's long-arm jurisdiction based on in-state "consequences" resulting from a tortious incident occurring outside of the state. *Price v Shessel,* 415 F Supp 306 (ED Mich, 1976), *Storie v Beech Aircraft Corp,* 417 F Supp 141 (ED Mich, 1976), *Amburn v Harold Forster Industries, Ltd,* 423 F Supp 1302 (ED Mich, 1976). All three opinions were authored by Judge Cornelia Kennedy and, taken together, thoroughly analyze what types of "consequences" are sufficient to confer jurisdiction on Michigan courts under MCLA 600.705(2); MSA 27A.705(2).

Factually *Price, supra,* is most analogous to the instant case. Plaintiff Price brought a negligence action against a Georgia hospital and an individual doctor who was a resident of Georgia. As in the instant case, plaintiff Price argued the "consequences" of the medical treatment in Georgia—suffering in Michigan and subsequent medical treatment in Michigan—conferred jurisdiction pursuant to MCLA 600.705(2); MSA 27A.705(2). Judge

Kennedy rejected plaintiff's argument and transferred the case to a Federal district court in Georgia.

In *Storie, supra,* plaintiff's action against four foreign corporations stemmed from an airplane crash that occurred in Ohio. The corporations moved to dismiss based on lack of personal jurisdiction. The trial court granted the motion, finding no limited personal jurisdiction based on MCLA 600.715(2); MSA 27A.715(2) (the corporation counterpart of MCLA 600.705(2); MSA 27A.705(2)). The only foundation for plaintiff's assertion of jurisdiction over defendants was the fact that the decedent and his personal representative (plaintiff) were Michigan residents and the estate was being administered in Michigan. In rejecting plaintiff's argument, the Court stated:

> "The Court concludes that when the Michigan statute speaks of causing consequences to occur within the state, it applies to situations in which an act or conduct of the defendant outside of Michigan leads to an event in Michigan which gives rise to a tort claim. In the context of personal injury cases, that event occurs when the injury results, and in this case that consequence occurred in Ohio at the time of the airplane crash." *Storie, supra,* at 145.

We adopt the above concise analysis by Judge Kennedy. In the instant case the injury and consequences occurred when the boats collided in Canadian waters.

The final case, *Amburn, supra,* is factually inapplicable but highlights the weakness of a jurisdictional claim based on the close contact of *plaintiffs,* rather than the defendant, with the forum state.

"The interpretation which plaintiffs seek to place on this statute would subject anyone who has caused any resident of Michigan damage in any way or anywhere to be sued in Michigan. It would equate 'consequences' with 'damages.' Any Michigan citizen injured anywhere could sue in Michigan. It would substitute the plaintiffs' close contacts to the forum state for the due process requirements of the defendants' contacts. It would permit an injured plaintiff to forum shop—to move to Michigan, or any forum where the case law was more favorable to the plaintiffs' position, in order to bring suit there." *Amburn, supra, at 1309.*

Again we find Judge Kennedy's reasoning persuasive.

Defendant Holsey is not subject to Michigan's long-arm jurisdiction based on MCLA 600.705(2); MSA 27A.705(2) and the trial court's grant of accelerated judgment is affirmed.

PEOPLE v 3474 FAIRVIEW

OPINION OF THE COURT

1. CRIMINAL LAW—SEARCHES AND SEIZURES—RECORDER'S COURT—TITLE DETERMINATIONS—JURISDICTION.

The Recorder's Court of Detroit does not have jurisdiction to determine title to monies seized under a search warrant issued by that court where no arrests were made as a result of the warrant or seizure, no criminal proceedings are pending therefrom, and the monies were not taken from the presence of the person claiming title to them nor from premises registered in his name.

DISSENT BY M. F. CAVANAGH, P. J.

2. COURTS—JURISDICTION—RECORDER'S COURT—SEARCHES AND SEIZURES—TITLE DETERMINATIONS.

Circuit court has primary jurisdiction to try title questions, but a recorder's court has jurisdiction to order the return of funds seized under a search warrant which it has issued and from which no arrests ensued where no government agency claims any interest in the funds and no other individual asserts a contrary right to possession.

Appeal from Recorder's Court of Detroit, Samuel C. Gardner, J. Submitted December 8, 1977, at Detroit. (Docket No. 77-1282.) Decided February 23, 1978. Leave to appeal denied, 402 Mich 945.

Motion by Zack Garrett in Recorder's Court for the City of Detroit seeking an order requiring the City of Detroit to return personal property seized under a search warrant. An order was entered for

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 68 Am Jur 2d, Searches and Seizures §§ 118, 119.

return of the property. The City of Detroit appeals by leave granted. Reversed.

Roger Craig, Corporation Counsel, *Tom Gallagher,* Assistant Corporation Counsel, and *Raymond L. Feul,* Legal Advisor, for the City of Detroit.

Miller, Amberg & Cristini, P. C., for claimant Zack Garrett on appeal.

Before: M. F. CAVANAGH, P. J., and J. H. GILLIS and D. C. RILEY, JJ.

J. H. GILLIS, J. On August 6, 1975, a Recorder's Court Judge for the City of Detroit issued a search warrant for a dwelling house located at 3474 Fairview in the City of Detroit. The warrant authorized the seizure of various drugs, narcotics paraphernalia, guns, and monies used and earned in narcotics trafficking.

Pursuant to the warrant, a narcotics raid was conducted on the premises during which police seized monies in the amount of $17,178.98, assorted drugs, and other personal property.

The officers also seized various documents that indicated that the premises was the residence of three individuals, Moses Garrett, Charles Garrett, and Ronald Garrett.

No arrests were made during the raid or subsequent thereto.

Subsequent to the seizure of the money, the State of Michigan issued a jeopardy assessment against one of the lessees, Ronald Garrett. The Detroit Police Department paid over $15,297.77 to the State of Michigan to satisfy the assessment, and paid over the remaining $1,881.20 to the treasurer of the City of Detroit.

On April 15, 1977, Zack Garrett, through his attorney, filed a motion in recorder's court for the return of the seized monies.[1] The motion alleged that Zack Garrett was the lessee of 3474 Fairview during the raid which took place in 1975, and that the monies seized were his.

Appellant, City of Detroit, answered this motion by claiming a question of title as to the monies was presented and that recorder's court lacked jurisdiction to rule on such a motion. The court disagreed and ordered the appellant to pay the monies over to Zack Garrett. The City of Detroit then appealed to this Court for emergency application for leave to appeal and moved for a stay of proceedings. On April 19, 1977, this Court ordered that the application for emergency leave to appeal be held in abeyance and granted the motion for immediate consideration and stay of proceedings. On May 25, 1977, this Court granted the application for leave to appeal.

The sole issue raised on appeal is whether or not recorder's court possesses the jurisdiction to order the return of the monies seized during the raid to Zack Garrett.

The jurisdiction of the Detroit Recorder's Court is set forth in MCLA 726.11; MSA 27.3561.

"*The said recorder's court shall have original and exclusive jurisdiction of all prosecutions and proceedings in behalf of the people of this state, for crimes, misdemeanors, and offenses arising under the laws of this state, and committed within the corporate limits of the city of Detroit,* except in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city; and shall have power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into com-

[1] This action is for the $1,881.20 retained by the City of Detroit.

plete effect the powers and jurisdiction given by this act, and especially to issue all writs and process, *and to do all acts which the circuit courts of this state, within their respective jurisdictions, may, in like cases, issue and do by the laws of this state:* Provided, that this section shall not be construed to prevent the grand jury for the county of Wayne from inquiring into and presenting indictments, as heretofore, for crimes and offenses committed within the limits of said city." (Emphasis supplied.)

This Court must first determine whether or not the instant matter involves a criminal prosecution or proceeding which is necessary for recorder's court jurisdiction.

In *People v Ewald,* 302 Mich 31; 4 NW2d 456 (1942), the Supreme Court of this state said:

"It is our conclusion that the exclusiveness of jurisdiction of the recorder's court does not extend to the initiatory step in the institution of proceedings, but merely to matters subsequent thereto connected with bringing an offender to trial * * * ." 302 Mich at 40.

This Court has interpreted the *Ewald* case in *People v Moss,* 68 Mich App 614, 617; 244 NW2d 1 (1976):

"Nor do we find that the 'original and exclusive' jurisdiction of recorder's Court, MCLA 726.11; MSA 27.3561, applies to more than 'prosecutions and proceedings', *People v Ewald,* 302 Mich 31; 4 NW2d 456 (1942). *That exclusiveness does not apply to proceedings for the discovery of crime, Ewald, supra, and search warrants are for the discovery of crime."* (Emphasis supplied.)

In the instant matter, no arrests were made, and no criminal proceedings are pending. The issuance

of a search warrant was the only action taken by the court. Under these circumstances, the controversy would seem to be outside the jurisdiction of recorder's court.

However, MCLA 726.11; MSA 27.3561 has been construed to grant recorder's court the authority to determine the right to possession of money seized by law enforcement officials.

> "We do hold that in criminal cases similar to the one before us in this appeal, it is the ancillary right and duty of the recorder's court to determine the right to possession of money or goods illegally seized by law enforcing officials." *People v Rosa,* 382 Mich 163, 168; 169 NW2d 297 (1969).

The facts in the instant matter are clearly distinguishable from those presented in the *Rosa* case, *supra.*

In *Rosa, supra,* an individual was seeking the return of monies seized from his hotel room. The individual was arrested and forcibly brought before recorder's court. The money was seized in his presence and from a room that was registered to him. Hence, the only issue presented to the court was who had the paramount right to possession of the monies, the individual or the state.

In the instant matter, Zack Garrett was not forcibly brought before the court. On the contrary, Mr. Garrett has filed a motion in recorder's court requesting the court to order the City of Detroit to pay over the seized monies to him.

Unlike *Rosa,* the monies seized in the case at bar were not taken in Mr. Garrett's presence nor from premises registered in his name. Therefore, Mr. Garrett's motion raises two questions for consideration: 1) who has the paramount right to possession of the monies, Mr. Garrett or the city;

and 2) whether Mr. Garrett was the owner of the monies at the time of their seizure.

The second question raises an issue outside the scope of recorder's court jurisdiction as evidenced by *Rosa, supra.*

"We are not considering an appeal involving an action that was started by defendant-appellee in the recorder's court to try question of title, but a case where defendant was forcibly brought before the recorder's court, where the issue presented is the superior right to possession as between the seizing authority and the one from whom the property was seized.

* * *

"We do not interpret the Court of Appeals' decision (as does plaintiff) as an authorization to the recorder's court to exercise general jurisdiction determining questions of title, and specifically hold that the statute does not grant such powers." 382 Mich at 167, 168.

Accordingly, we rule that the facts presented in the instant matter would require recorder's court to decide a question of title which is outside the scope of its jurisdiction. The proper forum would be in a court having civil jurisdiction.

Reversed. No costs, a public question being involved.

D. C. RILEY, J., concurred.

M. F. CAVANAGH, P. J. *(dissenting).* I must dissent from the majority's conclusion that MCLA 726.11; MSA 27.3561, does not allow recorder's court to exercise jurisdiction in the instant case.

My colleagues first accept *People v Ewald,* 302 Mich 31; 4 NW2d 456 (1942), as authority for the proposition that the exclusive jurisdiction of recorder's court does not extend to the issuance of a search warrant, a proceeding for the discovery of

crime. There is support for this interpretation, if the statements in *Ewald, supra,* are read without reference to the particular circumstances of that case. As I stated, obviously unpersuasively, in my dissent in *People v Moss,* 68 Mich App 614, 618; 244 NW2d 1 (1976), *lv den* 399 Mich 836 (1977):

"The statement in *People v Ewald,* 302 Mich 31; 4 NW2d 456 (1942), that proceedings for the discovery of crime are not prosecutions and proceedings for crimes within the meaning of the recorder's court jurisdiction statute does not require a different result. *Ewald* involved the authority of a one-man Wayne County grand jury, conducting an investigation into crimes in Detroit, to issue an arrest warrant for a crime committed within the city. The recorder's court jurisdiction statute contains a specific proviso preserving the authority of the grand jury to inquire into and make accusation of crimes committed within the city. The instant case does not involve the authority of a grand jury, one-man or otherwise."

The issuance, execution and return of the search warrant here was merely the first step of what presumably was anticipated to result in an arrest and criminal prosecution. It does not seem logical to me to say that because no arrest ensued after the warrant was returned to recorder's court, that court lost any jurisdiction it might otherwise possess to dispose of the seized funds.

I consider *People v Rosa,* 382 Mich 163; 169 NW2d 297 (1969), to be ample authority for the trial judge's actions here. That this is so is made clearer by a reading of this Court's rationale in *People v Rosa,* 11 Mich App 157; 160 NW2d 747 (1968).

"Under the terms of this jurisdiction delimiting statute, in order for the recorder's court to have authority

to return the cash, it must first be decided that a circuit court also would have the authority to make disposition in a criminal case of cash obtained under identical circumstances.

"In *People v Williams* (1961), 363 Mich 281, seized personal property and cash were claimed by third parties after the information in the case had been quashed. The Supreme Court, in a *per curiam* opinion, held the remedy, if any, in the *Williams Case* was 'on the civil side of the court.' That holding, however, was largely based on a 'lack of proper party in interest, neither affiant nor petitioner being party to criminal action in which petition is filed.' In cases brought by the accused parties for the return of illegally seized property the return has been ordered. *People v Krol* (1943), 304 Mich 623, *People v Marxhausen* (1919), 204 Mich 599 (3 ALR 1505); also see 20 MLP, Searches and Seizures, § 1, p 228 *et seq.* It is apparent that such return can be ordered by circuit courts in such cases, therefore, under the statutes, recorder's court can also order such returns.

"The question is now raised as to what return procedures would be compatible with the 4th Amendment of the Constitution of the United States, which was made fully applicable to the States by *Mapp v Ohio* (1961), 367 US 643 (81 S Ct 1684, 6 L Ed 2d 1081, 84 ALR2d 933). The people argue that recorder's court is not the appropriate tribunal in which to try complicated questions of title. A similar illegal seizure of cash was faced and decided under the principles of the 4th Amendment in *Berkowitz v United States* (CA 1, 1965), 340 F2d 168 (8 ALR3d 463). It was stated in that opinion that the basic concept of our American system incorporated in the 4th Amendment is that men have the right to be left in possession of their property unless valid authority for disturbing that possession can be shown to be based upon law. No complicated questions of title will be faced, as all that need be decided concerning seized property is the superior right of possession as between the seizing authority and the one from whom the property was seized. As pointed out in *Berkowitz,* this does not mean that an accused is entitled to receive possession of contraband of which the mere possession

is *per se* contrary to public policy. In the case of the seizure of noncontraband property, public policy against the unconstitutional seizure of property is so strong as not to allow undue vexation or delay in recovering property wrongfully seized."

The majority's attempt to distinguish *Rosa, supra,* cannot withstand analysis. They urge that the motion below raised two questions for consideration: (1) who has the paramount right to possession of the monies, Mr. Garrett or the city; and (2) was Mr. Garrett the owner of the monies at the time of its seizure? Each question relates to the other; however, neither is really determinative, for the reason, unobserved by my colleagues, that the city in oral argument admitted it has no valid claim whatever to the monies nor has it any knowledge of anybody other than the petitioner who lays claim to them. It is also worthy of note that in *Rosa,* as here, there were no criminal proceedings pending. The charges in *Rosa* had been dismissed well before the motion was made for return of the monies.[1]

In sum, the majority seems to strive for an unduly restrictive interpretation of recorder's court jurisdiction for no compelling reason. Why should this petitioner be forced at his expense to commence a civil action and seek relief in another forum? I agree, and I find nothing in *Rosa* to dispute, that circuit court has primary jurisdiction to try title questions, but it seems unnecessary to require petitioner to invoke that jurisdiction

[1] At the oral argument in this cause, counsel for the city, in response to the Court's inquiry, stated it to be his position that if, in *Rosa,* two years had lapsed from dismissal of the charges to the time of the motion, recorder's court would still have jurisdiction to return the funds. However, if, in this case, petitioner had brought his motion simultaneously with the return of the search warrant, recorder's court could not exercise jurisdiction. It is this inconsistency which troubles me.

where, as here, no government agency claims any interest in the funds and no other individual asserts a contrary right to possession. I would affirm.

TROMBETTA v DETROIT, TOLEDO & IRONTON RAILROAD COMPANY

1. ADMINISTRATIVE LAW—EXCLUSIVITY RULE—EMPLOYERS AND EMPLOYEES—RAILWAY LABOR ACT—ADMINISTRATIVE REMEDIES—JUDICIAL REMEDIES—COLLECTIVE BARGAINING AGREEMENTS—UNITED STATES CODE.

   The exclusivity rule expounded by the United States Supreme Court which provides that employees under the Railway Labor Act are bound to pursue administrative remedies under the act to the exclusion of judicial avenues of relief does not apply where an employee is asserting rights outside of a collective bargaining agreement (45 USC 151 *et seq.*).

2. CONTRACTS—EMPLOYMENT CONTRACTS—INDEFINITE PERIODS—EXCEPTIONS—PUBLIC POLICY.

   Contracts of employment for indefinite periods of time are terminable at the will of either party; an exception is made to this general rule if the act of an employer in discharging an employee violates the public policy of this state.

3. JUDGMENT—SUMMARY JUDGMENT—APPEAL AND ERROR—EMPLOYERS AND EMPLOYEES—WRONGFUL DISCHARGE—VIOLATIONS OF LAW—PUBLIC POLICY—STATUTES—COURT RULES.

   A trial court erroneously granted defendants' motion for summary judgment based on the ground that the plaintiff had failed to state a claim upon which relief could be granted where the plaintiff had stated a claim upon which relief could be granted when he claimed that defendants discharged him from their employ because he refused to manipulate and adjust pollution control reports to be filed with the state pursuant to statute since such manipulation would clearly violate the law of this state whose public policy does not condone such at-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 48 Am Jur 2d, Labor and Labor Relations §§ 425, 1157, 1158, 1295, 1338.

[2] 48 Am Jur 2d, Labor and Labor Relations § 1140.

[3, 4] 73 Am Jur 2d, Summary Judgment §§ 23–25.

[5] 73 Am Jur 2d, Summary Judgment §§ 2, 16, 20, 22, 23.

tempts to violate duly enacted laws (MCLA 323.1 *et seq.;* MSA 3.521 *et seq.,* GCR 1963, 117.2[1]).

4. JUDGMENT—SUMMARY JUDGMENT—APPEAL AND ERROR—ISSUES OF MATERIAL FACT—COURT RULES.

A trial court did not err in granting defendants' motion for summary judgment where the judge found, after considering the entire record and viewing the plaintiff's case in its most favorable light, that the parties had failed to present a genuine issue of material fact (GCR 1963, 117.3).

5. JUDGMENT—SUMMARY JUDGMENT—AFFIDAVITS—COUNTER-AFFIDAVITS—COURT RULES.

It is not mandatory that a plaintiff file counter-affidavits in opposition to a defendant's motion for summary judgment claiming that the plaintiff has failed to present a genuine issue of material fact; however, if affidavits submitted by defendant in support of the motion for summary judgment stand on the record uncontroverted by any opposing affidavits, depositions, or exhibits, then the allegations in the plaintiff's unsworn pleadings should not deprive the defendant of his right to summary judgment (GCR 1963, 117.3).

Appeal from Wayne, John R. Kirwan, J. Submitted December 6, 1977, at Detroit. (Docket No. 77-1335.) Decided February 23, 1978. Leave to appeal applied for.

Complaint by Frank Trombetta against the Detroit, Toledo & Ironton Railroad Company and C. P. Turner seeking damages for wrongful discharge from employment. Summary judgment for defendants. Plaintiff moved the trial court for a rehearing. Accelerated judgment for defendants. Plaintiff appeals. Affirmed.

Peter R. Barbara & Associates, P. C. (by *Phil Bozzo),* for plaintiff.

Bodman, Longley, Bogle & Dahling (by *Joseph A. Sullivan* and *James J. Walsh),* for Detroit, Toledo & Ironton Railroad Company.

John J. Morad, for defendant C. P. Turner.

Before: M. F. CAVANAGH, P. J., and J. H. GILLIS and D. C. RILEY, JJ.

J. H. GILLIS, J. Plaintiff commenced this action on April 13, 1976, against defendants, Detroit, Toledo & Ironton Railroad Co. and C. P. Turner,[1] alleging that defendants had wrongfully discharged him from their employ. Plaintiff did not assert rights arising under any written contract but maintained that his discharge violated the public policy of this state in that he was terminated after refusing to alter pollution control reports. These reports were filed with the state[2] to insure that defendant company was in conformity with the state pollution control standards.

On August 20, 1976, defendants filed a motion for summary judgment alleging that plaintiff had (1) failed to state a claim upon which relief could be granted under GCR 1963, 117.2(1), and (2) failed to present a genuine issue of material fact for litigation under GCR 1963, 117.2(3).

Affidavits were attached to the motion stating that plaintiff lost his position due to insubordination, and in reality had only been demoted. Plaintiff responded to defendants' motion with a brief in support of his position but failed to attach any affidavits, depositions or documentary evidence to contradict the exculpatory statements contained in the affidavits attached to defendants' motion.

The trial court granted defendants' motion for summary judgment on both grounds after a hearing on October 4, 1976.

Approximately one month later, plaintiff moved the trial court for a rehearing in light of a recent

[1] Defendant, C. P. Turner, was an employee of defendant, Detroit, Toledo & Ironton Railroad Co., and has adopted the company's brief on appeal.

[2] MCLA 323.6a; MSA 3.526(1).

decision handed down by this Court, *Sventko v The Kroger Co,* 69 Mich App 644; 245 NW2d 151 (1976).

Plaintiff maintained that the *Sventko* case, *supra,* recognized a cause of action for the wrongful discharge of an individual employed under a terminable at will employment contract. Plaintiff also contended that the trial court erred in granting defendants' motion for summary judgment on the grounds that plaintiff had failed to file counter-affidavits.

Defendants filed a brief in opposition to plaintiff's motion and also submitted a motion for accelerated judgment under GCR 1963, 116.1(2) on the basis that plaintiff had failed to exhaust his administrative remedies under the Railway Labor Act, 45 USC 151 *et seq.,* and therefore the trial court lacked jurisdiction to entertain the suit.

The trial court reaffirmed its earlier findings that the summary judgment was properly granted but held defendants' motion for accelerated judgment in abeyance until both parties filed briefs in respect to this issue.

After briefs were filed, the trial court granted defendants' motion for accelerated judgment stating that plaintiff, as an employee of Detroit, Toledo & Ironton Railroad Co., was bound to pursue his exclusive administrative remedies under the Railway Labor Act rather than seeking judicial relief.

Plaintiff appeals as of right from both the accelerated and summary judgments.

Defendants' motion to limit issues on appeal was denied by this Court.

Plaintiff first contends that the trial court erred in granting defendants' motion for accelerated judgment.

The trial court concluded:

"Preliminarily it can be said that if it is demonstrated that plaintiff is an employee covered by the act involved in a dispute within the ambit of the act he is constrained to first pursue and exhaust the administrative remedies prescribed by the statute, former *stare decisis* to the contrary notwithstanding, *Moore v Illinois Central R Co,* 312 US 630; 61 S Ct 754; 85 L Ed 1089 (1941), for *Moore* and its progeny were expressly overruled, *Andrews v Louisville & Nashville R Co,* 406 US 320, 326; 92 S Ct 1562; 32 L Ed 2d 95 (1972). The *Andrews* Court held that provision for arbitration of a discharge grievance is not a matter of voluntary agreement under the Railway Labor Act, and that the provisions of the act are not merely optional, to be availed of as the employee chooses, but rather are compulsory, and failing to adhere to the dictates of the act precludes the claimant from seeking relief in a judicial forum."

The trial court ruled that the *Andrews* case, *supra,* stood for the proposition that every employee under the Railway Labor Act[3] was bound to pursue his administrative remedies under the act to the exclusion of his judicial avenues of relief. Plaintiff disagreed and argued that the exclusivity rule of *Andrews, supra,* did not apply to all employees, but only to those who had rights under a collective bargaining agreement.

The language of *Andrews* supports plaintiff's contention. The numerous cases cited by defendants also support plaintiff's interpretation of *Andrews.* A review of these cases[4] reveals that in

[3] 45 USC § 151 *et seq.*

[4] *Belanger v New York Central R Co,* 274 F Supp 500 (ED Mich, 1966), *affirmed,* 384 F2d 35 (CA 6, 1967), *Ciaccio v Eastern Airlines, Inc,* 354 F Supp 1272 (ED NY, 1973), *Dominguez v National Airlines, Inc,* 279 F Supp 392 (SD NY, 1968), *Smith v Atlantic Coastline R Co,* 421 F2d 1400 (CA 5, 1970), *Magnuson v Burlington Northern, Inc,* 413 F Supp 870 (D Mont, 1976), *Dorsey v Chesapeake & O R Co,* 476 F2d 243 (CA 4, 1973).

each of them an employee was asserting rights under a collective bargaining agreement when he was denied judicial relief for failure to pursue his administrative remedies under the Railway Labor Act.

Where an employee is asserting rights outside of a collective bargaining agreement, the *Andrews* exclusivity rule does not apply.

> "The parties appear to agree that this claim [discharge wrongful because based on plaintiff's union activity] which rests upon a charge that Delta violated the statute, 45 USC § 152, is not committed to the exclusive jurisdiction of the adjustment board, but is within the jurisdiction of the district court [Federal question jurisdiction]. See *Brotherhood of Railway Trainmen v Howard,* 343 US 768; 72 S Ct 1022; 96 L Ed 1283 (1952); *Brotherhood of Railway Trainmen v Smith,* 251 F2d 282 (CA 6, 1958). We do not understand that *Andrews* * * * holds otherwise. It is clear that the dispute in *Andrews* stemmed 'from differing interpretations of the collective bargaining agreement,' whereas the claim here involved is that the Act was violated." *Conrad v Delta Airlines, Inc,* 494 F2d 914, 918 (CA 7, 1974).

Applying a proper interpretation of *Andrews* to the instant matter reveals that the trial court erred in finding that, as a matter of law, any employee covered by the Railway Labor Act is bound to pursue his exclusive administrative remedies under the act. Plaintiff must be a union employee asserting collective bargaining rights in order to be bound by the *Andrews* exclusivity rule.

These facts were not resolved by the trial court due to its improper interpretation of *Andrews, supra.* There is some evidence on the record that plaintiff is not a union member, and that he does not possess collective bargaining contract rights.

Accordingly, we conclude that the trial court erred in granting defendants' motion for accelerated judgment under GCR 1963, 116.1(2).

Plaintiff next contends that the trial court erred in granting defendants' motion for summary judgment by concluding that plaintiff (1) had failed to state a claim upon which relief could be granted, and (2) had failed to present a genuine issue of material fact for litigation.

The trial court concluded that:

> "The general rule of law is that contracts of employment for indefinite periods of time are terminable at the will of either party. It is true that the appellate courts of Michigan have carved out certain exceptions to this general rule, if the act of the employer in discharging an employee violates the public policy of the State of Michigan. In those appellate decisions, however, the courts have spelled out the type of conduct that is violative of public policy. The appellate courts, however, have not as yet specified that the alleged actions of the defendants as set forth in plaintiff's complaint violate the public policy of this State, thereby constituting an exception to the aforementioned general rule. And, if the actions of the defendants are to be construed as violative of public policy, then it should be left to the appellate courts or the legislature to fashion such a rule of law."

This Court has recognized exceptions to the well established rule that at will employment contracts are terminable at any time for any reason by either party.[5] These exceptions were created to prevent individuals from contravening the public policy of this state.

It is without question that the public policy of this state does not condone attempts to violate its duly enacted laws.

[5] *Sventko v The Kroger Co,* 69 Mich App 644; 245 NW2d 151 (1976).

Plaintiff claims that defendants discharged him from their employ when he refused to manipulate and adjust sampling results used for pollution control reports which were filed with the state pursuant to MCLA 323.1 *et seq.;* MSA 3.521 *et seq.* Such action would clearly violate the law of this state. MCLA 323.10; MSA 3.529(1).

Hence, we find that plaintiff has stated a claim upon which relief can be granted, and therefore the trial court erroneously granted defendants' motion for summary judgment on the basis of this ground.

We must now determine whether or not plaintiff presented a genuine issue of material fact for litigation.

The trial court granted defendants' motion for summary judgment, finding that the parties had failed to present a genuine issue of material fact under GCR 1963, 117.2(3).

"First, the facts contained in the affidavits of both defendants in support of their Motions for Summary Judgment stand unanswered. Plaintiff's assertion that the court rules do not require that counter-affidavits be filed in response to a Motion for Summary Judgment is correct. It is equally true, however, that if the affidavits of defendants show that there exists no genuine issue of fact and that the factual assertions contained in these affidavits are not contravened in some counter-affidavit, deposition, admission, or pleading *under oath,* then the defendants should prevail in their motions. In this proceeding there exists no deposition, affidavit, admission, or pleading under oath that contravenes the facts contained in defendants' affidavit, and therefore, the factual assertions contained in said affidavit are accepted as true. Clearly, one of the purposes of the rule requiring an affidavit in support of a Motion for Summary Judgment is to challenge the opposing party to respond under oath to those facts contained in that

affidavit. In this instance, the challenge has not been met." (Emphasis in original.)

GCR 1963, 117.3 establishes the proper procedures to be used where the parties contest a motion for summary judgment under GCR 1963, 117.2(3):

"A motion based upon sub-rule 117.2(3) shall be supported by affidavits, and the opposing party prior to the day of hearing may serve opposing affidavits. The affidavits submitted by either party shall be governed by the provisions of sub-rules 116.4, 116.5 and 116.6. Such affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties shall be considered by the court at the hearing. Each party shall be given opportunity to amend his pleadings as provided by Rule 118 unless the evidence then before the court shows amendment would not be justified. Judgment shall be rendered forthwith if the pleadings show that any party is entitled to judgment as a matter of law or if the affidavits or other proof show that there is no genuine issue of fact. If it appears that the opposing party rather than the moving party is entitled to judgment, the court may render summary judgment in his favor without necessity of a motion therefor."

Plaintiff maintains that this language allows him, in the face of the defendants' motion for summary judgment and supporting affidavits, to rest upon the allegations made in his pleadings in contesting that motion. To support his argument he cites *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973), and *Topps-Toeller, Inc v City of Lansing,* 47 Mich App 720; 209 NW2d 843 (1973). As plaintiff notes, these cases do hold that it is not mandatory, where plaintiff seeks to block summary judgment, that he file counter-affidavits.

However, the trial court in the instant case did

not grant defendants' motion simply on the ground that plaintiff had failed to file opposing affidavits. To the contrary, after considering the entire record, the trial judge found that no material issue of fact had been presented. Plaintiff's failure to submit any proof which would qualify as admissible evidence at trial to contradict the sworn statements made by defendants' agents contributed to the trial court's findings.

Under such circumstances, the granting of summary judgment was not improper.

"We do not mean to imply that the trial judge should dispose of a motion for summary judgment by referring only to the affidavits in support of and in opposition to the motion. The rule specifically directs that the affidavit shall be considered 'together with the pleadings, depositions, admissions and documentary evidence than filed.' But what the court shall consider are the affidavits, the pleadings and other matters referred to in the rule being merely the background in which the affidavits must be considered. *If, as here, the affidavits in support of the motion for summary judgment stand on the record uncontroverted by any opposing affidavits, depositions, or exhibits, then the allegations in the opponent's unsworn pleadings should not deprive the party of his right to summary judgment." Green v Lundquist Agency, Inc,* 2 Mich App 488, 492; 140 NW2d 575 (1966). (Emphasis supplied.)

Accordingly, we find that the trial court properly viewed plaintiff's case in its most favorable light, and found no issue of material fact. Hence, summary judgment was properly granted to defendants pursuant to GCR 1963, 117.3.

Affirmed. Costs to appellees.

THOMAS v THOMAS

1. JUDGMENT—DEFAULT JUDGMENT—SERVICE OF PROCESS—PROOF OF SERVICE—VALIDITY OF SERVICE—COURT RULES.

   Failure to make proof of service does not affect the validity of the service; therefore, proof of service on the record is no longer a prerequisite to the entry of a valid default judgment (GCR 1963, 104[2], 520).

2. JUDGMENT—DEFAULT JUDGMENT—SERVICE OF PROCESS—COURT RULES.

   Valid entry of a default judgment requires service of process upon the defendant either personally or by publication (GCR 1963, 105, 106).

3. DIVORCE—JUDGMENT—DEFAULT JUDGMENT—SERVICE OF PROCESS—PROOF OF SERVICE.

   A default judgment of divorce should not be set aside on the basis that there is no proof of service in the court file where the defendant was actually served with a copy of the original complaint for divorce.

4. COURTS—NO PROGRESS DOCKET—REINSTATEMENT OF CASE—NOTICE TO PARTIES.

   There is no requirement that notice be given to the parties where their case has been reinstated from the court's no-progress docket.

Appeal from Macomb, Hunter D. Stair, J. Submitted January 3, 1978, at Detroit. (Docket No. 77-1468.) Decided February 23, 1978.

Complaint by Neil A. Thomas against Sherrill L. Thomas for divorce. Default judgment of divorce

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 47 Am Jur 2d, Judgments § 1174.
[3] 24 Am Jur 2d, Divorce and Separation § 437.
[4] 75 Am Jur 2d, Trial § 27.

granted to plaintiff. Defendant moved to have default judgment set aside. Motions denied. Defendant appeals. Affirmed.

Brian M. Smith & Associates, P. C. (by *Matt W. Zeigler),* for defendant.

Before: BASHARA, P. J., and J. H. GILLIS and N. J. KAUFMAN, JJ.

J. H. GILLIS, J. On February 23, 1976, a default judgment of divorce was entered against defendant in Macomb County Circuit Court. Plaintiff was granted custody of the children and was not required to pay alimony to defendant.

On September 30, 1976, defendant moved to have the default judgment set aside on two grounds, 1) that no proof of service of the original complaint appeared in the court file, and 2) defendant had not been notified of the dismissal and reinstatement of the case. The trial court denied the motion. Defendant subsequently filed another motion based upon similar grounds which was also denied.

Defendant now appeals claiming error on the part of the trial court in refusing to grant the motion.

Defendant first contends that the default judgment must be set aside in that no proof of service of the original divorce complaint appears in the court file. Defendant, while admitting that she was actually served with a copy of the divorce complaint, claims that regardless of whether service has actually been made, a default judgment is void unless proof of service has been filed with the court before the default is taken. In support of this proposition, defendant cites *Borg v Thomas,* 338 Mich 669, 671, 672; 62 NW2d 466 (1954):

"In *Dades v Central Mutual Auto Insurance Co,* 263 Mich 260, 262 [248 NW 616 (1933)], this Court said:

" 'We have repeatedly held that unless the files of the court disclose proper proof of service of process a default entered is irregular; and the test is the condition of the file "on the day of default." This is true notwithstanding service has been actually and lawfully made.' "

Defendant fails to note that the statute underlying *Borg, supra,* and similar cases has been repealed by the Revised Judicature Act of 1961, MCLA 600.101 *et seq.;* MSA 27A.101 *et seq.* The repealed statute did in fact require "due proof of service" before a default could be entered. However, under the new court rules, the taking of a default judgment is governed by GCR 1963, 520, which contains no such limitation. Furthermore, GCR 1963, 104(2) specifically states that:

"Failure to make proof of service does not affect the validity of the service."

The combination of these two rules indicates that proof of service is no longer a prerequisite to the entry of a valid default judgment.

"Thus, default may now be entered without meeting a formal prerequisite of proof of service on the record. This does not mean, however, that a default may be validly entered when there has been no service of process upon the defendant either personally or by publication, as prescribed by Rules 105 and 106. The validity of the default and the default judgment must ultimately turn upon the fact of due service of process. If there is a motion to set aside the default or the default judgment or if there is a collateral attack upon the default judgment, the facts constituting due service of process will have to be shown." 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 657.

Accordingly, since defendant was actually served with a copy of the original divorce complaint,[1] the fact that no proof of service appears in the court file does not constitute a basis on which to set the default judgment aside.

Defendant next contends that she did not receive notice that the case had been dismissed and then reinstated, therefore, the default judgment must be set aside.

A careful review of the record reveals that the case was never dismissed. Instead, it was transferred to the "no progress" docket since no "steps or proceedings" were taken in respect to the matter for over one year. GCR 1963, 502.4.

Since the case was reinstated from the "no progress" docket, there is no requirement that notice be given to the parties.[2]

The other issues raised on appeal do not merit discussion by this Court.

Accordingly, the trial court's order denying defendant's motion to set aside the default judgment is affirmed. Costs to appellee.

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[1] Defendant admitted to actually being served with a copy of the original divorce complaint.

[2] *See,* 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 312, interpreting Wayne County Court Rules.

ALLSTATE INSURANCE COMPANY v DEFRAIN

1. INSURANCE—AUTOMOBILES—LIABILITY INSURANCE—EXCLUSIONARY CLAUSES—BODILY INJURY—NO-FAULT ACT—STATUTES.

A clause in a motor vehicle liability insurance policy which provides that coverage under the policy does not apply to "bodily injury to any person who is related by blood, marriage, or adoption to an insured against whom claim is made if such person remains in the same household as such insured" is not valid and is unenforceable because it deprives third parties of protection which is required by the no-fault automobile insurance act (MCLA 500.3101, 500.3135; MSA 24.13101, 24.13135).

2. INSURANCE—AUTOMOBILES—LIABILITY INSURANCE—EXCLUSIONARY CLAUSES—CERTIFIED POLICY—STATUTORY REQUIREMENTS.

Exclusionary clauses in an automobile liability insurance policy which cause a certified policy to deviate from statutory requirements are barred.

3. INSURANCE—AUTOMOBILES—LIABILITY INSURANCE—EXCLUSIONARY CLAUSES—NAMED PERSON—STATUTES.

Exclusion of liability coverage in an automobile liability insurance policy is allowed where a vehicle is operated by a named person and such exclusion is authorized by the insured; such an exclusion is not allowed where the exclusionary clause is designed to avoid liability when certain persons not involved in the operation of the motor vehicle are injured (MCLA 257.520[b][2], 500.3009[2]; MSA 9.2220[b][2], 24.13009[2]).

4. STATUTES—CONSTRUCTION OF STATUTES—IN PARI MATERIA.

Statutes dealing with the same matter are *in pari materia* and must be construed together to reach a harmonious result; it is important that the evident intent and meaning of the statutes as well as the force of them should be preserved.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] Am Jur 2d, New Topic, No-Fault Insurance §§ 18, 20, 23.
7 Am Jur 2d, Automobile Insurance §§ 210, 211, 216, 218.
[3] 7 Am Jur 2d, Automobile Insurance § 210 *et seq.*
[4] 73 Am Jur 2d, Statutes §§ 187–190.

Appeal from Ingham, Jack W. Warren, J. Submitted January 10, 1978, at Lansing. (Docket No. 77-2080.) Decided February 23, 1978. Leave to appeal applied for.

Complaint by Allstate Insurance Company against Roy J. DeFrain seeking a declaratory judgment of no liability under a policy of insurance to defend a personal injury action commenced by defendant's ex-wife. Judgment for defendant. Plaintiff appeals. Affirmed.

Newman & Mackay, for plaintiff.

Glassen, Rhead, McLean & Campbell, for defendant.

Before: BRONSON, P. J., and R. B. BURNS and R. E. A. BOYLE,* JJ.

R. E. A. BOYLE, J. Plaintiff appeals from a declaratory judgment entered May 24, 1977, wherein the trial court decided that a household exclusionary clause in the motor vehicle liability insurance policy of defendant with plaintiff was invalid and that plaintiff was under a duty to defend an action brought against defendant by his then wife, Bernadette Marie DeFrain.

The pertinent facts, which are undisputed, are these: On May 19, 1976, the said Bernadette DeFrain, then the wife of defendant, who resided in the same household as her husband, commenced an action against him for claimed injuries involving the serious disfigurement of her left leg and permanent impairment of the function of that leg. She alleged that these injuries were caused by the defendant's operation of his 1968 Mercury automobile on January 16, 1974. The car had become

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

stuck in the snow in the driveway of the parties' home in Mason, Michigan.

She further alleged that defendant had placed a wooden plank about twelve feet long, twelve inches wide and two inches thick under the right rear wheel of the car in an attempt to drive the car forward. In the process, the right rear wheel of the car spun, throwing the board into his wife's left leg, fracturing the left tibia and the left fibula.

At the time of this happening, defendant husband had a policy of motor vehicle liability insurance with plaintiff which was effective and in existence. This policy provided that coverage under the policy does not apply to "bodily injury to any person who is related by blood, marriage, or adoption to an insured against whom claim is made if such person remains in the same household as such insured".

Plaintiff declined to defend the case commenced by Bernadette DeFrain against her now ex-husband, contending that the foregoing exclusionary clause was valid, and filed its complaint for declaratory judgment in circuit court requesting that the trial court adjudge plaintiff not be required to defend the action because of such exclusionary clause.

Defendant, in his answer to the complaint, contended the exclusion relied upon by plaintiff was legally unenforceable and that the exclusion was contrary to the law of the State of Michigan and its policy as enunciated by statute. He counterclaimed for declaratory relief asking that plaintiff be required to defend the case brought by Bernadette DeFrain against defendant herein in the Ingham County Circuit Court.

The sole issue is whether the exclusionary clause in question is valid and enforceable so as to

relieve plaintiff from the responsibility of defending the case brought against defendant by his former wife for the alleged injuries.

We affirm the trial court and hold that such clause is not valid and enforceable. We agree with the analysis of another panel of this court in *Gurwin v Alcodray,* 77 Mich App 97; 257 NW2d 665 (1977).

While compulsory no-fault insurance partially abolished tort remedies, it retained residual liability as set forth in § 3135 of the act (MCLA 500.3135; MSA 24.13135), in accordance with which provisions Bernadette DeFrain, who was not the operator of the insured vehicle, brings suit against defendant. Section 3101 of the act (MCLA 500.3101; MSA 24.13101), requires that the policy coverage insure against serious injury to third parties.

Plaintiff concedes the abolition of interspousal immunity by the Supreme Court's decision in *Hosko v Hosko,* 385 Mich 39; 187 NW2d 236 (1971). It concedes, also, that Bernadette DeFrain has the right to sue defendant here, Roy DeFrain, but that the exclusionary clause in question frees plaintiff from the duty to defend and from any liability on the policy with respect to this particular accident.

Exclusions that cause a certified policy to deviate from statutory requirements are barred. *Lilje v Allstate Insurance Co,* 393 Mich 259; 224 NW2d 279 (1974), *Citizens Mutual Insurance Co v Central National Insurance Co of Omaha,* 65 Mich App 349; 237 NW2d 322 (1975).

MCLA 500.3009(2); MSA 24.13009(2) allows the exclusion of liability coverage when a vehicle is operated by a named person, not where, as here, the exclusionary clause is designed to avoid liabil-

ity when certain persons not involved in the operation of the motor vehicle (such as the wife in the instant case) are injured.

Plaintiff argues that the Legislature intended to exclude members of an insured's household from residual liability coverage by its enactment of § 3114 of the no-fault act (MCLA 500.3114; MSA 24.13114), providing for personal protection insurance for members of the insured's household. We disagree. The statutory amendment as to coverage, MCLA 257.520(b)(2); MSA 9.2220(b)(2), allows an exclusion only where a named person operates the automobile and such exclusion is authorized by the insured. The statute does not provide for any exclusion such as the one in this case.

In determining the legislative intent, we must examine the pertinent statutes. MCLA 500.3009(1); MSA 24.13009(1) provides for setting the minimum limits for coverage under a liability policy which insures against loss resulting "from liability *imposed by law* for * * * bodily injury or death suffered *by any person* arising out of the ownership, maintenance or use of a motor vehicle". (Emphasis supplied.)

MCLA 257.520; MSA 9.2220 requires the policy to insure the named insured against loss "from liability *imposed by law* for damages arising out of the ownership, maintenance or use of such motor vehicle". (Emphasis supplied.)

MCLA 500.3131; MSA 24.13131 of no-fault provides that "[r]esidual liability insurance shall cover bodily injury and property damage * * * [and that the] insurance shall afford coverage equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs * * *. In this state this insurance

shall afford coverage for automobile liability retained by section 3135" of the act. These statutes being in *pari materia* must be construed together and a reasonable construction at preserving the force and effect of each is to be sought. *Palmer v State Land Office Board,* 304 Mich 628; 8 NW2d 664 (1943), *Moyer v Wayne County Road Commission,* 52 Mich App 285; 217 NW2d 53 (1974), *People v Martin,* 59 Mich App 471; 229 NW2d 809 (1975).

We conclude that the exclusionary clause here in question is invalid. It is neither authorized by statute, nor in harmony with the legislative purpose to provide insurance coverage for bodily injuries as set forth in the above-cited statutes.

The trial court was correct in deciding the exclusion unenforceable, and that plaintiff is under a duty to defend.

Affirmed. Costs to defendant.

LEBLOND v ALL RIGHT AUTO PARTS, INC.

1. WORKMEN'S COMPENSATION—BANKRUPTCY—OFFICERS' AND DIRECTORS' LIABILITY—STATUTES.

Generally a workmen's compensation claim may be discharged in bankruptcy, though in Michigan the officers and directors of a bankrupt corporation may be found liable for that portion of a claim which remains unsatisfied after execution against the corporation (11 USCA 22[b], 103[a], MCLA 418.647; MSA 17.237[647]).

2. WORKMEN'S COMPENSATION—ENFORCEMENT OF AWARDS—STATUTES.

The Worker's Disability Compensation Act provides for prompt enforcement of awards through the expeditious entry of judgments in the circuit courts (MCLA 418.863; MSA 17.237[863]).

3. WORKMEN'S COMPENSATION—BANKRUPT CORPORATION—OFFICERS' AND DIRECTORS' LIABILITY—MODIFICATION OF AWARD.

A plaintiff injured worker who has received a workmen's compensation award against a bankrupt corporation may properly seek entry of a judgment in circuit court on his award against the officers and directors of the corporation prior to any execution of the award against the bankrupt corporation; however, the award should be modified by the circuit court to provide for the possibility of recovery from the bankrupt corporation.

4. WORKMEN'S COMPENSATION—BANKRUPT CORPORATION—JUDGMENT—MODIFICATION OF AWARD—WAIVER.

A plaintiff injured worker who has received a workmen's compensation award against a bankrupt corporation may receive a judgment on the award against the officers and directors of the corporation; the award should be reduced by the amount of the officers' and directors' provable share of the distributable assets possessed by the corporation; where such a plaintiff fails to

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REFERENCES FOR POINTS IN HEADNOTES

[1] 9 Am Jur 2d, Bankruptcy §§ 414, 779.
82 Am Jur 2d, Workmen's Compensation § 652.
[2] 82 Am Jur 2d, Workmen's Compensation § 572 *et seq.*
[3, 4] 9 Am Jur 2d, Bankruptcy §§ 414, 415, 552, 779.

assert his claim in the bankruptcy proceeding he waives his right to the funds of the bankrupt corporation.

Appeal from Oakland, William J. Beer, J. Submitted January 4, 1978, at Lansing. (Docket No. 77-2703.) Decided February 23, 1978.

Complaint by Larry J. LeBlond against All Right Auto Parts, Inc., Charles Schick, Douglas Isabelle and James Isabelle for enforcement of an award of workmen's compensation benefits. Judgment for defendants. Plaintiff appeals. Reversed and remanded.

Frank R. Langton & Associates, P. C. (by *David W. Martin),* for plaintiff.

Charles E. Maloney, P. C., for defendants.

Before: V. J. BRENNAN, P. J., and D. E. HOLBROOK and R. B. MARTIN,* JJ.

V. J. BRENNAN, P. J. On May 20, 1977, Oakland County Circuit Judge William J. Beer dismissed plaintiff's complaint against the defendants for enforcement of an award obtained by plaintiff against defendants from the Workmen's Compensation Appeal Board. On June 8, 1977, Judge Beer dismissed plaintiff's motion for rehearing. Plaintiff now appeals as of right. GCR 1963, 806.1.

Plaintiff suffered a broken leg while in the employ of defendant All Right Auto Parts [hereafter All Right]. He filed for workmen's compensation and because he was an illegally employed minor was awarded double compensation, $96 per week, on June 7, 1974. The referee closed plaintiff's award as of the final date of the hearing. On

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

December 16, 1974, the Workmen's Compensation Appeal Board modified the award in plaintiff's favor, ordering benefits to run through the date of the hearing and until further order.

Defendant All Right did not carry workmen's compensation insurance. On October 4, 1974, defendant All Right filed for bankruptcy in the United States District Court for the Eastern District of Michigan. All Right was discharged from bankruptcy on February 13, 1975. Plaintiff filed no claim in the bankruptcy proceedings. Defendant had total assets of $3,383.99 on July 14, 1975, available for distribution to creditors.

On appeal, plaintiff argues the trial court erred by failing to enforce a worker's compensation award against the individual officers and directors of defendant corporation which failed to carry workmen's compensation insurance when the corporation filed for bankruptcy and the plaintiff failed to prove a claim in the bankruptcy proceedings.

At stake here is an interpretation of MCLA 418.647; MSA 17.237(647), which states that:

> "If compensation is awarded under the provisions of this act against any employer who at the time of the injury has not complied with the provisions of section 611, [requiring employers to provide workmen's compensation coverage] the employer shall not be entitled as to any judgment entered upon the award, to any of the exemptions of property from seizure and sale on execution allowed by statute. If the employer is a corporation, the officers and directors thereof shall be individually and jointly and severally liable for any portion of any such judgment as is returned unsatisfied after execution against the corporation."

In essence, plaintiff argues that the statute should not bar recovery when the injured worker's

claim exceeds the assets available for distribution from a corporation in bankruptcy, even though the worker fails to make a claim against the corporation in the bankruptcy proceeding. This claim bears consideration.

Workmen's compensation claims may be discharged in bankruptcy except where state law provides otherwise. See 11 USCA 22(b), 11 USCA 103(a), (c). In Michigan, we permit the assertion of such a claim against officers and directors of the corporation for the portion of the claim unsatisfied after execution against the corporation. MCLA 418.647; MSA 17.237(647).

Defendants admit that this provision applies to them. Further, although defendants disagree with the size and duration of plaintiff's workmen's compensation award, no dispute exists that the award exceeds the $3,383.99 defendant All Right had available for distribution, even if all of defendant's arguments about the award are accepted.

We recently discussed the procedure a plaintiff should follow under MCLA 418.647; MSA 17.237(647) when execution against a corporate defendant would be useless. We found that "where the officers and directors of a bankrupt corporation are individually and jointly and severally liable for a workmen's compensation award, due to noncompliance with MCLA 418.611; MSA 17.236(611), a judgment may be entered against them in circuit court pursuant to MCLA 418.647; MSA 17.237(647) for any portion of the award remaining unpaid after the distribution of assets by the trustee in bankruptcy and the closing of the bankrupt estate". *Wyrybkowski v Cobra Pre-Hung Doors, Inc.* 66 Mich App 555, 559; 239 NW2d 660 (1976).

In *Wyrybkowski,* defendant bankrupt corporation had failed to carry workmen's compensation

insurance. Plaintiff successfully petitioned the circuit court for entry of his workmen's compensation award against the corporation and its officers and directors. He also made a claim in the bankruptcy proceeding and later received a distribution from the trustee in bankruptcy.

On appeal, we held that entry of the judgment prior to the distribution from the estate of the bankrupt was improper, but only because the judgment ignored the possibility that plaintiff might receive funds in the bankruptcy proceeding.

The Court noted that one of the policies of the workmen's compensation act is to provide prompt enforcement of awards through the expeditious entry of judgments in the circuit courts. *Wyrybkowski v Cobra Pre-Hung, supra* at 558. See MCLA 418.863; MSA 17.237(863).

Our decision in *Wyrybkowski* does not require the circuit court to delay entry of a judgment against officers and directors of a bankrupt corporation until the closing of the bankruptcy proceedings. Thus, plaintiff may properly seek entry of a judgment on his workmen's compensation award against officers and directors prior to any execution of the award against a bankrupt corporate defendant.

This holding comports with the policy behind the workmen's compensation act of liberal construction in order to protect injured workers. *Rodwell v Pro Football, Inc.* 45 Mich App 408, 412; 206 NW2d 773 (1973), *lv den,* 390 Mich 775 (1973), *Glick v H A Montgomery Co,* 22 Mich App 678, 687; 177 NW2d 724 (1970), *lv den,* 383 Mich 788 (1970).

In the case at hand, plaintiff failed to prove his claim in the bankruptcy proceedings, unlike the plaintiff in *Wyrybkowski.* However, according to

Wyrybkowski, the statute does not require prior execution of a workmen's compensation award against a bankrupt corporate defendant before the plaintiff can have his workmen's compensation award entered against officers and directors, provided that the award is modified to provide for the possibility of recovery from the bankrupt corporate defendant. *Wyrybkowski v Cobra Pre-Hung, supra* at 559. Thus, the trial court erred in failing to enter plaintiff's award, with appropriate modifications, against defendants.

To hold that plaintiff's failure to appear in the bankruptcy proceeding bars his claim against the officers and directors for the excess of his award over the distributable assets of the bankrupt corporate defendant not only would be contrary to our holding in *Wyrybkowski* but would defeat the purpose of MCLA 418.647; MSA 17.237(467). Clearly, the statute intends to afford redress to workmen's compensation plaintiffs against the officers and directors of a corporation which fails to carry workmen's compensation coverage. Holding against plaintiff in this case would defeat the protective policy of the workmen's compensation act.

Plaintiff's judgment against the officers and directors should be reduced by the amount of their provable share of the distributable assets possessed by defendant bankrupt corporation. By failing to assert his claim in the bankruptcy proceeding, plaintiff waived his right to the funds of the bankrupt corporation. Consequently, as so modified, we reverse and remand for entry of judgment in plaintiff's favor.

Reversed, as modified.

PEOPLE v MILTON

1. APPEAL AND ERROR—DIRECTED VERDICTS—DENIAL—EVIDENCE.

   A defendant's motion for a directed verdict of acquittal is properly denied if, viewing the evidence presented by the prosecution in the light most favorable to the prosecution, there is some evidence on which the jury could base a verdict of guilty.

2. CRIMINAL LAW—EVIDENCE—ELEMENTS—MATERIAL POINTS—SUFFICIENCY OF EVIDENCE.

   A conviction cannot constitutionally be sustained if there is no evidence on some element of the crime; however, unless there is no evidence at all on a material point, the sufficiency of the evidence is a question that should be left to the jury.

3. HOMICIDE—FIRST-DEGREE MURDER—PURPOSE OF CAUSING DEATH—CONSCIOUS INDIFFERENCE.

   A person must act with the purpose of causing death in order to commit first-degree murder; mere conscious indifference to the likelihood of death as a result of an intentional act is not enough to constitute first-degree murder.

4. HOMICIDE—FIRST-DEGREE MURDER—SECOND-DEGREE MURDER—PREMEDITATION—DELIBERATION—MALICE.

   The elements of premeditation and deliberation distinguish first-degree murder from second-degree murder; a failure to define these elements for a jury independently of malice is error because it has the effect of abolishing the difference between first-degree and second-degree murder.

REFERENCES FOR POINTS IN HEADNOTES

[1] 75 Am Jur 2d, Trial § 553.
[2] 30 Am Jur 2d, Evidence § 1124 *et seq.*
[3] 40 Am Jur 2d, Homicide §§ 45–52, 569.
[4] 40 Am Jur 2d, Homicide § 501.
[5] 40 Am Jur 2d, Homicide §§ 10, 52, 228.
[6] 40 Am Jur 2d, Homicide § 72 *et seq.*
[7] 5 Am Jur 2d, Appeal and Error §§ 787, 891–893.
[8] 4 Am Jur 2d, Appeal and Error §§ 533–538.

5. CRIMINAL LAW—HOMICIDE—PREMEDITATION—DELIBERATION.
To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem.

6. HOMICIDE—FELONY MURDER—ESSENTIAL PREREQUISITES—PROOFS.
It is essential for conviction under a felony murder theory for the prosecution to prove the underlying felony as well as the murder.

7. HOMICIDE—FIRST-DEGREE MURDER—APPEAL AND ERROR—PREMEDITATED MURDER—FELONY MURDER—EVIDENCE.
A first-degree murder conviction must be overturned when the jury is instructed on both premeditated murder and felony murder when the evidence presented at trial is legally insufficient to establish the crime of felony murder.

8. CRIMINAL LAW—APPEAL AND ERROR—INSTRUCTIONS TO JURY—ATTORNEY AND CLIENT.
The Court of Appeals will reverse a defendant's conviction in order to prevent manifest injustice where the trial court's instructions omitted an essential element of the crime for which the defendant was convicted in spite of the fact that defense counsel did not object to the instructions, and successfully prevented them from being given in proper form.

Appeal from Recorder's Court of Detroit, James Del Rio, J. Submitted January 3, 1978, at Detroit. (Docket No. 30774.) Decided February 23, 1978.

Herbert E. Milton was convicted of first-degree murder. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward Reilly Wilson,* Principal Attorney, Appeals, and *Anne B. Wetherholt,* Assistant Prosecuting Attorney, for the people.

Carl Ziemba, for defendant on appeal.

Before: BASHARA, P. J., and J. H. GILLIS and N. J. KAUFMAN, JJ.

PER CURIAM. Defendant was convicted by a jury of first-degree murder, MCLA 750.316; MSA 28.548, in Recorder's Court for the City of Detroit. He now appeals as of right, raising two allegations of error.

Defendant first contends that the trial court erred in denying his motion for a directed verdict of acquittal. We disagree.

Such a motion is properly denied if, viewing the evidence presented by the prosecution in the light most favorable to the prosecution, there is some evidence on which the jury could base a verdict of guilty. *People v Garcia,* 398 Mich 250, 256; 247 NW2d 547 (1976), *People v DeClerk,* 400 Mich 10, 18; 252 NW2d 782 (1977). A conviction cannot constitutionally be sustained if there is no evidence on some element of the crime. *Johnson v Florida,* 391 US 596, 598; 88 S Ct 1713, 1714–1715; 20 L Ed 2d 838, 840 (1968). However, unless there is no evidence at all on a material point, the sufficiency of the evidence is a question that should be left to the jury. *People v Johnson,* 397 Mich 686, 687; 246 NW2d 836 (1976).

In the instant matter, there was testimony that the defendant made repeated telephone threats to the decedent, his former girlfriend, after she moved in with another man. In these phone calls defendant referred to himself as a "hit man" and asked the decedent how she was enjoying the rest of her life. The person who shot the decedent could not be positively identified, but the victim made dying declarations implicating the defendant which were overheard by three witnesses. There was sufficient evidence that defendant was guilty of first-degree murder to justify denial of a motion for a directed verdict.

Nevertheless, we are constrained to reverse de-

fendant's conviction because of flagrant errors in the trial judge's instructions to the jury.

The trial judge in his charge authorized the jury to convict the defendant of first-degree murder if he "either intended to kill the deceased or that he consciously created a very high degree of risk of death to another with knowledge of its probable consequences". This is not the law. *People v Potter,* 5 Mich 1, 8 (1858), *People v Scott,* 6 Mich 287, 294 (1859), *People v Hansen,* 368 Mich 344, 351; 118 NW2d 422 (1962), *People v Morrin,* 31 Mich App 301, 314 n 17; 187 NW2d 434 (1971), *lv den,* 385 Mich 775 (1971). Mere conscious indifference to the likelihood of death as a result of a person's intentional act is not enough; to commit first-degree murder, a person must act with the purpose of causing death. *People v Garcia,* 398 Mich 250, 259; 247 NW2d 547 (1976).

Another fatal flaw in the instructions was their failure to define the elements of premeditation and deliberation. These elements distinguish first-degree murder from second-degree murder. *People v Vail,* 393 Mich 460, 468; 227 NW2d 535 (1975). Failure to define these elements independently of malice has the effect of abolishing the difference between first-degree murder and second-degree murder. *People v Morrin, supra,* at 326, *People v Hoffmeister,* 394 Mich 155, 158; 229 NW2d 305 (1975). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem". *People v Morrin, supra,* at 329, see also, *People v Vail, supra,* at 468. In the instant case, nothing in the instruction afforded the jury any understanding of these crucial elements of the crime of which they convicted the defendant.

The trial judge's charge also erroneously inter-

jected an issue of felony murder which was neither encompassed by the information nor warranted by the evidence. The judge read to the jury a truncated version of the felony murder instruction, CJI 16:2:02, although the defendant was not charged with felony murder and there was no evidence that he committed or attempted to commit any of the felonies enumerated in MCLA 750.316; MSA 28.548, upon which a felony murder conviction might be predicated. An essential prerequisite for conviction under a felony murder theory is proof of the underlying felony as well as proof of the murder. *People v Allen,* 39 Mich App 483, 503; 197 NW2d 874 (1972), (LEVIN, P. J., dissenting), adopted by the Supreme Court, 390 Mich 383; 212 NW2d 21 (1973), *People v Olsson,* 56 Mich App 500, 504; 224 NW2d 691 (1974), *lv den,* 394 Mich 772 (1975), *People v Skowronski,* 61 Mich App 71, 75; 232 NW2d 306 (1975).

A first-degree murder conviction must be overturned when the jury is instructed on both premeditated murder and felony murder when the evidence presented at trial is legally insufficient to establish the crime of felony murder. *People v Gilbert,* 55 Mich App 168, 173–174; 222 NW2d 305 (1974), *lv den,* 393 Mich 774 (1974).

It should be noted that the prosecutor, Thomas Ziolkowski, attempted to cure part of the defective instructions at trial in an effort to insure that the jury was properly instructed on first-degree murder and to see that defendant received a fair trial.

However, the trial judge refused to amend his erroneous instructions when defense counsel stated that he was satisfied with the instructions, and would object if they were changed.[1]

[1] "The Court: Are you satisfied with the instructions given by the Court?

"Mr. Henry [defense counsel]: The defense is satisfied.

It would appear that defense counsel was deliberately trying to inject error into the trial in order to insure reversal on appeal should the jury return a verdict adverse to the defendant.

However, in spite of the fact that defense counsel did not object to the instructions and successfully prevented them from being given in proper form, we are required to reverse defendant's conviction in order to prevent manifest injustice. See *People v Townes,* 391 Mich 578, 585–587; 218 NW2d 136 (1974), *People v Lenkevich,* 394 Mich 117, 122–124; 229 NW2d 298 (1975), *People v Williams,* 75 Mich App 53, 55; 254 NW2d 649 (1977), *People v Joeseype Johnson,* 75 Mich App 337, 341; 254 NW2d 667 (1977), *People v Peoples,* 75 Mich App 616, 620; 255 NW2d 707 (1977).

Reversed and remanded for a new trial.

"Mr. Ziolkowski [assistant prosecutor]: I hate to bring it up, but again the instruction on premeditation and deliberation. It's my understanding of the law that you should give an instruction on premeditation and deliberation. Define both.

"The Court: All right. Are you satisfied with the instructions?

"Mr. Henry: The defense is satisfied, your Honor.

"Mr. Ziolkowski: Your Honor, may I offer this to the court. I have a short paragraph here—

"The Court: Well, we will look at it. Let Mr. Henry see it.

"One of the reasons that I didn't consider that was that the book sent to us by the Supreme Court cautioned us not to use for example a definition of malice when we have a murder second degree or included offense included in our instructions. I don't think premeditation or deliberation would be of any value, but I am willing to do whatever you and counsel agree on.

"Mr. Henry: I think they understand the words deliberation, premeditation. Those are clear words. As the Court has indicated, the Supreme Court has laid down the guidelines of what should be said with the included offense. I can't see why we should run any risk on that. I frankly am satisfied with the charge as given.

"The Court: Well, do you object to it, counsel?

"Mr. Henry: I would object to giving that.

"The Court: Very well. We will leave it as it is, gentlemen."

TURNER v FORD MOTOR COMPANY

OPINION OF THE COURT

1. LIMITATION OF ACTIONS—BORROWING STATUTE—CLAIMS ACCRUING OUTSIDE THE STATE—STATUTES.

Michigan's borrowing statute provides in part that the period of limitation applicable to a claim accruing outside of the state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever bars the claim; therefore, a products liability claim for personal injury which accrued in the state of Georgia, which has a two-year limitation period, would be barred in Michigan courts where the action was commenced after the two-year period had run, even though the action was started within Michigan's three-year limitation period for such actions (MCLA 600.5861[2]; MSA 27A.5861[2]).

2. LIMITATION OF ACTIONS—BORROWING STATUTE—LOSS OF CONSORTIUM—DERIVATIVE CLAIM.

An action for loss of consortium which is derivative of a products liability personal injury action which accrued in Georgia is not barred in Michigan courts where the action was commenced within the four-year limitation period provided by Georgia law for such actions and within Michigan's three-year limitation period; there is no inconsistency in barring a wife's personal

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 51 Am Jur 2d, Limitation of Actions §§ 201, 306.

Construction, application, and effect, with reference to statutory causes of action, of statute of forum which admits bar of statute of limitations of other state. 67 ALR2d 216.

[3] 73 Am Jur 2d, Statutes § 186 *et seq.*

[4] 61 Am Jur 2d, Pleadings §§ 12–14.

[5] 16 Am Jur 2d, Conflict of Laws § 11.

Place of tort: what is place of tort causing personal injury or resultant damage, for purpose of principle of conflict of laws that law of place of tort governs. 77 ALR2d 1266.

Products Liability: what law governs liability of manufacturer or seller for property damage caused by product sold. 76 ALR2d 130.

[6] 5 Am Jur 2d, Appeal and Error § 545.

injury claim as untimely while allowing the husband's claim for loss of consortium if the claims are subject to different limitation periods.

3. STATUTES—PRESUMPTION AGAINST NULLITY.

A statute should not be presumed to be a nullity; if reasonably possible, every part should be given effect.

4. PLEADING—FOREIGN JURISDICTIONS—RAISING ISSUES—STATUTES—NOTICE—STATUTES OF LIMITATION.

A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside of Michigan should give notice in his pleadings or other reasonable written notice; this requirement was sufficiently complied with by a defendant seeking an accelerated judgment based on a Georgia statute of limitations which barred the plaintiffs' claim where the defendant in its brief in support of its motion for accelerated judgment cited the proper Georgia statute as the statute which barred the plaintiffs' claim; there was no need to supply the full text of the statute to the court or to the plaintiffs because the statute was readily accessible and there was no demand before the trial court for a fuller showing (MCLA 600.2114a; MSA 27A.2114[1]).

5. TORTS—RIGHT OF ACTION—LEX LOCI DELICTI—SUBSTANTIVE LAW—SIGNIFICANT CONTACTS—CASE PRECEDENT.

Michigan courts have consistently held that the substantive law to be applied in a torts case is the law of the place where the tort occurred; the Court of Appeals is bound to follow a Supreme Court decision which expressly rejected the "significant contacts" approach unless the Court of Appeals is convinced by overwhelming evidence that the Supreme Court would overrule that decision today.

DISSENT BY J. H. GILLIS, J.

6. APPEAL AND ERROR—ISSUES NOT RAISED IN LOWER COURT.

Generally, a claim may not be reviewed for the first time on appeal where it was not the subject of a ruling of the court below.

Appeal from Wayne, Myron H. Wahls, J. Submitted December 6, 1977, at Detroit. (Docket No. 30855.) Decided February 23, 1978.

Complaint by Velma A. Turner and Edgar R. Turner, Jr., against Ford Motor Company for damages for personal injuries suffered by Velma Turner caused by a defective automobile and for Edgar Turner's loss of consortium. Accelerated judgment for defendant. Plaintiffs appeal. Affirmed in part, reversed in part, and remanded.

Denenberg, Tuffley & Thorpe (by *James A. Thorpe* and *Robert J. Bugge),* for plaintiffs.

Seavitt, Westcott, Miller, Stowe & Magnuson (by *Thomas L. Misuraca),* for defendant.

Before: M. F. CAVANAGH, P. J., and J. H. GILLIS and D. C. RILEY, JJ.

PER CURIAM. This is an appeal from an order granting accelerated judgment in favor of defendant Ford Motor Company in a products liability case. Plaintiffs' complaint alleged that plaintiff Velma Turner was injured on February 12, 1972, in Unadilla, Georgia, when an automobile in which she was a passenger collided with a concrete abutment after its left rear wheel became detached from the vehicle. The automobile was allegedly designed, manufactured and assembled by defendant, and plaintiffs alleged that the accident was caused by various defects in the design, manufacture, and assembly of the vehicle. In addition to Mrs. Turner's injuries, Mr. Turner's loss of consortium was claimed as part of plaintiffs' losses and damages resulting from the incident. The Turners' theories of the case were negligence, breach of implied warranties, strict liability in tort, and wilful and wanton misconduct. The trial judge granted accelerated judgment as to all claims for the reason that they were barred by the statute of

limitations. We affirm his order with respect to Velma Turner's allegations of personal injury but reverse with respect to Edgar Turner's allegation of loss of consortium.

The accident allegedly occurred on February 12, 1972, and suit was filed on February 10, 1975—more than two years but less than three years later. The Michigan borrowing statute, MCLA 600.5861(2); MSA 27A.5861(2) provides in part:

> "The period of limitation applicable to a claim accruing outside of this state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever bars the claim."

Since this case involves product liability claims against a manufacturer for personal injury, Velma Turner's claims accrued in Georgia on February 12, 1972. *Parish v B F Goodrich Co,* 395 Mich 271; 235 NW2d 570 (1975). Under Michigan law, the limitations period applicable to personal injury claims like these is three years.[1] MCLA 600.5805; MSA 27A.5805. Under the law of Georgia, the state where the claim accrued, the general personal injury limitations period is two years. Ga Code Ann § 3-1004. Since the Georgia limitations period would bar the claim, under the borrowing statute the claim is barred in our courts as well.

[1] The only other arguably applicable period is the four-year limitations period in contract cases specified in Uniform Commercial Code § 2-725 (MCLA 440.2725; MSA 19.2725). This would apply, if at all, only to the breach of warranty claims. We believe the Supreme Court would probably apply the three-year personal injury limitations period, not the four-year contract limitations period, to such a products liability personal injury action. *Waldron v Armstrong Rubber Co (On Remand),* 64 Mich App 626, 633; 236 NW2d 722 (1975), *see, Huhtala v Travelers Insurance Co,* 401 Mich 118, 126; 257 NW2d 640 (1977), *but see, Reid v Volkswagen of America, Inc,* 512 F2d 1294 (CA 6, 1975). We need not decide this question now, since the applicable Georgia limitations period is shorter than that prescribed by either of the Michigan statutes.

Hill v Clark Equipment Co, 42 Mich App 405; 202 NW2d 530 (1972), *lv denied,* 388 Mich 801 (1972), *Shamie v Shamie,* 45 Mich App 384; 206 NW2d 463 (1973).

However, Georgia provides for a four-year limitations period for "actions for injuries to the person involving loss of consortium". Ga Code Ann § 3-1004. With respect to Edgar Turner's claim of loss of consortium, the shorter of the Georgia and Michigan limitations periods is the three-year Michigan limit, in which case this claim is not barred.[2] Under Georgia law, a spouse may maintain an action for loss of consortium even if the other spouse's personal injury claims based on the same accident are time-barred. *Central of Georgia R Co v Harbin,* 132 Ga App 65; 207 SE2d 597 (1974). The cases relied upon by defendant are distinguishable from the instant case because they involved inconsistent verdicts on the merits where one spouse brought an action for personal injury and the other brought a derivative action for loss of consortium. See *Stone Mountain Memorial Association v Herrington,* 225 Ga 746; 171 SE2d 521 (1969), *Smith v Tri-State Culvert Manufacturing Co, Inc,* 126 Ga App 508; 191 SE2d 92 (1972). But there is no inconsistency in barring a wife's personal injury claim as untimely while allowing the husband's claim for loss of consortium *if* the claims are subject to different limitations periods. The Georgia Legislature has provided for a two-

[2] Plaintiffs' counsel made no reference to the longer limitations period for loss-of-consortium claims in his answer to the motion for accelerated judgment or in oral argument. The general rule is that an issue not raised before the trial court cannot be raised on appeal. However, the defendant has fully briefed the issue, and in the interest of justice we choose to consider it. *People v LeBlanc,* 399 Mich 31, 49, n 12; 248 NW2d 199 (1976), *Hart v Wayne County,* 61 Mich App 188, 190; 232 NW2d 678 (1975), *reversed on other grounds,* 396 Mich 259; 240 NW2d 697 (1976).

year limit on most personal injury claims but a four-year limit on such claims involving loss of consortium. The only inconsistency is the work of the Georgia Legislature. Any other interpretation would reduce the longer loss-of-consortium limitations period to a nullity, since a claim of loss of consortium presupposes an originally valid personal injury claim by the other spouse and the latter claim is subject to a two-year limitations period. A statute should not be presumed to be a nullity; if reasonably possible, every part should be given effect. *Stowers v Wolodzko,* 386 Mich 119, 133–134; 191 NW2d 355 (1971), *Peters v Department of State Highways,* 66 Mich App 560, 563; 239 NW2d 662 (1976), 2A Sutherland, Statutory Construction (4d ed, 1973), § 46.06, p 63. The way to effectuate every part of Ga Code Ann § 3-1004 is to allow a loss-of-consortium claim even if the underlying claims of the injured spouse are barred by a shorter limitations period. *Central of Georgia R Co v Harbin, supra.* Otherwise the four-year limit on loss-of-consortium claims would be illusory.

Defendant urges us not to enforce the Georgia limitation period in consortium cases because it is against the public policy of Michigan. It is contended that Michigan's policy is to apply the same statute of limitations to all claims arising from a single tortious transaction. Assuming that to be true, it merely shows that Georgia law is different, not that its enforcement would violate public policy. We see nothing immoral, unjust to, or inconsistent with the interests of our citizens in applying this statute of limitations. *Rick v Saginaw Bay Towing Co,* 132 Mich 237, 240; 93 NW 632; 102 Am St 422 (1903), *Eskovitz v Berger,* 276 Mich 536; 268 NW 883 (1936), *Lieberthal v Glens Falls Indemnity*

Co of Glens Falls, New York, 316 Mich 37, 42; 24 NW2d 547 (1946), *Growe v Growe,* 2 Mich App 25, 32–33; 138 NW2d 537 (1965), *lv denied,* 377 Mich 708 (1966), 1 Restatement, Conflict of Laws, 2d, § 90, p 267.

Plaintiffs also argue that the defendant improperly pleaded and proved the foreign statute on which it relied. MCLA 600.2114a; MSA 27A.2114(1) provides in pertinent part:

> "A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside this state shall give notice in his pleadings or other reasonable written notice."

In its brief in support of the motion for accelerated judgment, the defendant cited Ga Code Ann § 3-1004 as the statute of limitations which barred the plaintiffs' claims. We reject plaintiffs' contention that defendant was obliged to furnish the full text of the statute to the court or to them. We note that there was no demand for a fuller showing before the trial court. Since the statute is readily accessible, citation to it in the supporting brief was sufficient notice under the statute.

Finally, we are constrained to reject plaintiffs' proposal to replace the *lex loci delicti* choice-of-law principle with the "significant contacts" approach employed in many other jurisdictions. Our courts have repeatedly held that the substantive law to be applied in a torts case is the law of the place where the tort occurred. *Kaiser v North,* 292 Mich 49; 289 NW 325 (1939), *Abendschein v Farrell,* 382 Mich 510; 170 NW2d 137 (1969), *Sweeney v Sweeney,* 71 Mich App 428; 248 NW2d 571 (1976). We are bound to follow the *Abendschein* decision, where a unanimous Supreme Court criticized and expressly rejected the "significant contacts" ap-

proach, unless we are convinced by overwhelming evidence that the Supreme Court would overrule that decision today. *Abendschein v Farrell,* 11 Mich App 662, 679; 162 NW2d 165 (1968), *affirmed,* 382 Mich 510 (1969), *Burton Drywall, Inc v Kaufman,* 69 Mich App 85, 90; 244 NW2d 367 (1976), *lv granted,* 399 Mich 875 (1977). We have seen no such evidence. Furthermore, even if the "significant contacts" test were adopted, it would be irrelevant in this case because the borrowing statute controls the question whether the applicable Michigan or sister-state statute of limitations governs claims accruing in the other state. See, 1 Restatement, Conflict of Laws, 2d, § 6, p 10, *Hill v Clark Equipment, supra,* at 407.

Affirmed in part, reversed in part and remanded for proceedings not inconsistent with this opinion.

J. H. GILLIS, J. *(dissenting).* I respectfully dissent. Plaintiffs' counsel made no reference to the longer statute of limitations period applicable to loss-of-consortium claims in any of the lower court proceedings. Accordingly, since the issue was not raised before the trial court, it should not be considered for the first time on appeal. See, *Falk v Civil Service Commission of Macomb County,* 57 Mich App 134, 137, 138; 225 NW2d 713 (1974), *lv den,* 394 Mich 819 (1975), *Buxton v Alexander,* 69 Mich App 507, 509–510; 245 NW2d 111 (1976), *lv den,* 399 Mich 827 (1977), *Three Lakes Association v Whiting,* 75 Mich App 564, 575; 255 NW2d 686 (1977).

I would affirm the lower court's order in its entirety.

PEOPLE v WITTEBORT

1. CONSTITUTIONAL LAW—CRIMINAL LAW—WITNESSES—PRIOR RECORDED TESTIMONY—CROSS-EXAMINATION—ADMISSIBILITY AT TRIAL—STATUTES.

   Michigan criminal procedure, under the appropriate circumstances, permits the introduction of prior recorded sworn testimony taken in accordance with generally accepted rules of evidence; however, the right to cross-examine and confront witnesses is secured by the constitution, and where a defendant has been effectively denied these rights at a preliminary examination, testimony taken at the examination may not be introduced at trial (US Const, Am VI, XIV, MCLA 768.26; MSA 28.1049).

2. WITNESSES—CRIMINAL LAW—PRELIMINARY EXAMINATION TESTIMONY—CROSS-EXAMINATION—ADMISSIBILITY AT TRIAL.

   Perfunctory cross-examination of a witness at a preliminary examination may be sufficient to admit the transcript of this witness's testimony at a later trial at which the witness is unavailable.

3. WITNESSES—CRIMINAL LAW—PRELIMINARY HEARING TESTIMONY—CROSS-EXAMINATION—ADMISSIBILITY AT TRIAL.

   Generally, the transcript of a witness's testimony at a preliminary hearing is admissible at a later criminal trial at which the witness is unavailable where the defendant was represented by counsel at the preliminary hearing and apparently failed to exercise what was an adequate opportunity for cross-examination.

4. WITNESSES—CRIMINAL LAW—PRIOR RECORDED TESTIMONY—CROSS-EXAMINATION—OPPORTUNITY TO CROSS-EXAMINE—ADEQUACY OF OPPORTUNITY.

   Admissibility of a witness's prior recorded sworn testimony at a

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REFERENCES FOR POINTS IN HEADNOTES

[1–6] 21 Am Jur 2d, Criminal Law §§ 343, 344.
29 Am Jur 2d, Evidence § 761.
Claim of privilege by a witness as justifying the use in criminal case of his testimony given on a former trial or preliminary examination. 45 ALR2d 1354.

preliminary hearing turns upon the opportunity for cross-examination at the preliminary hearing; adequacy of opportunity depends upon qualitative factors such as the presence and participation of counsel, the nature of the proceeding, the character of the witness and his connection with the events, the extent and subject of his direct testimony, and the time and preparatory opportunities available to the accused and his attorney.

5. APPEAL AND ERROR—WITNESSES—PRELIMINARY EXAMINATION TESTIMONY—JUDGE'S DISCRETION—REVIEW OF RECORD.

A determination of whether a trial court abused its discretion in admitting the preliminary examination testimony of a witness at a later trial requires a qualitative review of the record.

6. WITNESSES—CRIMINAL LAW—PRELIMINARY EXAMINATION TESTIMONY—CROSS-EXAMINATION—ADMISSIBILITY AT TRIAL.

Mere opportunity at a preliminary examination to cross-examine a witness who later becomes incapable of testifying at trial may be insufficient for a trial court to admit the testimony of that witness, but where the record indicates that cross-examination would have been counter-productive to the defendant and where counsel participated to the extent of interposing objections to questions asked on direct examination of the witness, the constitutionally mandated adequate opportunity to cross-examine the witness has been met and the earlier testimony of the witness is admissible at the later trial.

Appeal from Muskegon, John H. Piercey, J. Submitted November 1, 1977, at Grand Rapids. (Docket No. 30899.) Decided February 23, 1978.

Arthur W. Wittebort was convicted of breaking and entering a building with intent to commit a felony. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Gerald D. Warner,* Prosecuting Attorney, and *Gerald W. Gibbs,* Assistant Prosecuting Attorney, for the people.

Marietti, Mullally & Grimm, for defendant.

Before: R. M. MAHER, P. J., and M. F. CAVANAGH and N. J. KAUFMAN, JJ.

PER CURIAM. Defendant was convicted of breaking and entering, MCLA 750.110; MSA 28.305, placed on two years probation and ordered to pay court costs of $100. He appeals, raising two contentions, only one of which merits discussion.

Defendant contends that the trial court committed reversible error by admitting the preliminary examination testimony of a witness who died prior to trial.

Admission of such evidence is governed generally by *People v Martin #2,* 21 Mich App 667, 671; 176 NW2d 470 (1970), *lv den* 384 Mich 820 (1971):

"Under the appropriate circumstances, Michigan criminal procedure permits the introduction of prior recorded testimony (MCLA § 768.26 [Stat Ann 1954 Rev § 28.1049]), in accordance with generally accepted rules of evidence. 5 Wigmore, Evidence (3rd Ed), §§ 1395, 1396, 1402. However, the United States Supreme Court has declared that the 6th Amendment right to cross-examine and confront witnesses is secured to state court defendants through the 14th Amendment. *Douglas v. Alabama* (1965), 380 US 415 (85 S Ct 1074, 13 L Ed 2d 934). Accordingly, where a defendant has been effectively denied his rights of cross-examination and confrontation at a preliminary examination, testimony taken at the examination may not be introduced at trial. *Pointer v. Texas* (1965), 380 US 400 (85 S Ct 1065, 13 L Ed 2d 923)."

The precise question we must answer is, under the facts of this case, was defendant denied his constitutional right of cross-examination and confrontation?

At the preliminary examination, assigned coun-

sel for defendant recognized a witness, a Mr. Jamison, as a client. Defendant's original counsel, recognizing the conflict of interest, explained it to the examining magistrate and moved for an adjournment to "arrange for a public defender without conflict".

The magistrate took a brief recess to look for another public defender in the building. Substitute counsel was procured. Witness Jamison was then sworn and the examination continued. Jamison gave crucial incriminating testimony. Substitute counsel did not question him, nor did he ask for an adjournment of the preliminary examination.

There is no definitive Michigan case law covering this factual situation. Perfunctory cross-examination was held sufficient in *People v Martin #2, supra.* There, this Court held that:

> "Where defendant is represented by counsel at preliminary hearing, and counsel apparently fails to cross-examine fully a given witness, the transcript of this witness's testimony is *admissible* at trial *if* * * * the opportunity for cross-examination was available but not exercised." (Emphasis in original.) 21 Mich App at 676.

In this case, as an "opportunity" for cross-examination existed at the preliminary examination, the authority cited above would appear to bar relief for defendant. However, it is not enough to speak of "opportunity" without looking to see how the *Martin* Court defined the term.

This Court in *Martin* considered the following passage from *Pointer v Texas,* 380 US 400, 407; 85 S Ct 1065; 13 L Ed 2d 923 (1965):

> " 'The case before us would be quite a different one had [the] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel

who had been given a complete and adequate opportunity to cross-examine.' " 21 Mich App at 672.

Judge (now Justice) FITZGERALD also examined relevant California precedent:

"Of particular importance to the case at bar, where the *nature* of the preliminary examination is being challenged, is *People v. Gibbs* (1967), 255 Cal App 2d 739, 743 (63 Cal Rptr 471). In reversing appellant's conviction, the court there said:

" 'Bare existence of an opportunity for cross-examination in a prior proceeding supplies only a limited indicator of the opportunity's adequacy. *Pointer v. State of Texas* holds the opportunity inadequate when the accused has no lawyer. The presence and participation of counsel, however, do not necessarily ensure the opportunity's adequacy. Qualitative factors play a role. The nature of the proceeding; the character of the witness and his connection with the events; the extent and subject of his direct testimony; the time and preparatory opportunities available to the accused and his attorney—these are some of the influential factors.' " (Emphasis in original.) 21 Mich App at 673.

It is, therefore, noteworthy that the *Martin* Court reached its conclusion only "after careful study of the record" and only because it was "apparent that defense counsel declined to cross-examine Mrs. Dunning for his own reasons." 21 Mich App at 676.

In this case, we have undertaken a qualitative review of the record as suggested in *People v Gibbs, supra.* From the record adduced both at the preliminary examination and at trial, we cannot say that the trial court abused its discretion. The extent and subject of witness Jamison's testimony indicates that cross-examination would have been counter-productive to defendant. Furthermore, substitute counsel participated to the extent of

interposing objections to questions asked on direct examination of witness Jamison. Therefore, although mere "opportunity" to cross-examine may be insufficient for a trial court to admit preliminary examination testimony of a witness who died prior to trial, in this case, defense counsel had the constitutionally mandated "adequate" opportunity.

As there was no error, we affirm.[1]

[1] Appellant's second argument, concerning a prosecutorial motion regarding defendant's prior felony convictions, has been considered and is without merit.

PEOPLE v TEBEDO

OPINION OF THE COURT

1. ARREST—ARREST WITHOUT WARRANT—FELONIES—REASONABLE CAUSE—STATUTES.

   A police officer may not, without a warrant, arrest a person for a felony unless a felony has been committed and the officer has reasonable cause to believe that the person arrested has committed it (MCLA 764.15[c]; MSA 28.874[c]).

2. ARREST—INVESTIGATORY STOP—UNUSUAL CONDUCT.

   A police officer may stop a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest where the officer has observed unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.

3. ARREST—INVESTIGATORY STOP—JUSTIFICATION FOR STOP.

   An investigative stop of a person by police must be justified at its inception and must be reasonably related in scope to the circumstances which justified the interference in the first place.

4. ARREST—FLIGHT BY SUSPECT—RELATION TO CRIME.

   The fact that a suspect flees at the approach of the police does not by itself justify an arrest; the police must positively relate the flight to the commission of a crime.

5. ARREST—INVESTIGATORY STOP—REASONABLE SUSPICION—SUBSEQUENT ACTS OF ACCUSED—EVIDENCE.

   Police officers who stop a person for investigation of possible criminal activity may not use subsequent actions of the accused to supply the reasonable suspicion which is essential to justify the initial intrusion; therefore, an inculpatory statement made by a defendant after his arrest is not admissible in evidence

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REFERENCES FOR POINTS IN HEADNOTES

[1, 5] 5 Am Jur 2d, Arrest §§ 24, 25, 32.

[2–6] 5 Am Jur 2d, Arrest § 45.

What constitutes probable cause for arrest—Supreme Court cases. 28 L Ed 2d 978.

where the police did not have reasonable cause to arrest the defendant.

CONCURRENCE BY ALLEN, J.

6. ARREST—INVESTIGATORY STOP—SUSPICIOUS PERSONS—EVIDENCE.

Police officers had a sufficient basis to stop a person to inquire of him what he was doing where the person was discovered at 5 a.m. standing behind a row of apartment buildings shortly after a suspicious person had been reported in the area and where the person fled as the police car approached; without more, however, the police were not justified in arresting the person because there was no indication of criminal activity, and a statement made by the person after his arrest cannot be used to inculpate him in a robbery which occurred three days earlier.

Appeal from Genesee, Ollie B. Bivins, Jr., J. Submitted December 7, 1977, at Lansing. (Docket No. 31039.) Decided February 23, 1978.

Gary M. Tebedo was convicted of armed robbery. Defendant appeals. Reversed, and new trial granted.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,* Prosecuting Attorney, and *Donald A. Kuebler,* Chief, Appellate Division, for the people.

Terrance P. Sheehan, for defendant on appeal.

Before: R. B. BURNS, P. J., and ALLEN and R. M. MAHER, JJ.

PER CURIAM. Charged with armed robbery, MCLA 750.529; MSA 28.797, defendant was convicted by a jury on March 18, 1976. The trial court sentenced him to a term of 30 to 40 years. He comes before this Court on a delayed appeal.

On June 25, 1975, a Kroger grocery store on

Corunna Road in Flint Township was robbed. On June 28, 1975, two officers from the Flint Township police department received a call from a Genesee County police car that a suspicious person had been spotted in the area of the Kroger store on Corunna Road. No connection was made between the individual spotted and the June 25th robbery.

The officers drove to an area approximately one-quarter mile from the store, stayed 10 to 15 minutes but saw no one. They then proceeded into a private drive in the rear of the nearby Circle Court Apartments where defendant lived. They saw defendant standing behind the last row of buildings, about ten feet from the door of his apartment. As they approached defendant in their marked police car, he ran.

One of the officers got out of the car and gave chase. After pursuing defendant for two blocks, the officer drew his gun and ordered defendant to halt. He laid defendant on his stomach and handcuffed him. It was then, according to the police testimony, that defendant said "he knew we had him for the robberies and that's why he ran". The officer also testified that defendant's only suspicious action was his running; he indicated that while defendant was standing outside his residence he was doing nothing suspicious.

Defendant alleges error in the trial court ruling which admitted into evidence the statement defendant made when first stopped by police. He claims that because his arrest was unlawful, the incriminating statement must be suppressed as the fruit of the poisonous tree.

A police officer may not without a warrant arrest a person unless a felony has been committed and the officer has reasonable cause to believe

that such person has committed it. MCLA 764.15(c); MSA 28.874(c). A police officer may, however, "in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest". *Terry v Ohio,* 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). It is not unlawful for a police officer to stop persons when he has observed "unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot". *People v Whalen,* 390 Mich 672, 680; 213 NW2d 116 (1973).

But in justifying the intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion. *Terry v Ohio, supra,* at 21. In the present case the parties dispute whether the actions of the officers constituted an investigative stop or an arrest.

We note first that, whatever it is determined to be, the officers could articulate no specific facts which would warrant an intrusion of the kind made upon defendant. They stated that when first spotted, defendant was merely standing about ten feet from the door of his apartment, an action which cannot reasonably be called suspicious.

> "There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended." *Sibron v New York,* 392 US 40, 73; 88 S Ct 1889; 20 L Ed 2d 917 (1968) (Harlan, J., concurring).

The officers in this case had no knowledge and no

reason even to suspect that defendant was linked to a robbery which occurred three days earlier. Their testimony reveals the police made no connection between the defendant and the robbery of the grocery store.

Moreover, an investigative stop—if the police action is so characterized—must be justified at its inception and must be reasonably related in scope to the circumstances which justified the interference in the first place. *Terry v Ohio, supra,* at 20. The justification in this case was a radio report that a suspicious person had been seen in the vicinity of the Kroger store. A stop of even limited scope in such a situation is of dubious propriety. The "stop" in this case was not, however, limited in scope nor strictly tied to and justified by circumstances which rendered its initiation permissible. Rather, the police actions constituted an arrest, as the trial court aptly explained to the jury. Laying one who has been detained on his stomach on the ground and then handcuffing him are not the elements of an investigative stop.

The police and the prosecutor attempt to justify the warrantless arrest on the basis of defendant's flight from the police car. Flight alone does not justify an arrest, particularly when, as here, defendant's running is not flight from the scene of a reported crime. The police must positively relate the flight to commission of a crime. *People v Dogans,* 26 Mich App 411; 182 NW2d 585 (1970).

> "Flight may be some evidence of consciousness of wrongdoing, but it does not necessarily point to the commission of a felony. A police officer may not arrest for consciousness of wrongdoing. He must have reasonable cause to believe that a felony has been committed and that the accused person committed it." 26 Mich App at 421 (Footnotes omitted.)

When first observed by the police, defendant was doing nothing suspicious. On that basis the officers had no reason to arrest or even to stop the defendant. Defendant began to run. It must be emphasized that he was not running from the scene of any reported criminal activity. The police try to justify their actions by calling defendant's flight suspicious.

For purposes of an investigatory stop, police officers cannot use subsequent actions by the accused to supply the reasonable suspicion essential for the initial intrusion. The initial intrusion must be justified. Nor can mere suspicion of an individual, the most the officers could have had in this case, be proper justification for a warrantless arrest. *Wong Sun v United States,* 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), *People v Reeves,* 23 Mich App 183; 178 NW2d 115 (1970). The officers were not investigating a particular crime; they were not aware of any crime which had just been committed from which defendant could have been fleeing; they did not relate defendant to the robbery at the Kroger store three days earlier.

That a person, doing nothing suspicious, should run at the sight of a police car does not warrant the officers in that car to pursue the individual on foot, to order him to halt at gunpoint, to lay him on the ground on his stomach and to handcuff him, when the only suspicious activity was the individual's flight, precipitated by the officers' initial intrusion. No probable cause to make a warrantless arrest of defendant existed.

We realize that police should not shrug their shoulders and allow crime to occur. Yet good police work is characterized not only by the prevention and detection of crime but also by the avoidance of intrusions upon personal privacy in

violation of the fourth amendment. *People v Lillis,* 64 Mich App 64; 235 NW2d 65 (1975).

The police action in this instance when there was no probable cause to arrest was too great an intrusion on defendant's privacy to be sanctioned. The arrest was unlawful. Defendant's statement, made after the arrest, should have been suppressed. The conviction is reversed and defendant is granted a new trial.

ALLEN, J. *(concurring).* I write separately in concurrence to distinguish this case from *People v Kirchoff,* 74 Mich App 641; 254 NW2d 793 (1977). In the instant case, the only facts known to the officers was that a person standing behind a row of apartment buildings at 5 a.m., an area where a suspicious person had recently been reported to the officers, fled as the officers' patrol car approached. These facts provided a sufficient basis for a limited *Terry v Ohio*[1] type investigatory stop. But they did not justify laying the defendant on the ground and handcuffing him.

At 5 a.m., and in view of the earlier report to the officers concerning a suspicious person in the apartment building area, it would have been appropriate to inquire of the individual what he was doing. Even in light of the fact that the individual fled, there was no indication of criminal activity which, at that point, warranted arrest without prior questioning of the fleeing person's activities. The handcuffing was an arrest which was a serious intrusion upon the freedom of the individual and precluded the use of the statement made by defendant upon arrest.

In *Kirchoff, supra,* the defendant was apprehended by the police about 11:20 p.m., shortly

[1] 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

after he fled from police after observing their patrol car. The police attempted to make an initial investigatory stop but the defendant again fled and some 100 yards later threw away a knapsack in which was found packets of marijuana. It was concluded that the initial stop in *Kirchoff* was warranted. Such a stop would have been warranted in the instant case. Further, the Court found that the knapsack had been "abandoned" by the defendant and thus, under *Hester v United States,* 265 US 57; 44 S Ct 445; 68 L Ed 898 (1924), the search of the knapsack's contents and their admissibility in evidence was lawful. The abandonment rationale is non-existent in the instant case and may not be used to justify the introduction in evidence of defendant's incriminating statement made following the handcuffing. In my opinion, the type of intrusion made in the instant case exceeded a *Terry* investigative stop and therefore I agree with the majority that, in this case, the exclusionary rule should apply.

AVANT v NATIONAL BANK OF DETROIT

1. ACTION—CIVIL RIGHTS—DAMAGES—DISCRIMINATION—PRIVATE EMPLOYMENT—LABOR RELATIONS.

   A plaintiff can maintain a civil damage action for redress of his statutorily created right to be free from discrimination in private employment, and this remedy may be pursued in addition to the remedial machinery provided by statute.

2. CIVIL RIGHTS—JUDICIAL REMEDIES—DAMAGES—DISCRIMINATION—PRIVATE EMPLOYMENT—DEPARTMENT OF CIVIL RIGHTS—ADMINISTRATIVE LAW.

   A plaintiff may avail himself of a judicial remedy to recover compensation for damage suffered by reason of discrimination in private employment even though a complaint, alleging essentially the same facts, filed by the plaintiff with the Michigan Department of Civil Rights is pending when the suit is begun.

Appeal from Wayne, Charles Kaufman, J. Submitted November 1, 1977, at Detroit. (Docket No. 77-479.) Decided February 23, 1978. Leave to appeal applied for.

Complaint by Billie Avant against the National Bank of Detroit seeking damages for discrimination in private employment. Defendant's motions for summary and accelerated judgments were denied. Defendant appeals by leave granted. Affirmed.

Ovander W. Stoner, for plaintiff.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 15 Am Jur 2d, Civil Rights § 293.

Fair employment statutes designed to eliminate racial, religious, or national origin discrimination in private employment. 44 ALR2d 1138.

Dykema, Gossett, Spencer, Goodnow & Trigg (by *Bettye S. Elkins* and *Seth M. Lloyd),* for defendant.

Before: BEASLEY, P. J., and D. E. HOLBROOK, JR. and M. J. KELLY, JJ.

PER CURIAM. On February 4, 1976, plaintiff filed a complaint with the Michigan Department of Civil Rights claiming that because of her sex and race she was unfairly demoted and bypassed for a merit increase. While the matter was pending, on May 6, 1976, plaintiff started a suit for damages alleging essentially the same facts. Defendant filed motions for summary judgment and accelerated judgment, which were denied.

Defendant appeals by leave granted claiming that plaintiff has failed to exhaust her administrative remedies before the Michigan Department of Civil Rights.

The claim is without merit. *Pompey v General Motors Corp* controls.[1] We are not persuaded that *Michigan Civil Rights Commission v Clark* requires a different result here.[2] An additional reason for affirmance here is the subsequent voluntary dismissal of the proceeding before the Michigan Department of Civil Rights. We affirm denial of the motions for summary judgment and accelerated judgment.[3]

Affirmed, with costs.

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[1] 385 Mich 537, 560; 189 NW2d 243 (1971), where the Court said:

"We hold that plaintiff can maintain a civil damage action for redress of his statutorily created right to be free from discrimination in private employment, and that this remedy may be pursued in addition to the remedial machinery provided by statute."

[2] 390 Mich 717, 724, n 3; 212 NW2d 912 (1973).

[3] It should be noted that we express no opinion here regarding the manifold issues concerning such matters as possible consolidation, overlapping or inconsistent relief, duplicate damage awards, and the like.

GREEN v SUDAKIN

1. NEGLIGENCE—MALPRACTICE—UNWANTED CHILD—DAMAGES—PUBLIC POLICY.

An award of damages for the unwanted birth of a normal, healthy, child is not contrary to public policy; the birth of such a child does not confer an unquestionable benefit upon the parents, which outweighs, as a matter of law, any detrimental expenses related to the birth and rearing of the child.

2. NEGLIGENCE—DAMAGES—UNWANTED CHILD—REASONABLE ASCERTAINMENT—ROUTINE COMPUTATIONS—RECOVERY ALLOWED.

Damages to compensate parents for the expenses of rearing an unwanted child are not speculative or ethically questionable; the cost of rearing a child is a computation which is routinely performed; the law is clear that there need only be a basis for reasonable ascertainment of the amount of the damages and where the fact of liability is proven, difficulty in determining such damages need not bar recovery.

3. CONTRACTS—BREACH OF CONTRACT—DAMAGES—PERSONAL NONCOMMERCIAL CONTRACTS—MENTAL ANGUISH—RECOVERY FOR BREACH.

Generally, damages for mental anguish are not permitted in breach of contract actions; however, an exception to this rule has been created where the contract at issue is highly personalized and noncommercial and where a breach of duty will inevitably and necessarily result in mental anguish, pain and suffering.

Appeal from Wayne, Joseph A. Moynihan, Jr., J. Submitted January 3, 1978, at Detroit. (Docket No. 77-1289.) Decided February 23, 1978. Leave to appeal applied for.

Complaint by Ruth Green and Herbert Green

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 61 Am Jur 2d, Physicians and Surgeons § 135.

[3] 22 Am Jur 2d, Damages § 195.

against Leonard B. Sudakin and Joseph Stern for damages for medical malpractice and breach of contract. Judgment for plaintiffs. Defendants appeal. Affirmed.

Jeffrey M. Mallon, for plaintiffs.

Harvey, Kruse & Westen, P. C. (by *Jonathan Martin),* for defendants.

Before: BASHARA, P. J., and J. H. GILLIS and N. J. KAUFMAN, JJ.

PER CURIAM. Plaintiffs commenced this action in Wayne County Circuit Court seeking damages from defendant-doctors[1] for alleged medical malpractice and breach of contract.

The record reveals that plaintiff-wife[2] consulted with defendants, and decided to have a tubal ligation performed immediately following the birth of her third child. The purpose of such a procedure is to prevent future pregnancies.

After delivering plaintiffs' third child, defendants failed to perform the agreed upon tubal ligation. The issue of whether or not plaintiffs were notified of this fact was contested at trial. Plaintiffs claimed that defendants failed to inform them of the fact that the operation was not performed. Hence, plaintiffs, apparently in reliance upon defendants' promise to perform the operation, took no birth control precautions subsequent to the delivery of their third child, which resulted in plaintiff-wife promptly becoming pregnant with her fourth child.

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[1] Defendants, Doctors Sudakin and Stern, were partners in a medical practice which was limited to obstetrics and gynecology.

[2] Plaintiff-wife was pregnant with her third child at the time of the consultations.

The jury determined that defendants had failed to notify plaintiffs of the fact that the tubal ligation had not been performed, and entered a verdict of $95,000 in favor of plaintiffs.

Defendants appeal citing several instances of error.

Defendants first contend that an award of damages for the unwanted birth of a normal, healthy child is contrary to the public policy of this state. Defendants claim that the birth of such a child confers an unquestionable benefit upon the parents, which outweighs, as a matter of law, any detrimental expenses related to the birth and rearing of the child.

Such an assumption has been expressly rejected by this Court in the case of *Troppi v Scarf,* 31 Mich App 240; 187 NW2d 511 (1971), *lv den,* 385 Mich 753 (1971). Therefore, we find no public policy considerations which warrant that defendants be exempted from the consequences of their negligent acts.

Defendants next contend that an award of damages to compensate plaintiffs for the expenses of rearing their fourth child would be speculative and ethically questionable. We disagree.

As *Troppi, supra,* points out, the cost of rearing a child is a computation which is routinely performed in numerous cases:

> "As to the costs of rearing the child until his majority, this is a computation which is routinely performed in countless cases.
>
> "It should be clear that ascertainment of *gross* damages is a routine task. Whatever uncertainty attends the final award arises from application of the benefits rule, which requires that the trier of fact compute the dollar value of the companionship and services of an unwanted child. Placing a dollar value on these seg-

ments may well be more difficult than assessing damages for, say, Mrs. Troppi's lost wages. But difficulty in determining the amount to be subtracted from the gross damages does not justify throwing up our hands and denying recovery altogether.

"Michigan law is clear that there need only be a basis for reasonable ascertainment of the amount of the damages. Where the fact of liability is proven, difficulty in determining damages will not bar recovery." *Troppi, supra,* at 261.

Hence, we find that the damages in the instant matter are reasonably ascertainable.[3]

Defendants' allegation that the damages are unethical under the circumstances of the instant matter fails in light of the *Troppi* case, *supra.*

Defendants finally contend that the trial court erred in instructing the jury that their verdict could include an award for mental pain and suffering.

We note that damages for mental anguish are generally not permitted in breach of contract actions. However, an exception to this rule has been created by the courts in cases where the contract at issue is

" * * * concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the

[3] The Michigan Supreme Court has recognized, in wrongful death actions, that the dollar value of a child's services and companionship is not too uncertain as to be left to the judgment of the trier of fact. *See Wycko v Gnodtke,* 361 Mich 331; 105 NW2d 118 (1960), approved in *Smith v Detroit,* 388 Mich 637; 202 NW2d 300 (1972), MCLA 600.2922; MSA 27A.2922.

payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it." *Stewart v Rudner,* 349 Mich 459, 471; 84 NW2d 816 (1957).

In *Stewart, supra,* the Supreme Court upheld an award of damages for mental anguish where a physician breached a contract to perform a Caesarean section on a patient which resulted in the death of the unborn child. The Court concluded that the contract was highly personal in nature, and that no reasonable person could doubt that mental pain and suffering were within the contemplation of the parties in the event that the physician failed to perform the agreed-upon operation.

The agreement in the instant matter is intensely personal in nature. The failure to perform such a contract could foreseeably cause great mental pain and suffering.

Therefore, we find that a damage award for mental anguish is appropriate under the circumstances of the case at bar.

The other issues raised on appeal do not merit discussion by this Court.

Affirmed. Costs to plaintiffs.

FIRST BANK OF CADILLAC v BENSON

1. JUDGMENT—DEFAULT JUDGMENT—SETTING ASIDE DEFAULT—GOOD CAUSE—MERITORIOUS DEFENSES.

   Both good cause and a meritorious defense must be shown before a default judgment will be set aside; good cause is defined as (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand.

2. COURTS—COMPUTING TIME—COURT RULES.

   Michigan Court Rules provide that in computing time, the day of the act, event or default after which the designated period of time begins to run is not included while the last day of the period is to be included; two additional days are allowed when service by mail is addressed for delivery outside the county of mailing (GCR 1963, 108.6, 108.7[1]).

3. COURTS—COMPUTING TIME—NOTICE—GENERAL RULE.

   The general rule with regard to the computation of legal notice is that the day of performance of the required act is included and the day from which the notice begins to run is excluded; when an act is to be done a certain number of days before a day stated, then that day is excluded in the computation; but where the act is to be done a certain number of days before another act, then the day on which that act is to be done is included.

4. COURTS—PROCEDURE—ATTORNEY AND CLIENT.

   An appellant's failure to obtain counsel for more than a month

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REFERENCES FOR POINTS IN HEADNOTES

[1] 46 Am Jur 2d, Judgments §§ 708, 740.

[2] 20 Am Jur 2d, Courts § 84.
47 Am Jur 2d, Judgments §§ 1152, 1178.

[3] 20 Am Jur 2d, Courts §§ 84, 86.

[4] 7 Am Jur 2d, Attorneys at Law § 143.

[5] 46 Am Jur 2d, Judgments §§ 724, 737.
Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers. 21 ALR3d 1255.

after his first attorney withdrew from his case does not reasonably excuse his failure to comply with a production order by the lower court entered prior to his attorney's withdrawal where all proceedings in the case were suspended for thirty days to provide the appellant the opportunity to secure counsel.

5. APPEAL AND ERROR—ATTORNEY AND CLIENT—ATTORNEY'S NEGLECT —DEFAULT JUDGMENTS—SETTING ASIDE JUDGMENTS.

The neglect or omission of a party's attorney does not constitute adequate grounds for setting aside a default judgment; the neglect of an attorney is generally regarded as attributable to his client.

Appeal from Wexford, William R. Peterson, J. Submitted January 6, 1978, at Grand Rapids. (Docket No. 77-2445.) Decided February 23, 1978.

Complaint by the First Bank of Cadillac for interpleader against Arnold E. Benson and Violet M. Benson to settle the defendants' adverse claims to a bank account with the plaintiff. The bank was allowed to deposit the funds from the account with the Wexford County Clerk and to withdraw from the case. The defendants then filed cross-claims with respect to the account. Judgment for Violet M. Benson. Arnold E. Benson appeals. Affirmed.

Benson & Wotila, for Arnold E. Benson.

Herrinton, Herrinton & Hughes, P. C., for Violet M. Benson.

Before: D. F. WALSH, P. J., and R. M. MAHER and BEASLEY, JJ.

PER CURIAM. The First Bank of Cadillac commenced this interpleader action against Arnold E. Benson and Violet M. Benson. The bank was allowed to deposit $26,195.82 plus interest with the

Wexford County Clerk, leaving the adverse claimants, the appellant and the appellee in this case, to file cross-claims with respect to the bank account.

Andy E. Benson died, leaving a widow, Violet M. Benson, the appellee, and an only son by a prior marriage, Arnold E. Benson, the appellant. In 1971, a general savings account was opened at the bank. The signature card for the account contained the signed name of Andy E. Benson and the printed name of Arnold E. Benson. Arnold never submitted a signature card to the bank.

In 1976, a new signature card was delivered to the bank on which the signatures of Andy E. and Violet M. Benson provided for a joint account. The reverse side was also signed by both parties, thus providing for a joint account with survivorship benefits.

Both Arnold and Violet laid claim to the funds. Arnold contended that Andy held the account in trust for Arnold; that the account was a gift; that Andy made a change in account ownership only in his final illness; that Andy was, therefore, incompetent to make a change in ownership; and that Violet interfered with a trust agreement between Arnold and Andy by inducing the change. Violet laid claim to the account on the basis that it was a joint and survivorship account.

On April 20, 1977, the trial court entered judgment against Arnold on three grounds: default for failure to comply with discovery orders; summary judgment pursuant to GCR 1963, 117.2(3) and accelerated judgment pursuant to GCR 1963, 116.1(5). On May 9, 1977, Arnold moved to set aside the default judgment pursuant to GCR 1963, 520 and 528.3. The motion was denied. Arnold appeals as of right.

In the instant case, a default judgment was entered against appellant for failure to comply with the court's order of December 28, 1976, which required production on or before January 15, 1977, of certain documents requested by appellee.

On February 1, 1977, appellee filed a motion for an order to show cause for appellant's failure to comply with the court order. On March 8, 1977, because appellant's attorney withdrew from the case, the trial court ordered that all proceedings in the case be suspended for 30 days. Appellee again moved on April 8, 1977, for an order to show cause. The trial court issued the order on April 11, 1977, and required appellant to appear on April 20, 1977. Appellant failed to appear on April 20, 1977, and the trial court entered the default judgment.

Before a default judgment will be set aside both good cause and a meritorious defense must be shown. *Butler v Cann,* 62 Mich App 663; 233 NW2d 827 (1975), *Okros v Myslakowski,* 67 Mich App 397; 241 NW2d 223 (1976). Good cause is defined as:

> "(1) a substantial defect or irregularity in the proceedings upon which the default was based,
>
> "(2) a reasonable excuse for failure to comply with the requirements which created the default, or
>
> "(3) some other reason showing that manifest injustice would result from permitting the default to stand." 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), Authors' Comments, p 662.

See, also, *Mission Investment Co v Perfect Totalisator Corp,* 51 Mich App 376; 214 NW2d 898 (1974).

Appellant claims there was a substantial defect or irregularity in the proceedings because he had

insufficient notice of the April 20 hearing. GCR 1963, 520.2(2) requires that "[i]f the party against whom judgment by default is sought has appeared in the action, he * * * shall be served with written notice of the application for judgment at least 7 days prior to the hearing".

In computing time, the day of the act, event or default after which the designated period of time begins to run is not included while the last day of the period is to be included. See GCR 1963, 108.6. Two additional days are allowed when service by mail is addressed for delivery outside the county of mailing. GCR 1963, 108.7(1).

The hearing on appellee's motion for an order to show cause was held on April 11, 1977; the first day under the 7-day notice was Tuesday, April 12 and the last day of the 7-day period was Monday, April 18. The two-day mailing period meant that the hearing could be held on Wednesday, April 20.

April 20, the day the hearing was scheduled, is properly included as the last day. The general rule with regard to notice includes the day of performance and excludes the day from which the notice begins to run. *Gantz v Toles,* 40 Mich 725 (1879), *In re Miller's Estate,* 173 Mich 467; 139 NW 17 (1912). When an act is to be done a certain number of days before a *day* stated, then that day is excluded in the computation, but where, as here, the act is to be done a certain number of days before another *act,* then the day on which that act is to be done is included. *Chaddock v Barry,* 93 Mich 542; 53 NW 785 (1892).

Appellant also suggests that he had a reasonable excuse for his failure to comply with the production order because he was unable to obtain counsel. Given the circumstances, we do not find appellant's suggested excuse to be reasonable. Appellant had more than a month in which to retain new

counsel after his first attorney withdrew. The length of the period makes it impermissible for us to find appellant had a reasonable excuse.

Appellant contends there is another ground which provides the reasonable excuse necessary for setting aside a default judgment. He claims he thought he had complied with the production order because he believed that his attorney had produced the requested documents. However, neglect or omission of a party's attorney does not constitute adequate grounds for setting aside a default judgment. *Badalow v Evenson,* 62 Mich App 750; 233 NW2d 708 (1975). In Michigan, the neglect of an attorney is generally regarded as attributable to his client. *White v Sadler,* 350 Mich 511; 87 NW2d 192 (1957). Appellant cannot, therefore, rely on his attorney's neglect to provide him with the reasonable excuse he seeks.

Finally, appellant claims that manifest injustice would result if the default is not set aside. In determining whether manifest injustice would occur, each case should be examined on its own facts. Appellant likens his situation to that of the party in *Mission Investment Co v Perfect Totalisator Corp, supra.* We find that case distinguishable. There the default was due to defense counsel's failure to file a timely answer. The Court apparently felt that it would be manifestly unjust if the party there was denied his day in court.

In the present case, only because he failed to secure counsel for himself, when he had sufficient time to do so, is defendant being denied his day in court. Appellant placed himself in the situation and should not be heard to complain of manifest injustice. The problem was of his own making.

Appellant has failed to demonstrate the good cause necessary to set aside a default judgment. Consequently, the trial court's entry of a default judgment is affirmed.

MOCK v CITY OF DETROIT

1. DEPOSITIONS—ATTENDANCE AT DEPOSITION—ORDERS LIMITING ATTENDANCE—PARTIES—AUTHORITY OF COURT—COURT RULES.

A trial court was without authority to issue an order precluding the presence of plaintiffs from the depositions of any other coplaintiff because the court rule which restricts the presence of persons at a deposition makes a specific exception as to parties from orders limiting attendance at depositions; such an order of the trial court, issued without the authority to issue the order, is void (GCR 1963, 306.2).

2. DISMISSAL AND NONSUIT—ORDERS—FAILURE TO OBEY ORDER—AUTHORITY TO ISSUE ORDER.

Dismissal of the plaintiffs' cause of action cannot be ordered for the failure of the plaintiff to obey an order that the trial court did not have the power to issue.

Appeal from Wayne, Thomas J. Foley, J. Submitted December 19, 1977, at Detroit. (Docket No. 77-2876.) Decided February 23, 1978. Leave to appeal applied for.

Complaint by Clarence Mock, Johnny Mock, Marguerite Mitchell and Lucille Holmes against the City of Detroit, the Department of Transportation and Leonard H. Sutton for damages for personal injuries suffered when the automobile in which they were riding was struck by a bus driven by defendant Sutton. A defense motion to dismiss the action with prejudice due to the plaintiff's failure to comply with a discovery order was granted. Plaintiffs appeal. Reversed and remanded.

REFERENCES FOR POINTS IN HEADNOTES

[1] 23 Am Jur 2d, Depositions and Discovery § 45.

[2] 24 Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 56.

Walter A. Lucken, for plaintiffs.

Roger E. Craig, Corporation Counsel, and *Mercedes Mueckenhein,* Senior Assistant Corporation Counsel, for defendants City of Detroit and the Department of Transportation.

Before: BASHARA, P. J., and BEASLEY and D. E. HOLBROOK, JR., JJ.

PER CURIAM. Plaintiffs appeal a trial court order dismissing their cause of action against defendants.[1] Dismissal was granted on defendant's motion after plaintiffs refused to obey the court's discovery order requiring each plaintiff to be deposed without the presence of the other co-plaintiffs.[2]

Suit was initiated by plaintiffs to recover for

[1] The order of dismissal was predicated upon GCR 1963, 313.2, which in pertinent part provides:

".2 Failure to Comply With Order.

"(1) Contempt. If a party or other deponent refuses to be sworn or refuses to answer any question after being directed to do so by the court in the county in which the deposition is being taken or by the court in which the action is pending, the refusal may be considered a contempt of the court which made such order.

"(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subrule 313.1 requiring him to answer designated questions, or an order made under either Rule 310 or 311, the court may make such orders in regard to the refusal as are just."

[2] The discovery order was issued pursuant to the provisions of GCR 1963, 306.2, which states:

"Orders for the Protection of Parties and Deponents. Upon motion seasonably made by either party or by the person to be examined and upon reasonable notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers and counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments or research need

personal injuries allegedly sustained when the automobile in which they were riding was struck from behind by defendant's bus, which was being driven by defendant, Sutton. Sometime after the accident Sutton relocated and cannot be found. He and plaintiffs were the only witnesses to the accident.

Noting the circumstances of Sutton's unavailability, defendant city urges affirmance of the trial court's discovery order as the only means by which the plaintiffs could be effectively cross-examined and the validity of their allegations tested. The city refers to the uniformity of the plaintiffs' answers to its interrogatories. It suggests that presence of all plaintiffs at each other's deposition will facilitate their fabrication of testimony, frustrating the city's efforts to reveal the truth.

Whether a trial court may issue an order under GCR 1963, 306.2 to preclude a party from attending the deposition of a co-party is the determinative question we must resolve. Defendant contends that such authority is provided by that clause contained in rule 306.2 that states "or the court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression".

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not be disclosed, or that parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment or oppression. The court shall not order the production or inspection of any writing prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories."

GCR 1963, 306.2. However, this clause is preceded by a delineation of possible discovery orders permitted by the rule. One of those specifically addresses orders restricting the presence of persons at a deposition and states, "or that the examination shall be held with no one present *except the parties* to the action and their officers and counsel." *Id.* (Emphasis added.)

This latter provision has been construed by other jurisdictions with a similarly phrased discovery rule to give all parties the right of attendance at depositions.[3] Further, Federal procedure from which this rule was derived contains identical language, but was subsequently amended. FR Civ P 26(c), amending FR Civ P 30(b). See also 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 110. As a consequence of that amendment, the power of the courts was enlarged to permit exclusion of a party from presence at a deposition. *Galella v Onassis,* 487 F2d 986, 997 (CA 2, 1973).

Since our rule has not been amended and makes a specific exception as to parties from an order limiting attendance at depositions, we conclude that the trial court was without authority to preclude the presence of plaintiffs from the deposition of co-plaintiffs.

That the trial court's order is erroneous is also suggested by the committee comments to rule 306.2, reported at 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 110. The purpose of the rule is to protect deponents from a

[3] *See, e.g., Reynolds v Reynolds,* 217 Ga 234, 245–246; 123 SE2d 115, 127 (1961) (language of court rule similar to GCR 1963, 306.2), *Anderson v Snyder,* 91 Conn 404; 99 A 1032 (1917) (language of court rule similar to GCR 1963, 306.1), *Gillis v First National Bank of Frederick,* 47 Okla 411; 148 P 994 (1915) (language of court rule similar to GCR 1963, 306.1).

deposing party's abuse of the discovery proceedings, not to protect the deposing party. *Id.*

Accordingly, we also conclude that the order of dismissal was improper. Orders of dismissal under rule 313.2, by the clear language of that rule, are available only for disobediance of an order issued pursuant to GCR 1963, 310, 311, or 313.1. GCR 1963, 313.2. Additionally, punishment by dismissal cannot be ordered for failure to obey an order that the court did not have the power to issue. This is analogous to the rule developed in the context of contempt proceedings. See *Stowe v Wolverine Metal Specialties Co,* 242 Mich 624; 219 NW 714 (1928).

In rule 306.2, the express exception for parties from an order restraining attendance of persons at depositions left the court without power to issue the order challenged by plaintiffs. As a consequence, that order was void. *Id.*

Reversed and remanded for proceedings consistent with this opinion. Costs to plaintiffs.

PEOPLE v BERNARD SMITH

PEOPLE v LARASENA SMITH

OPINION OF THE COURT

1. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—RES GESTAE.

The general rule is that evidence tending to show the commission of other criminal offenses by a criminal defendant is inadmissible on the issue of his guilt or innocence of the offense charged because whatever probative value such evidence has is outweighed by the disadvantage of diverting the trier of fact from an objective appraisal of the defendant's guilt or innocence; an exception to this rule is that the acts, conduct and demeanor of the defendant at the time of or shortly before or after the offense is claimed to have been committed may be shown as part of the res gestae; proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime.

2. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—EXPLANATION AND CORROBORATION—VARIANCE OF PROOF—INFORMATION.

The admission of evidence of other criminal offenses which is offered solely in explanation and corroboration of the evidence of the act charged in an information does not constitute a variance of proofs from the information; therefore, it was not error for a trial judge, at defendants' trial for armed robbery, to allow the prosecution to introduce into evidence two items that were seized from the defendants' residence when they were arrested which had been stolen from the victim's home but were not listed on the information.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2, 4, 7–10] 29 Am Jur 2d, Evidence §§ 320, 321.
[3] 75 Am Jur 2d, Trial §§ 827, 828.
[4, 7–10] 29 Am Jur 2d, Evidence § 327.
[5, 6] 73 Am Jur 2d, Statutes § 249 *et seq.*
[6, 9] 50 Am Jur 2d, Larceny §§ 44, 49, 56.
73 Am Jur 2d, Statutes §§ 293–295.

3. CRIMINAL LAW—INSTRUCTIONS TO JURY—REASONABLE DOUBT.

Instructions given to the jury regarding reasonable doubt are proper where the instructions given are consistent with past instructions approved by the Court of Appeals.

4. CRIMINAL LAW—FELONIES—EVIDENCE—PRIOR CONVICTIONS—IMPEACHMENT—MISDEMEANORS—STATUTES.

The crimes of unlawful driving away of an automobile and attempted unlawful driving away of an automobile are felonies; therefore, use of a defendant's prior convictions for committing those offenses does not violate the rule which prohibits the use of prior misdemeanor convictions for impeachment purposes (MCLA 750.92, 750.413; MSA 28.287, 28.645).

5. STATUTES—STATUTORY CONSTRUCTION—INCONSISTENCIES.

It is a fundamental rule of statutory construction that courts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction; seeming inconsistencies in the various provisions of a statute should be reconciled, if possible, so as to arrive at a meaning which gives effect to all parts of the statute.

6. STATUTES—CONSTRUCTION—INTENTION OF STATUTES—CONFLICTS BETWEEN STATUTES—ATTEMPTED LARCENY—MISDEMEANORS—FELONIES.

Statutory provisions should be construed whenever possible so as not to conflict with other statutory provisions; where one statutory provision expresses a specific intention that conflicts with a general intention expressed elsewhere, the particular intention is to be regarded as an exception to the general intention; therefore, the offense of attempted larceny in a building should be treated as a misdemeanor for purposes of determining the admissibility of such a conviction for impeachment purposes, despite the fact that a general statute makes this crime a felony since it is punishable by imprisonment in a state prison, because the specific statute defining the crime makes it a misdemeanor (MCLA 750.7, 750.92; MSA 28.197, 28.287).

7. CRIMINAL LAW—EVIDENCE—IMPEACHMENT—PRIOR CONVICTIONS—MISDEMEANORS.

The prohibition on the use of *all* misdemeanor convictions for impeachment purposes remains the rule of law in Michigan, absent the adoption of Michigan's proposed rules of evidence, or reconsideration of the issue by the Supreme Court.

8. CRIMINAL LAW—EVIDENCE—IMPEACHMENT—PRIOR CONVICTIONS—MISDEMEANORS—DEFENDANT'S RIGHT TO TESTIFY.

A trial judge's decision to allow a defendant to be impeached by evidence of a prior misdemeanor conviction cannot be considered to be harmless error, even though the defendant had prior felony convictions which would have been used as impeachment evidence had the defendant taken the stand, where the defendant, faced with the probability of impeachment by his complete criminal record, chose not to testify in his own behalf; where the issue involved is as crucial to the judicial process as a defendant's right to testify in his own behalf, any doubt as to the motivating factors behind a decision to forego that right must be resolved in the defendant's favor.

DISSENT BY J. H. GILLIS, J.

9. CRIMINAL LAW—EVIDENCE—ATTEMPTED LARCENY—MISDEMEANOR—IMPEACHMENT—RULES OF EVIDENCE.

Attempted larceny from a building is a high misdemeanor punishable by two years in prison and under the Michigan Rules of Evidence, effective March 1, 1978, such an offense clearly would be admissible for impeachment purposes.

10. CRIMINAL LAW—EVIDENCE—IMPEACHMENT—PRIOR CONVICTIONS—MISDEMEANORS—HARMLESS ERROR.

A trial judge's failure to grant a defense motion to suppress a defendant's misdemeanor conviction for impeachment purposes was harmless error where the defendant would have been impeached by evidence of his prior felony convictions.

Appeal from Recorder's Court of Detroit, John Patrick O'Brien, J. Submitted December 8, 1977, at Detroit. (Docket Nos. 30241, 77-104.) Decided March 6, 1978. Leave to appeal applied for.

Bernard Smith and Larasena Smith were convicted of armed robbery. Defendants appeal. Bernard Smith's conviction is reversed and the matter remanded, and the conviction of Larasena Smith is affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,*

Prosecuting Attorney, *Edward R. Wilson,* Research, Training & Appeals, and *Richard A. Neaton* and *Paul C. Louisell,* Assistant Prosecuting Attorneys, for the people.

Sallen, Sallen, Seymour & Sallen, for defendants on appeal.

Before: M. F. CAVANAGH, P. J., and J. H. GILLIS and D. C. RILEY, JJ.

D. C. RILEY, J. The charges in the instant matter stem from a robbery which took place in a residence located within the City of Detroit on February 24, 1976.

The record reveals the following facts:

The victim left her home on the morning in question to drive a roommate to work. Upon her return, she noticed that the door of the house had been tampered with. As she entered the residence, she discovered a masked man with a gun who ordered her into the dining room. The intruder then placed a pillow case over her head and bound her with some cord. The man then removed her ring and watch as he talked with his accomplice. The victim recognized the voice of the accomplice as that of defendant, Larasena Smith, with whom she was acquainted. After the intruders left, the victim untied herself and discovered that her keys and car were missing. She also noticed a strange cap which she carried with her to a nearby bar where the police were notified of the crime.

It appears that the owner of the bar recognized the cap as one belonging to defendant, Bernard Smith. On the basis of this identification, coupled with the fact that the victim recognized defendant Larasena Smith's voice at the scene of the crime,

the police proceeded to the Smith residence and arrested the defendants. During the arrest, the police officers confiscated certain items which were later identified as belonging to the victim and her roommate.

Defendants were then charged with armed robbery, contrary to MCLA 750.529; MSA 28.797, and subsequently were convicted by a jury in Detroit Recorder's Court. Defendants appeal as of right alleging several instances of error.

Defendants first contend that the trial court erred in admitting into evidence property which was not listed in the information.

At trial, the prosecution sought to admit into evidence a shotgun and a sewing machine that were seized from defendants' residence when they were arrested. These items were stolen from the victim's home but were not listed in the information filed against the defendants.[1] Defendants contend that such evidence is inadmissible in that it violates the rule set forth in *People v DerMartzex,* 390 Mich 410; 213 NW2d 97 (1973).

"While evidence of a prior conviction of a defendant may be admissible to impeach his credibility, the general rule is that evidence tending to show the commission of other criminal offenses by the defendant is inadmissible on the issue of his guilt or innocence of the offense charged.

"Evidence of other crimes is barred because it has been decided that whatever probative value such evidence has is outweighed by the disadvantage of diverting the trier of fact from an objective appraisal of the defendant's guilt or innocence." 390 Mich at 413.

However, an exception to the rule is set forth in

[1] The information charged the defendants with feloniously stealing the victim's watch, ring and keys.

People v Scott, 61 Mich App 91, 95; 232 NW2d 315 (1975).

" 'It is elementary that the acts, conduct and demeanor of a person charged with a crime at the time of, or shortly before or after the offense is claimed to have been committed, may be shown as a part of the *res gestae. Proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime.' People v Savage,* 225 Mich 84, 86; 195 NW 669 (1923)." (Emphasis supplied.)

Here, the prosecutor introduced the evidence in question to establish that the defendants were in the victim's home.

The introduction of such evidence could prejudice the defendants' case in that the jury could find the defendants guilty of stealing items not listed in the information. However, to do so, the jury would have to disregard the trial court's clear instructions.

"The third element is that at the time of that assault, the Defendant took the money or property alleged to have been taken, in this case, we're talking about *keys and ring and a watch,* which money or property did not belong to the defendant." (Emphasis supplied.)

We will not presume that the jury disregarded this instruction.

Based upon this record, we find that the trial judge did not abuse his discretion in determining that the probative value of the evidence outweighed its prejudicial effect.[2]

Defendants also claim that they were prejudiced because the admission of the evidence constituted

[2] *People v McCartney,* 60 Mich App 620; 231 NW2d 472 (1975), *People v Draine,* 72 Mich App 592; 250 NW2d 139 (1976).

an impermissible variance of the proofs from the information. The admission of evidence of other offenses which is offered solely in explanation and corroboration of the evidence of the act charged in the information does not constitute a variance. *People v Jenness,* 5 Mich 305 (1858), *People v King,* 365 Mich 543; 114 NW2d 219 (1962).

Accordingly, we find no error in respect to this issue.

Defendants next contend that the trial court's instruction on reasonable doubt was improper and mandates reversal of their convictions.

The trial court instructed the jury on reasonable doubt as follows:

"What do we mean when we talk about reasonable doubt? Again, I instruct you that the People must prove the Defendants guilty beyond a reasonable doubt. I said reasonable doubt, that doesn't mean beyond all doubt, it doesn't mean beyond a shadow of a doubt; we're talking about a reasonable doubt.

"A reasonable doubt is exactly what those two words signify, *a doubt which is founded in reason, a doubt for which you can give a reason for entertaining.* It can be a doubt which arises from the evidence which you've heard during this case or it can be a doubt which arises from the lack of evidence. To put it another way, *the People don't have to eliminate all doubt from your minds.* To do that would be to put you in the position of a witness, someone who has seen what happened rather than as a Juror because only if you were a witness to the event could you say that you know what happened.

"But the proofs presented by the People *must eliminate doubt based upon reason, any doubt which has a rational explanation.*

"Each and every element of the crime charge must be proven by that standard of proof beyond a reasonable doubt and a reasonable doubt is not something flimsy or fanciful or fictitious, nor is it any doubt based upon any

sympathy or prejudice or any bias." (Emphasis supplied.)

Defendants' contention is without merit. The instruction given by the trial court is consistent with past instructions approved by this Court.[3]

Defendant, Bernard Smith, next contends that the trial court erred in denying his motion to suppress his prior misdemeanor convictions which the prosecution intended to use for impeachment purposes if he testified.

At trial, defendant's attorney filed a motion to preclude the prosecution from using his prior misdemeanor convictions for impeachment purposes. The trial court denied the motion, and defendant chose not to testify in his own behalf.

Defendant claims that the court's ruling is in direct conflict with the rule set forth in *People v Renno,* 392 Mich 45; 219 NW2d 422 (1974), which prohibits the use of prior misdemeanor convictions for impeachment purposes.

Defendant contends that his convictions for attempted unlawful driving away of an automobile and attempted larceny in a building are misdemeanors, pursuant to MCLA 750.92; MSA 28.287, and are therefore barred from being used for impeachment purposes by *Renno, supra.*

Unlawful driving away of an automobile is a felony under Michigan law. MCLA 750.413; MSA 28.645 provides:

"Any person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a *felony,* punish-

[3] *People v Finley,* 38 Mich 482 (1878), *People v Poe,* 27 Mich App 422; 183 NW2d 628 (1970), *People v Ames,* 60 Mich App 168; 230 NW2d 360 (1975).

able by imprisonment in the state prison for *not more than 5 years."* (Emphasis supplied.)

Pursuant to MCLA 750.92; MSA 28.287 attempted unlawful driving away of an automobile is also a felony:

"If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a *felony,* punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year." (Emphasis supplied.)

Since the aforementioned conviction was a felony, its use for impeachment purposes was within the trial court's discretion,[4] and the *Renno* rule does not apply.

We now turn to defendant's conviction for attempted larceny in a building. This particular crime is defined by MCLA 750.92; MSA 28.287 as a misdemeanor. However, under MCLA 750.7; MSA 28.197, attempted larceny in a building is a felony as it is punishable by imprisonment in a state prison.

This inconsistency can be reconciled by applying well-established rules of statutory construction to the facts at hand.

"[It is a] fundamental rule of construction * * * [that] courts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction; seeming inconsistencies in the various provisions of a statute should be reconciled, if possible, so as to arrive at a meaning which gives effect to all parts of the statute." *In re Petition of State Highway Commission,* 383 Mich 709, 714–715; 178 NW2d 923, 926–927 (1970).

" 'When a general intention is expressed, and also a particular intention which is incompatible with the

[4] *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974).

general one, the particular intention shall be considered an exception to the general one.'

"The above statement was quoted with approval in *Mayor of Port Huron v City Treasurer of Port Huron,* 328 Mich 99, 112 [43 NW2d 77 (1950)], where it was said, in further discussion, that (pp 111, 112):

" 'A special statute shall be given effect as an exception to the general statute in order to carry out the legislative intent. *Board of Education v Blondell,* 251 Mich 528 [232 NW 375 (1930)]. When a general intention is expressed and also a particular intention which is incompatible with the general one, the particular intention shall be considered as an exception to the general one. *Attorney General, ex rel Owen v Joyce,* 233 Mich 619 [207 NW 863 (1926)]; *Heims v School District No 6 of Davison Township,* 253 Mich 248 [234 NW 486 (1931)], and cases therein cited.' " *Bullinger v Gremore,* 343 Mich 516, 544; 72 NW2d 777 (1955). See also *Minor Child v Health Commissioner,* 16 Mich App 128, 131; 167 NW2d 880 (1969).

In the instant matter, MCLA 750.92; MSA 28.287 deals exclusively with the offense of attempted larceny in a building. MCLA 750.7; MSA 28.197 is the general statutory provision that defines what constitutes a felony under Michigan law.

The more specific statute should be controlling under the circumstances, and we rule, as a matter of law, that attempted larceny in a building is a misdemeanor in spite of the fact that it is punishable by up to two years in a state prison.

Having ruled that the offense in question is a misdemeanor, we must now determine if *Renno, supra,* barred its use for impeachment purposes at trial.

In *Renno, supra,* the Michigan Supreme Court expressly held that "municipal ordinance or *misdemeanor* convictions" cannot be used for impeachment purposes. 392 Mich at 55. (Emphasis added.)

Even though the dissent makes a comprehensive argument that the *Renno* rule should not be applied to two-year or high misdemeanors, the fact remains that the Supreme Court has not acted to so limit the reach of *Renno.* We do not believe that this Court has the power to impose its own limits on *Renno's* seemingly unambiguous language.

Absent the adoption of Michigan's proposed rules of evidence, or Supreme Court response to the *People v McMillan*[5] majority's urging of a review of *Renno,* the prohibition on the use of *all* misdemeanor convictions for impeachment purposes remains the rule of law in Michigan.

We also cannot agree that the trial court's decision was harmless error under the facts of this case. In *People v Hagar,* 73 Mich App 536; 252 NW2d 484 (1977), cited by the dissent, the defendant chose to testify and was impeached by several convictions, all but one apparently misdemeanor convictions. The *Hagar* Court, in a brief discussion, held that this *Renno* violation was harmless since the defendant had already been impeached by a felony conviction.

Without wishing to comment on the wisdom of the *Hagar* decision, we find it distinguishable from the case at bar. In *Hagar* this Court had a record of the defendant's testimony and could evaluate the impact of the impeachment by use of misdemeanor convictions. Since the nature of those convictions, and Hagar's felony conviction, were not revealed in the opinion, it can only be inferred that the prejudice to defendant was not sufficient to mandate reversal of the conviction.

In the present case, however, defendant, faced with the probability of impeachment by his complete criminal record, chose not to testify. This

[5] 68 Mich App 113; 242 NW2d 518 (1976).

Court has no record on which to evaluate the reasons behind defendant's decision. While it is conceivable that defendant relinquished his right to testify solely because of a desire to keep his felony conviction off the record, it is equally conceivable that the combined effect of the felony and misdemeanor was the factor that swayed the decision. It is also necessary to note that the misdemeanor conviction here was for a larceny offense, and thus may have had significant impeachment value, especially in a trial for armed robbery. Where the issue involved is as crucial to the judicial process as a defendant's right to testify in his own behalf, any doubt as to the motivating factors behind a decision to forego that right must be resolved in the defendant's favor.

Accordingly, the decision to allow defendant to be impeached by a misdemeanor conviction cannot be considered to be harmless error.

We have examined the issue of search and seizure and find no reversible error. See *Harris v US,* 390 US 234; 88 S Ct 992 (1968), *People v Eddington,* 387 Mich 551, 565; 198 NW2d 297 (1972).

The conviction of defendant Bernard Smith is reversed and remanded. The conviction of Larasena Smith is affirmed.

M. F. CAVANAGH, P. J., concurred.

J. H. GILLIS, J. *(dissenting).* I respectfully dissent.

The *Renno* case[1] set forth the following rule:

"We do not hesitate in this case to prohibit the further use of municipal ordinance or misdemeanor convictions used by the prosecution *solely for impeachment purposes.* This type of conviction was never intended by our Legislature to fall within the confines of MCLA 600.2158; MSA 27A.2158, or MCLA 600.2159; MSA 27A.2159. This is affirmatively shown by the legislative history of these statutes. It is time that this Court brings our current interpretation of these stat-

[1] *People v Renno,* 392 Mich 45; 219 NW2d 422 (1974).

utes back in line with their original purposes." *Renno, supra,* at 55.

However, the *Renno* Court carefully acknowledged that the nature and extent of any rule set forth in *Renno* would be subject to future modification.

"The nature of and the extent of any rule which this Court may devise in this area is still not settled." *Renno, supra,* at 51.

A recent Supreme Court case has questioned the validity of *Renno, supra.*

"In *People v Renno,* 392 Mich 45, 55; 219 NW2d 422 (1974), this Court held that municipal ordinance or misdemeanor convictions may not be used for impeachment purposes.

"The proposed Michigan Rules of Evidence would provide that the credibility of a witness may not be impeached by evidence that he was convicted of a crime punishable by imprisonment for one year or less unless the crime involved dishonesty or false statement. MRE 609(a)(2). This rule would modify *Renno, Sting [Sting v Davis,* 384 Mich 608; 185 NW2d 360 (1971)], and GCR 1963, 607. It appears that before this case is likely to be retried this Court will act comprehensively regarding the proposed Michigan Rules of Evidence." *Kirby v Larson,* 400 Mich 585, 600; 256 NW2d 400 (1977).

The Michigan Supreme Court adopted the proposed Michigan Rules of Evidence effective March 1, 1978.

This Court in *People v McMillan,* 68 Mich App 113; 242 NW2d 518 (1976),[2] has interpreted the *Renno* case, *supra,* as not mandating per se rever-

[2] Leave to appeal was denied by the Michigan Supreme Court, 399 Mich 825 (1977).

sal of a conviction when prior misdemeanor convictions are used for impeachment purposes at trial. The *McMillan* Court stated that under certain circumstances the use of prior misdemeanor convictions for impeachment purposes would be harmless error. The *McMillan* Court went on to conclude that *Renno, supra,* was in need of clarification in respect to what exactly constitutes a misdemeanor for impeachment purposes under the case:

"*Renno* held that from hence forward, only convictions for infamous crimes could be used to impeach a witness. *Renno* further equated infamous crimes with felonies.

"We do not think that, in Michigan, the term 'infamous crime' can necessarily be equated with the term 'felony'. In *Attorney General v Montgomery,* 275 Mich 504, 513; 267 NW 550 (1936), our Supreme Court defined an infamous crime as follows:

" 'Whether a crime is infamous or not is not determined by the nature of the offense (2 Bouvier's Law Dictionary [Rawle's 3d Rev] p 1553, 1554), but by the consequences to the individuals by the punishment prescribed for such offense. *Butler v Wentworth,* 84 Me 25 (24 Atl 456, 17 L.R.A. 764). Crimes subject to infamous punishments are infamous crimes, *and the term "infamous crime" means any crime punishable by imprisonment in the state prison.'* (Citations omitted.)

* * *

"It would then appear that under *Montgomery, supra,* impeachment should be permissible by use of prior convictions based on a crime punishable by imprisonment in the state prison, regardless of whether it is dubbed 'felony' or 'misdemeanor'.

"We do not point out this apparent inconsistency to nitpick at the Supreme Court. Real problems are presented in this area. For example, the crime of unlawfully taking and using an automobile is labeled a misdemeanor, but, nonetheless, carries the possible sentence of two years imprisonment in a state penitentiary.

MCLA 750.414; MSA 28.646. On the other hand, the crime of issuing a check without an account or credit is labeled a felony although it also carries a possible maximum sentence of two years in the state prison. MCLA 750.131a; MSA 28.326(1). Under *Renno,* the prosecutor would be allowed to impeach credibility by using a conviction under MCLA 750.131a; MSA 28.326(1); he would not be able to do so by using one under MCLA 750.414; MSA 28.646. Yet the two statutes carry exactly the same penalties, and we believe, under *Montgomery,* there is no distinction between them in regards to impeaching credibility." *McMillan, supra,* at 123–124.

The offense in the instant matter, attempted larceny from a building, is a high misdemeanor punishable by two years in prison. Under the Michigan Rules of Evidence, effective March 1, 1978, such an offense clearly would be admissible for impeachment purposes:

"For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if

"(1) the crime was punishable by death or *imprisonment in excess of one year* under the law under which he was convicted, or the crime involved theft, dishonesty or false statement, regardless of the punishment, and

"(2) the court determines that the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect." (Emphasis supplied.) MRE 609(a).

It should also be noted that the majority in the *McMillan* case, *supra,* urged the Supreme Court to allow the use of high misdemeanor convictions for impeachment purposes by restricting the *Renno*

rule to those crimes carrying a maximum penalty of 90 days in jail.

Regardless of the construction the Supreme Court gives to *Renno* in respect to what constitutes a misdemeanor, the trial judge's failure to suppress defendant's misdemeanor convictions for impeachment purposes was harmless error under the circumstances in this case. Since defendant would have been impeached by his prior felony conviction,[3] I fail to see how allowing further impeachment via a misdemeanor conviction would result in a miscarriage of justice.[4]

Accordingly, I would affirm defendants' convictions.

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[3] *People v Hagar,* 73 Mich App 536; 252 NW2d 484 (1977).

[4] *People v Roberson,* 55 Mich App 413; 222 NW2d 761 (1974), *People v McMillan,* 68 Mich App 113; 242 NW2d 518 (1976).

STURGIS SAVINGS AND LOAN ASS'N v ITALIAN VILLAGE, INC.

1. MECHANICS' LIENS—WAIVER—BURDEN OF PROOF—EVIDENCE.

   The burden of proof is on the owner of the property to show a valid waiver of a mechanic's lien, and to be effective the waiver document should clearly and unequivocally show an express waiver.

2. CONTRACTS—AMBIGUOUS TERMS—CONSTRUCTION AGAINST PREPARER—PAROL EVIDENCE—INTENT OF PARTIES.

   Ambiguous terms, especially in a printed form contract, are to be strictly construed against the preparer of the contract; a trial court does not err in allowing parol evidence, where there is ambiguity in a contract, to show the intent of the parties.

3. APPEAL AND ERROR—NONJURY CASE—FINDINGS OF FACT—COURT RULES.

   Findings of fact by a trial court cannot be set aside unless they are clearly erroneous; this is especially true where the testimony at trial was in sharp conflict and the judge had the advantage of seeing and hearing the witnesses (GCR 1963, 517.1).

4. APPEAL AND ERROR—PROPERTY OWNERSHIP—MECHANICS' LIENS—WAIVER—BURDEN OF PROOF—FINDINGS OF FACT—CLEAR ERROR RULE.

   A finding that a plaintiff property owner had not met his burden

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur 2d, Mechanics' Lien §§ 290, 291, 397.

[2] 17 Am Jur 2d, Contracts §§ 22, 77, 78, 241, 247–275.

Ambiguity: comment note on the parol evidence rule and admissibility of extrinsic evidence to establish or clarify ambiguity in written contract. 40 ALR3d 1384.

[3] 4 Am Jur 2d, Appeal and Error §§ 17–19, 839–845.

[4, 5] 5 Am Jur 2d, Appeal and Error §§ 822, 839–845.

[5] 81 Am Jur 2d, Witnesses §§ 105–110, 658, 660–666.

[6] 81 Am Jur 2d, Witnesses §§ 75, 76.

29 Am Jur 2d, Evidence §§ 356, 603, 654, 714.

[7] 5 Am Jur 2d, Appeal and Error §§ 800, 801, 803, 805.

[8] 5 Am Jur 2d, Appeal and Error § 727.

[9] 53 Am Jur 2d, Mechanics' Liens §§ 432, 433.

Attorneys' fees: amount of compensation for services in absence of contract or statute fixing amount. 56 ALR2d 114.

of showing that the waiver of a mechanic's lien was clear and unequivocal as to liens for work to be done in the future will not be upset by the Court of Appeals where, after reviewing all the evidence, the appellate court cannot say that the finding of the trial court was clearly erroneous.

5. EVIDENCE—WITNESSES—CONFLICTING TESTIMONY—RESOLUTION OF CONFLICTING TESTIMONY—CLEAR ERROR RULE.

The resolution of conflicting testimony is best done by a trial judge and although he is not bound to accept as true the testimony of interested witnesses, such testimony does provide a basis for a finding that is not clearly erroneous.

6. WITNESSES—PERSONAL KNOWLEDGE—WITNESS TESTIMONY—CIRCUMSTANTIAL EVIDENCE.

Questions about the state of a person's knowledge can only be proved by statements of witnesses or by circumstantial evidence.

7. APPEAL AND ERROR—JUDGMENT—SUPPORT FOR JUDGMENT—FINDINGS OF FACT—NONCRUCIAL FINDINGS—EVIDENTIARY SUPPORT.

A trial court's judgment must be affirmed if supported by findings not against the clear weight of the evidence; a claim of error based upon findings by the court which are not crucial to the decision will not lead to reversal, even if such findings were without evidentiary support.

8. APPEAL AND ERROR—RECOVERY—ALTERNATIVE THEORIES—RESOLUTION ON ONE GROUND—SUFFICIENT RELIEF.

A party cannot gain reversal on appeal by claiming that the trial court erred in refusing to rule on the prevailing party's alternative theory of recovery where the resolution of the case on one ground gives that party all the relief he seeks.

9. ATTORNEY AND CLIENT—ATTORNEY FEES—MECHANIC'S LIEN CLAIMS—STATUTES—REMEDIAL CONSTRUCTION—JUDGE'S DISCRETION.

The statute which provides for reasonable attorney's fees in mechanic's lien cases is remedial and should not be narrowly construed; the awarding of attorney fees is within the discretion of a trial judge and his discretion will be upheld in the absence of an abuse in determining the amount of reasonable attorney fees (MCLA 570.12; MSA 26.292).

Appeal from St. Joseph, Robert E. A. Boyle, J. Submitted December 8, 1977, at Grand Rapids. (Docket No. 30652.) Decided March 6, 1978.

Complaint by Sturgis Savings and Loan Ass'n against Italian Village, Inc. and others to foreclose a mortgage. The premises were conveyed to Sturgis Savings and Loan by Italian Village, Inc. in lieu of foreclosure. Cross-complaint and counterclaim by Terry Blanchard against Sturgis Savings and Loan for recovery on a mechanic's lien against the premises. Judgment for Terry Blanchard on the mechanic's lien. Plaintiff appeals and Terry Blanchard cross-appeals. Affirmed.

Dresser, Marks & Svendsen (by *Roger A. Bird* and *Raymond H. Dresser, Jr.),* for plaintiff.

John L. Schwendener (by *Robert J. Barnard, Jr.),* for defendant, Terry Blanchard.

Before: DANHOF, C. J., and T. M. BURNS and M. J. KELLY, JJ.

DANHOF, C. J. Plaintiff filed suit to foreclose a mortgage, recorded November 1, 1973, on a restaurant named Italian Village, Inc. Before trial, the owners conveyed the restaurant to the bank in lieu of foreclosure and the only remaining controversy concerns defendant Blanchard's alleged mechanic's lien. On October 31, 1973, defendant submitted his bill dated October 26, 1973, for $5,000 to plaintiff for work done to that date. Before Sturgis Savings agreed to release any money for payment, defendant was requested to and did sign a mechanic's lien waiver agreement. Defendant, after completing further work, billed the restaurant for $4,504.99 but received no payment. He then filed a lien on the property.

The main issue in this case is whether the defendant waived his right to a lien for work done in the future by signing a document on October 31

which stated, "The undersigned hereby waive * * * any and all claims or right of lien which the undersigned now have or may have hereafter * * * for labor rendered, material supplied". The burden of proof is on the owner of the property to show a valid waiver, *Marquette Lumber Co v Albee,* 196 Mich 127; 162 NW 1005 (1917). To be effective, the waiver document should clearly and unequivocally show an express waiver, *Saginaw Lumber Co v Stirling,* 305 Mich 473; 9 NW2d 680 (1943).

If the document had made a clear reference to work to be performed in the future, there would be no controversy. See *Pittsburgh Plate Glass Co v Art Centre Apartments,* 253 Mich 501; 235 NW 234 (1931). In that case, the materialman executed a waiver knowing it had been changed specifically to include future work. In this case, however, the waiver document's only reference to the future concerns rights which may later arise from the work performed. It should be noted that "labor rendered, material supplied" was written in the past tense, and so the waiver should be read with this in mind. This interpretation does not make the words meaningless since the contractor could be waiving lien rights on future installment payments for work already completed. In *Saginaw Lumber Co, supra,* a waiver document was held to cover only work already performed, when the reference to rights which may later accrue was crossed out. In both the above cases, the expression of intention as to future work was clear while in this case it was not as clear. Ambiguous terms, especially in a printed form contract, are to be strictly construed against the preparer, *Washtenaw Asphalt Co v State of Michigan,* 42 Mich App 132; 201 NW2d 277 (1972), *Keller v Paulos Land*

Co, 381 Mich 355; 161 NW2d 569 (1968). Since some ambiguity did exist in the contract, the trial court was not in error in allowing parol evidence on the parties' intentions. The issue was not over the terms of the waiver, but whether there was any contract or waiver, at all, concerning work not yet performed.

From analyzing the testimony at trial, the judge found as fact that the defendant only intended a partial waiver for the work covered by his $5,000 bid and bill. His bill was expressly limited to work done to date. Also the court found that the plaintiff was aware of additional work done by the defendant at the restaurant that was not covered by his original bid. These findings cannot be set aside unless they are clearly erroneous. 1963 GCR, 517.1. This is especially true where the testimony at trial is in sharp conflict and the judge had the advantage of seeing and hearing the witnesses. *Andrew C Sisman Co v Miller,* 215 Mich 425; 184 NW 456 (1921). This rule applies equally to this case, even though the testimony is not irreconcilable. The judge, based on his observations of the witnesses, found that the witnesses for the plaintiff seemed to have selective memories, recalling only incidents favorable to their side.

After reviewing all the evidence, one cannot say that the trial court was clearly erroneous in finding that the plaintiff had not met his burden of showing that the waiver was clear and unequivocal as to liens for work to be done in the future.

Plaintiff also claims that the judge was clearly erroneous in the finding of six specific facts supporting his decision: (1) That the defendant had no intention of waiving lien rights for future work, (2) the plaintiff knew he did not intend a full waiver, (3) that if defendant did additional work, plaintiff

agent said plaintiff would see the defendant got paid, (4) that the plaintiff never disclosed that it would not pay over $5,000, (5) that the earmarking of funds was without substance and (6) that two other subcontractors who worked on the building were later paid, but not the defendant. The first and fourth of these facts are supported by the direct testimony of the defendant:

"Q. Did you understand you were waiving your lien rights forever?
"A. No, I did not."

Also, even though the defendant might have known or suspected that the plaintiff would only pay out $5,000, he claims the plaintiff never disclosed this to him. Mr. Stanard, who was plaintiff's vice-president, however, claims that he said any future payment must come from the owner. Resolving this conflicting testimony is best done by the trial judge. Although the court is not bound to accept as truth the testimony of interested witnesses, it does provide a basis for a finding that is not clearly erroneous.

The court's second finding, that plaintiff's representative knew that defendant only intended a partial waiver, concerned the state of the agent's knowledge. Like all questions about the state of one's knowledge, this can only be proved by statements of the plaintiff's agents or circumstantial evidence. Plaintiff offered no evidence to show that a full waiver was expected. Plaintiff's evidence, which showed that plaintiff did not intend to pay out any more than the $5,000 earmarked by the loan agreement with the owners, did not concern the defendant's right to enforce a mechanic's lien against the property. The circumstantial evidence admitted at trial supported the judge's findings.

Plaintiff's agent inspected the premises after the billing date and found that defendant was performing additional work there. Also there is no evidence of any discussion concerning the status of mechanics' lien rights for future work. Since plaintiff was aware that defendant was doing additional work on the premises and the parties did not discuss the possibility of waiving lien rights for future work, the trial court was not clearly erroneous in finding from this circumstantial evidence that plaintiff's agents knew that the defendant did not intend to waive his rights to liens for future work.

The other findings claimed as error by plaintiff are not crucial to the decision since the defendant is not seeking recovery through a contractual relationship with the plaintiff. Thus, even if these findings were without support, the judgment must still be affirmed if supported by findings not against the clear weight of the evidence. *Weber v Ford Motor Co,* 245 Mich 213; 222 NW 198 (1928).

The plaintiff also claims that the trial court erred in not ruling on the applicability of the Building Construction Fund Act, MCLA 570.151; MSA 26.331. Since the judge resolved the case on other grounds, he did not rule on this. When the resolution of the case on one ground gives a person all the relief he seeks, the other party cannot gain reversal on appeal by claiming that the trial court erred in refusing to rule on the prevailing party's alternative theory of recovery. This Court declines to rule on issues that have not been considered at the trial court. *John Deere Co v Wonderland Realty Corp,* 38 Mich App 88; 195 NW2d 871 (1972), *Szyszkoski v City of Lansing,* 64 Mich App 94; 235 NW2d 72 (1975).

Plaintiff also challenges the applicability of

MCLA 570.12; MSA 26.292, which provides for reasonable attorney's fees in proceedings concerning mechanics' lien claims. Plaintiff argues that this case is not disputing a lien but rather the alleged waiver of it; a simple contract case. However, the purpose of the statute is remedial and it should not be narrowly construed. The language of the statute reads to "determine the amount due to each creditor who has a lien" which covers the issues presented here. The trial court did not abuse its discretion in permitting the awarding of attorney's fees.

On cross-appeal, defendant claims that the award for reasonable attorney's fees was too low. The awarding of attorneys' fees is within the discretion of the trial judge. *Williams & Works, Inc v Springfield Corp,* 76 Mich App 541; 257 NW2d 160 (1977), and it will be upheld absent an abuse of discretion. See *e.g., In the Matter of the Attorney Fees of William J Hayes,* 55 Mich App 30; 222 NW2d 20 (1974). However, the judge must make findings of fact on the issue, *Desender v DeMeulenaere,* 12 Mich App 634; 163 NW2d 464 (1968). In this case, defendant asks for $5,500 based on 121 hours of time expended in collecting a $4,500 claim. One of the reasons the trial judge awarded only $850 was that he felt the attorney was unreasonable in working that many hours and charging more than was sought to be recovered. The trial court also considered the complexity and difficulty of the issues involved in determining a reasonable allowance. It was not required to accept the attorney's claim of what is reasonable based solely on the number of hours spent. The trial court did not abuse its discretion in determining the amount of reasonable attorney's fees.

Affirmed. No costs, neither party prevailing in full.

CITY OF TROY v TROY CIVIL SERVICE COMMISSION

1. LABOR RELATIONS—DISCHARGE—PROBATIONARY EMPLOYEES—HEARINGS—POLICE.

   A probationary police officer denied permanent employment is entitled by statute to a hearing at which cause for the denial must be established (MCLA 38.511, 38.514; MSA 5.3361, 5.3364).

2. LABOR RELATIONS—PROBATIONARY EMPLOYEES—HEARINGS ON DISMISSAL—STATUTES.

   A probationary employee does not have a right to a hearing on dismissal at the end of his probationary period of employment unless that right is expressly created by statute.

Appeal from Oakland, William P. Hampton, J. Submitted November 16, 1977, at Detroit. (Docket No. 30704.) Decided March 6, 1978.

Complaint by the City of Troy against the Troy Civil Service Commission and Joseph M. Forgue seeking an order of superintending control upholding the plaintiff's dismissal of defendant Forgue from the Troy Police Department and barring the defendant commission from ordering his reinstatement. Judgment for defendants. Plaintiff appeals. Affirmed.

Dykema, Gossett, Spencer, Goodnow & Trigg (by *Paul H. Townsend, Jr., Ronald J. Santo,* and *Seth M. Lloyd),* for the City of Troy.

John A. Lyons, for defendant Joseph M. Forgue.

REFERENCE FOR POINTS IN HEADNOTES

[1, 2] 48 Am Jur 2d, Labor and Labor Relations § 1238.

Before: BRONSON, P. J., and ALLEN and T. M. BURNS, JJ.

BRONSON, P. J. Appellant, City of Troy, appeals from dismissal of its complaint for superintending control and summary judgment for appellees and the reinstatement with back pay of appellee Joseph Forgue to the Troy Police Department. The basic facts underlying this dispute are not contested.

Joseph Forgue was employed as a probationary police officer by the City of Troy from June 26, 1975, to June 25, 1976. On June 25, 1976, he was informed by letter from the Troy City Manager that he would not receive permanent employment with the Troy Police Department. The termination notice accompanying the letter cited "unsatisfactory conduct or capacity for permanent employment" as the reason for discharge.

Forgue appealed this action to the Troy Civil Service Commission. The commission held that under 1935 PA 78, § 11,[1] a probationary police officer denied permanent employment at the end of his probationary period was entitled to a § 14[2] hearing at which the city must establish cause for the dismissal. As appellant declined to attempt to show the requisite cause, Forgue was ordered reinstated to permanent employment with back pay.

Appellant then filed a complaint for superintending control and a summary judgment motion[3] in Oakland County Circuit Court, contending that the commission's action was contrary to § 11 of

[1] MCLA 38.511; MSA 5.3361.

[2] MCLA 38.514; MSA 5.3364. Appellant contends that even if there is a right to a hearing, it need not be a hearing for cause. We hold that any hearing required under § 11(a) is to be a § 14 hearing at which cause for dismissal must be established by the city.

[3] GCR 1963, 117.2(3).

1935 PA 78. That court affirmed the commission's action, interpreting §§ 11 and 14 to mean that a probationary officer denied permanent employment is entitled to a hearing at which cause for the denial must be established.

Section 11(a) provides in part:

"All original appointments to any positions in the police departments, within the terms of this act, shall be for a probationary period of 1 year after the completion of legally required courses of basic training. *At any time during the probationary period the appointee may be dismissed for such cause, in the manner provided in this act.* If at the close of this probationary term the conduct or capacity of the probationer has not been satisfactory to the appointing officer, the probationer shall be notified within 10 days in writing, that he will not receive permanent appointment, whereupon his employment shall cease; otherwise his retention in the service shall be equivalent to his final appointment. *The probationer shall be entitled to a hearing before the commission as provided in section 14.*" (Emphasis added.)

Section 14 provides in part:

"No member of any fire or police department within the terms of this act shall be removed, discharged, reduced in rank or pay, suspended or otherwise punished except for cause, and in no event until he shall have been furnished with a written statement of the charges and the reasons for such actions, and all charges shall be void unless filed within 90 days of the date of the violation, except in the case of a probationer, whose violations may accumulate for the probationary period."

The right to a hearing on dismissal at the end of a probationary period of employment depends on express statutory authority. OAG, 1961–1962, No

4023, pp 462, 464; Kaplan, *The Law of Civil Service,* 230 (Matthew Bender & Co ed, 1958). We hold that the final sentence of § 11(a) provides such statutory authority in clear and unequivocal terms.

Appellant's argument that § 11(a) does not provide for a hearing for cause in this case is twofold. Appellant first contends that the final sentence of § 11(a) gives the hearing right only to probationers discharged *during* the probationary term, but not to probationers discharged at the end of their probationary term. We find no support for this interpretation in the language of § 11. The final sentence of § 11 clearly gives a probationer a right to a hearing: "The probationer shall be entitled to a hearing before the commission as provided in section 14."

The use of the word "probationer" in § 11 is significant. It is used in § 11(a) solely to describe an end-of-term probationary officer; the term "appointee" is used to describe a probationary officer before expiration of the probationary term. One sentence of § 11(a) gives the "appointee" a right to a hearing for cause: "At any time *during the probationary period the appointee* may be dismissed for such cause * * * ." This sentence designates as an "appointee" a probationary officer during the probationary period. But, when § 11(a) discusses an end-of-term probationary officer, the word "probationer" is used: "If *at the end of the probationary* term the conduct or capacity *of the probationer * * * the probationer* shall be notified." Immediately following this sentence, in which "probationer" refers solely to an end-of-term probationary officer, the final sentence of § 11(a) reads: "The *probationer* shall be entitled to a hearing * * * ." The use of the word "proba-

tioner" in § 11(a) thus indicates that the end-of-term probationary officer is entitled to a § 14 hearing if he is denied permanent employment.

Prior to 1971, § 11 provided:

> "If at the close of this probationary term, the conduct or capacity of the probationer has not been satisfactory to the appointing officer, the probationer shall be notified, in writing, that he will not receive permanent appointment, whereupon his employment shall cease; otherwise his retention in the service shall be equivalent to his final appointment: Provided, however, That the probationer shall be entitled to a hearing before the commission as provided in section 14."

The language used expressed more clearly than the present version the probationer's right to a hearing upon dismissal at the end of the probationary period, as the right to a hearing was a proviso to language allowing the dismissal of an end-of-term probationer. The 1971 amendments do not indicate that the Legislature meant to change the probationer's right to a hearing, however. Rather, it appears that the Legislature merely simplified the language of § 11 in the context of other substantive changes in 1935 PA 78.[4] Nothing suggests that the Legislature intended to remove the hearing requirement for dismissal of end-of-term probationers.

Appellant also argues that the lower court's interpretation destroys the statutory distinction between probationary and permanent employees. However, under § 14, there is still a distinction between probationers and permanent employees regarding the accumulation of charges. In fact, the language in § 14 allowing charges against proba-

[4] For example, the probationary period for police officers was extended to one year and the completion of basic training courses was added as a requirement. MCLA 38.511; MSA 5.3361.

tioners to be accumulated until the end of the probationary period ("for the probationary period") would be meaningless unless a probationer had a right to a hearing at that time.

Finally, appellant argues that, as a matter of policy, the City of Troy should be able to discharge end-of-term probationers without demonstrating cause. Our function in this case, however, is to interpret the language of the statute, not to make policy. See *Killingsworth v Civil Service Commission of Saginaw,* 12 Mich App 340, 349; 162 NW2d 826 (1968). Appellant's arguments are more properly directed to the Legislature.[5]

We hold that §§ 11 and 14 of 1935 PA 78, as amended, entitle a probationary police officer denied permanent employment to a hearing at which cause for his dismissal must be established. As no cause was established in the case at bar, the order of the lower court reinstating plaintiff with back pay is affirmed. Costs to defendants-appellees.

[5] We note that a collective bargaining agreement between the City of Troy and the Troy Police Officers' Association, which was made part of the lower court record, provides that "no employee shall be disciplined or discharged except for just cause". "Employee" includes probationary officers who are members of the association. Appellant argues that an end-of-term probationary officer denied permanent employment has not been "discharged". However, appellant's policy argument is undercut by the agreement, under which a probationer denied permanent employment has at least a colorable right to a hearing for cause.

TOPE v WATERFORD HILLS ROAD RACING CORPORATION

1. WORDS AND PHRASES—PUBLIC POLICY—DEFINITIONS.

"Public policy" evolves into constitutional provisions, statutes, and judicial decisions, and more often abides only in the customs and conventions of the people, in their clear consciousness and conviction of what is naturally and inherently just and right between man and man; where a course of conduct is cruel or shocking to the average man's conception of justice, it must be held to be obviously contrary to public policy.

2. CONTRACTS—INDEMNIFICATION AGAINST LIABILITY—NEGLIGENCE—PUBLIC POLICY.

An indemnity agreement entered into between a plaintiff race car driver and a defendant race promoter which unequivocally exempts the promoter from liability for damages sustained by the plaintiff because of the promoter's own negligence is not offensive to public policy where the general public as a whole is minimally affected by the agreement, private interests are primarily at stake, and the public interest would not be served by striking down the provision.

3. TORTS—NEGLIGENCE—CONTRACTS—INDEMNIFICATION AGAINST LIABILITY.

Generally, a party may contract against liability for harm caused by his negligence in performance of a contractual duty, but he may not do so with respect to his gross negligence; if the performance of a tortious act for which indemnification is claimed under the contract is only an undesired possibility in the performance of the contract, and the contract does not tend to induce the act, the indemnification provision is valid.

4. CONTRACTS—INDEMNIFICATION—PARTIES—BARGAINING POSITIONS—KNOWLEDGE.

A professional race car driver who entered into an indemnifica-

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REFERENCES FOR POINTS IN HEADNOTES

[1] 16 Am Jur 2d, Constitutional Law § 167.

[2, 3] 47 Am Jur 2d, Contracts §§ 188–191.

41 Am Jur 2d, Indemnity §§ 6–18, 29–31.

[4] 41 Am Jur 2d, Indemnity § 17.

4 Am Jur 2d, Amusements and Exhibitions §§ 81, 98.

tion agreement with a race promoter should be held to a higher standard of conduct and knowledge than an amateur driver as regards the respective bargaining positions of the parties, particularly where the driver had previously participated in a race run over the same course, which consisted of city highways, and was aware of the increased hazards of racing on such a course.

Appeal from Wayne, William Leo Cahalan, J. Submitted November 3, 1977, at Detroit. (Docket No. 30719.) Decided March 6, 1978.

Complaint by Donald Tope, administrator of the estate of Harry W. Tope, deceased, against the Waterford Hills Road Racing Corporation for damages for negligence in the design and layout of a race course and in the management of an automobile race in which Harry W. Tope was fatally injured. Accelerated judgment for defendant. Plaintiff appeals. Affirmed.

Goodman, Eden, Millender & Bedrosian (by *James A. Tuck* and *Joan Lovell),* for plaintiff.

Harvey, Kruse & Westen, P. C. (by *John A. Kruse* and *Michael F. Schmidt),* for defendant.

Before: BEASLEY, P. J., and D. E. HOLBROOK, JR. and M. J. KELLY, JJ.

M. J. KELLY, J. Plaintiff appeals from an order for accelerated judgment of no cause of action granted the defendant on October 15, 1976, in Wayne County Circuit Court. Plaintiff is the administrator of the estate of Harry Warren Tope, a professional race car driver. Tope sustained fatal injuries during the Wide Track II road race held on July 5, 1975, at Pontiac, Michigan. The race was sponsored by the City of Pontiac and the

defendant, Waterford Hills Road Commission, Inc., a nonprofit Michigan corporation.

Tope had won the inaugural wide track race the year before his fatal accident. He had entered the 1975 race to promote his business, Tope Racing Enterprises, which was his source of livelihood. As a condition to participating in the race, all entrants paid $50 and signed an entry form containing an assumption of the risk, release, discharge of liability, and a separate form entitled "Waiver and Release from Liability and Indemnity Agreement".

Tope was killed when his race car collided with a guard rail during the race. The trial court noted:

> "Tope's race car was a needle-nose design; the guardrail was of a single-beam design. When Tope's car collided with the guardrail, the single beam slid up the top of the car until it impacted with Tope's head."

Plaintiff administrator filed the instant action alleging that defendant's negligence in the design and layout of the race course and in the management of the race resulted in Tope's death. Defendant filed a motion for accelerated judgment based upon:

> "(1) [A] purported contractual assumption of risk and release of Defendant contained in the entry blank signed by Tope prior to the race; (2) a purported contractual assumption of risk and release of Defendant contained in the Waiver and Release from Liability and Indemnity Agreement, signed by Tope and other drivers prior to the race; and (3) contributory negligence which Defendant claims Tope was guilty of as a matter of law." Trial court's opinion, p 1.

The motion was granted.

Plaintiff raises one issue on appeal contending that the contract provision which exempts an auto

racing club from liability for personal injuries to the auto racers caused by the club's negligence is unenforceable as being contrary to public policy.

The relevant contractual terms, pertaining to the assumption of risk provision and the release and waiver, provide:

"The entrant, in signing this agreement and in consideration of the right to use the race course at his own risk and thereby releases and discharges the Waterford Hills Road Racing, Inc. and The City of Pontiac, the organizers and race officials, together with their successors, assigns, officers, agents, employees, from all liability for injuries to person, property or reputation, suffered by him or his employees as a result of the race or races or events contemplated under this entry blank, or practice or preparation therefor, and whether caused by any condition of the road course or grounds or the conduct of any officer, agent, representative, or employee of the Waterford Hills Road Racing, Inc., or the City of Pontiac and the organizers and race officials, or conduct of said races. It is further agreed that the entrant, in signing this entry form has studied the rules and regulations in the entry form, and agrees to abide thereby. He further agrees to ensure that all crew members and driver designated to drive the car are similarly acquainted with the aforementioned rules." Official Entry Blank.

"IN CONSIDERATION of being permitted to enter for any purpose of the RESTRICTED AREA (herein defined as the area to which admission for the general public is prohibited, including but not limited to the pit area, racing surface and infield, including walkways, concessions and other appurtenances therein) each of the Undersigned, for himself and personal representatives, assigns, heirs and next of kin:

1. HEREBY RELEASES, WAIVES, DISCHARGES AND COVENANTS NOT TO SUE the Promoter, Racing Association, Track Operator, Track Owner, Landowner, and each of them, their officers, and employees, all for purposes herein referred to as RELEASEES, from all liability to the Undersigned, his personal rep-

resentatives, assigns, heirs and next of kin for all loss or damage, and any claim or demands therefor, on account of injury to the person or property or resulting in death of the Undersigned, whether caused by the negligence of Releasees or otherwise while the Undersigned is upon the Restricted Area, and

* * *

"Each of the Undersigned warrants the following statements are true and correct and understands that the Releasees have relied on them in entering into the foregoing Release, Waiver and Indemnity Agreement and in giving the Undersigned permission to enter the Restricted Area:

"1. No oral representations, statements or inducements apart from the foregoing written agreement have been made.

"2. He assumes full responsibility and risk of bodily injury, death or property damage due to negligence of Releasees or otherwise upon entering the Restricted Area.

"3. If a driver, he has a valid driver's license from the state of his residence.

"4. That he is an independent contractor and assumes and takes all responsibility for all charges, premiums and taxes, if any, payable on any funds he may receive as a result of his activities, including without limiting the generality of the foregoing, social security, unemployment, income and withholding taxes, and Workmen's Compensation insurance.

"5. HE HAS READ AND VOLUNTARILY SIGNS THIS RELEASE AND WAIVER OF ALL LIABILITY OF INDEMNITY AGREEMENT." Waiver and Release from Liability and Indemnity Agreement (hereafter "Waiver and Release").

The waiver and release expressly exempts defendant from liability for damages to the plaintiff caused by defendant's negligence. Construing the indemnity clause strictly against defendant we find the language unequivocal in exempting defendant from liability for damages sustained by

the plaintiff because of defendant's own negligence. See *Klann v Hess Cartage Co,* 50 Mich App 703, 705–706; 214 NW2d 63 (1973). We are asked to determine whether or not the indemnity clause is contrary to public policy. The precise definition of "public policy" has recently been set forth by another panel of this Court quoting the language found in *Skutt v Grand Rapids,* 275 Mich 258, 263–265; 266 NW 344 (1936). *Murphy v Seed-Roberts Agency, Inc,* 79 Mich App 1, 13; 261 NW2d 198 (1977). A summary of the definition establishes that "public policy" evolves into constitutional provisions, statutes, and judicial decisions, " '[m]ore often * * * it abides only in the customs and conventions of the people,—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man' ". The definition is further qualified by the Court in the following passage:

> " 'When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be Constitution, statute or decree of court.' "

There is no constitutional or statutory provision, or court decision which specifically declares the instant release clause, as it relates to auto racing, contrary to public policy. *Query:* Is it "cruel or shocking to the average man's conception of justice" for a race promoter to insulate itself from liability for its own negligence? We are dealing with a fairly narrow segment of the public participating in a relatively dangerous sporting activity. The general public as a whole is minimally affected.

We find the contract provisions are not inimical to the public interest. *Cf. Gray v Galesburg,* 71 Mich App 161, 166; 247 NW2d 338 (1976). Private interests are primarily at stake. See *Winterstein v Wilcom,* 16 Md App 130; 293 A2d 821, 826 (1972). The public interest would not be served by striking down a contract provision between private parties voluntarily assumed and historically sanctioned in Michigan in other factual situations. *Mann v Pere Marquette R Co,* 135 Mich 210; 97 NW 721 (1903), *Blazic v Ford Motor Co,* 15 Mich App 377, 380; 166 NW2d 636 (1968), *lv den,* 382 Mich 758 (1969), *Shelby Mutual Insurance Co v Grand Rapids,* 6 Mich App 95; 148 NW2d 260 (1967), *United States Fibres, Inc v Proctor & Schwartz, Inc,* 358 F Supp 449 (ED Mich, 1972).

In *Gore v Tri-County Raceway, Inc,* 407 F Supp 489, 492 (MD Ala, 1974), wherein a widow of a participant in an auto race brought suit against the operator of the race track for damages for her husband's death, the court, reviewing a similar release clause, stated:

> "If these agreements, voluntarily entered into, were not upheld, the effect would be to increase the liability of those organizing or sponsoring such events to such an extent that no one would be willing to undertake to sponsor a sporting event. Clearly, *this would not be in the public interest."* (Emphasis added.)

The *Gore* court granted defendant's motion for summary judgment and dismissed plaintiff's case.

This Court has held:

> "Generally a party may contract against liability for harm caused by his negligence in performance of a contractual duty, but he may not do so with respect to his gross negligence. *Shelby Mutual Insurance Co v*

Grand Rapids, 6 Mich App 95; 148 NW2d 260 (1967); *Thomas v Atlantic CLR Co,* 201 F2d 167 (CA 5, 1953), Restatement, Contracts, § 574; 6A Corbin on Contracts, § 1472, pp 596–597. * * *

"A contract of indemnity against one's own negligence is not necessarily invalid. *Buffa v General Motors Corp,* 131 F Supp 478 (ED Mich, 1955); *Blazic v Ford Motor Co,* 15 Mich App 377; 166 NW2d 636 (1968). If the performance of the tortious act for which indemnification is claimed under the contract is only an undesired possibility in the performance of the contract, and the contract does not tend to induce the act, the indemnification provision is valid. Restatement, Contracts, § 572." *Klann v Hess Cartage, supra,* at 706.

The fatal accident here caused in part by the negligent design of the guard rail for racing purposes, was "only an undesired possibility in the performance of the contract, and the contract [did] not tend to induce the act". Under *Klann* such a provision is valid.

The *Klann* panel noted some exceptions to the above rules, specifically, contracts of common carriers and other public servants when contracting in their capacity to serve the public. The instant facts do not present parties directly serving the public, thus, the exceptions are inapplicable.

Plaintiff relies upon *Allen v Michigan Bell Telephone Co,* 18 Mich App 632; 171 NW2d 689 (1969), *lv den,* 383 Mich 804 (1970). In *Allen,* this Court refused to enforce a contract clause which limited the telephone company's liability for damages when it failed to publish plaintiff's advertisements in the yellow pages as it had contracted to do. The primary concern of the Court in denying effect to the exculpatory clause was that the plaintiff was contracting with a public utility which, in essence, had a monopoly on the type of advertising sought by the plaintiff. There being no realistic alterna-

tive means for the plaintiff to communicate with the same audience which the yellow pages reaches, the Court found that the nonliability term was offered on a "take it or leave it" proposition, that the term was unreasonable and, in effect, unconscionable. The Court concluded by stating:

> "We believe the law in Michigan to be that, where goods or services used *by a significant segment of the public* can be obtained from only one source, or from limited sources on no more favorable terms, an unreasonable term in a contract for such goods or services will not be enforced as a matter of public policy." (Emphasis added.) 18 Mich App at 640.

We hold the *Allen* decision inapplicable and plaintiff's reliance on it not justified under the facts of this case. The *Allen* Court was concerned with a public utility and monopolistic services offered to the general public at large. The facts of the instant case do not concern a public utility nor public services. There is no great disparity in bargaining power between the parties. Furthermore, we are not confronted with a situation where "a significant segment of the public" would contract with defendant.

Judicial opinions from other jurisdictions have upheld similar race track release forms. See *Corpus Christi Speedway, Inc v Morton,* 279 SW2d 903 (Tex Civ App, 1955), *French v Special Services Inc,* 107 Ohio App 435; 159 NE2d 785 (1958), *Gore v Tri-County Raceway, Inc, supra, Hine v Dayton Speedway Corp,* 20 Ohio App 2d 185; 252 NE2d 648 (1969), *LaFrenz v Lake County Fair Board,* — Ind App —; 360 NE2d 605 (1977), *Lee v Allied Sports Associates, Inc,* 349 Mass 544; 209 NE2d 329 (1965), *Morrow v Auto Championship Racing Assoc, Inc,* 8 Ill App 3d 682; 291 NE2d 30 (1972),

Seymour v New Bremen Speedway, Inc, 31 Ohio App 2d 141; 287 NE2d 111 (1971), *Solodar v Watkins Glen Grand Prix Corp,* 36 App Div 2d 552; 317 NYS2d 228 (1971), *Theroux v Kedenburg Racing Assoc, Inc,* 50 Misc 2d 97; 269 NYS2d 789 (1965), *Winterstein v Wilcom,* 6 Md App 130; 293 A2d 821 (1972). In fact, plaintiff fails to cite a single case where such a clause has been denied application. The *Winterstein* court held:

> "The short of it is that as to the releases here the effect of the exemptive clauses upon the public interest was nil. We find that each release was merely an agreement between persons relating entirely to their private affairs. In the absence of a legislative declaration, we hold that they were not void as against public policy." 16 Md App at 139; 293 A2d at 826.

We agree with the quoted conclusion.

Plaintiff's brief notes that none of the cases cited by defendant involved a plaintiff who raced for a living as did Mr. Tope. This argument reverses itself to his detriment. Professional race car drivers should be held to a higher standard of conduct and knowledge reflecting a more equable bargaining position than the amateur.

Furthermore, the instant race in which plaintiff's driver had previously participated was run over city highways, an admittedly unique format. The race has since been discontinued by order of the State Highway Commission. It is indisputable that city highways are not best adapted to race car driving. The record indicates that Tope was aware of the increased hazards of racing on city streets.

The instant exculpatory clauses in the auto racing contract are not contrary to public policy and are enforceable. The order of the trial court granting defendant's motion for accelerated judgment of no cause of action in favor of the defendant and against the plaintiff is affirmed.

SMITH v MAYOR OF THE CITY OF ECORSE

1. ADMINISTRATIVE LAW—APPEAL AND ERROR—STANDARD OF REVIEW.

The judicial yardstick for assessing the validity of an administrative decision is whether the decision is supported by competent, material and substantial evidence on the whole record; on an appeal of an administrative decision, a court should not superimpose its judgment on that of the administrative agency and review questions of fact and weigh evidence or determine whether the probabilities preponderate one way or another, but should simply determine whether the evidence justifies the findings of the agency.

2. ADMINISTRATIVE LAW—VETERAN'S PREFERENCE ACT—POLICE OFFICERS—SUSPENSIONS—HEARINGS—MAYOR PRO TEM DECISIONS.

An administrative hearing concerning the suspension of a police officer pursuant to the veteran's preference act may be conducted by the mayor pro tem of a city although the city charter does not specifically state that the mayor pro tem should conduct such hearings where such a conclusion is implied in the city charter and is correct both in terms of legal sense and common sense; to hold otherwise would mean that the hearing could not be held until a new mayor was elected (MCLA 35.402; MSA 4.1222).

Appeal from Wayne, Harry J. Dingeman, Jr., J. Submitted January 4, 1978, at Detroit. (Docket No. 30827.) Decided March 6, 1978.

Complaint by Raymond Smith against the City of Ecorse, its mayor and acting chief of police seeking a restraining order reinstating the plaintiff as a police officer in the City of Ecorse and for

REFERENCES FOR POINTS IN HEADNOTES

[1] 2 Am Jur 2d, Administrative Law § 549.

[2] 2 Am Jur 2d, Administrative Law §§ 435–440.

damages for wrongful suspension. Judgment for defendants. Plaintiff appeals. Affirmed.

Pitts, Mann & Patrick, P. C., for plaintiff.

Victor T. Mitea and *Todd J. Mikesell,* City Attorneys for the City of Ecorse.

Before: BASHARA, P. J., and J. H. GILLIS and N. J. KAUFMAN, JJ.

N. J. KAUFMAN, J. Plaintiff-appellant, a police officer in the City of Ecorse, was suspended on February 21, 1975. A complaint was filed against him consisting of three criminal allegations. A hearing was scheduled before the Police and Fire Commission of the City of Ecorse but was adjourned at the request of appellant's counsel. Prior to the adjourned hearing, appellant filed a lawsuit in Wayne County Circuit Court. On July 3, 1975, the circuit court struck two of the allegations against appellant and on August 7, 1975, entered an order remanding the matter to proceed on the third count only: making inconsistent statements before the Wayne County prosecutor's office and in a trial of a criminal cause. In his petition to the Wayne County Circuit Court, appellant demanded and was granted a hearing under the veteran's preference act.[1]

[1] MCLA 35.402; MSA 4.1222, provides, in pertinent part:

"No veteran * * * shall be removed or suspended, or shall, without his consent, be transferred from such office or employment except for official misconduct habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency; and such veteran shall not be removed, transferred or suspended for any cause above enumerated from any office or employment, except after a full hearing * * * before the mayor of any city * * * and at such hearing the veteran shall have the right to be present and be represented by counsel and defend himself against such charges * * * Provided further, That the mayor * * * may refer any protest where a veteran is removed, transferred, suspended or

Pursuant to the August 7, 1975, order, on September 3, 1975, a hearing was commenced before the Honorable Charles G. Coman, Mayor of the City of Ecorse. However, before this hearing could be concluded, Mayor Coman entered Detroit Osteopathic Hospital and the hearing was adjourned without date pending his recovery and emergence from the hospital.

During the mayor's illness, the parties returned to Wayne County Circuit Court and appellant requested that the then mayor pro tem conduct a new hearing. Appellee objected contending that the mayor pro tem could not hold the hearing because the mayor was living and the veteran's preference act provides that the mayor will conduct the hearing.

Mayor Coman did not return from the hospital where he died on November 29, 1975. Following Coman's death, Dora Gaines was elected the new Mayor of Ecorse.

Proceeding under the August 7, 1975, order of the circuit court, the parties attempted to have the matter heard by the newly elected mayor. However, when appellant and appellees, along with their respective counsel, appeared for the hearing, Mayor Gaines disqualified herself on the basis that her personal knowledge of the appellant and his family might interfere with her ability to render a fair decision.

Appellant claims that the litigants returned to

discharged, to the legal department of such city or village for a hearing. The legal department shall act as a fact finding body and shall have the power to examine witnesses, administer oaths and do all those things which the mayor could do hereunder: Provided further, That the findings shall be transmitted to the mayor in writing by the legal department, whereupon the mayor shall examine the transcript of the hearing and make a decision based on the transcript thereof * * * ."

the Wayne County Circuit Court to ask for direction. Appellee does not address this issue.

The docket card does not show a hearing on this issue and appellant admits that no order was entered by the trial court.

Subsequently, Mayor Gaines designated Harry J. White as mayor pro tem to hear the matter. The hearing under the veteran's preference act was held by Mayor Pro Tem White without the presence of appellant or his counsel although appellant admits he received proper notice. Mayor Pro-Tem White found, based on the unrefuted testimony, that appellant was guilty of the charges against him and should be dismissed. The trial court upheld the administrative hearing. We affirm.

The trial court in its opinion stated:

"The Court's function here is to ascertain if there was competent, material and substantial evidence upon which the Administrative decision can be based.

" 'Judicial yardstick for assessing validity of an administrative decision is whether the decision is supported by competent, material and substantial evidence on the whole record.' *Union Bank & Trust Co., v First Michigan Bank & Trust Co.* 44 Mich. App 83 [205 NW2d 54 (1972).]

" 'In determining questions such as here presented to the trial court and now presented in this appeal to this court, neither court should superimpose its judgment over that of the commission and review questions of fact and weigh evidence, nor determine whether the probabilities preponderate one way or another, but such appeals simply determine whether the evidence is such as justifies the findings of the Commission.'

"*Carroll v City Commission, etc.,* 266 Mich. 123 [253 NW 240 (1934)]; *Bischoff v County of Wayne,* 320 Mich. 376 [31 NW2d 798 (1948)]; *Mapley v City of Pontiac,* 288 Mich 396 [284 NW 924 (1939)]; *In re Fredericks,* 285

Mich. 262 [280 NW 464 (1938)]; *Royal v Ecorse Police & Fire Comm.,* 345 Mich. 214 [75 NW2d 841 (1956)]."

We agree with the trial court's summation of the relevant standard on appeal.

The fact that the mayor pro tem conducted the hearing instead of the mayor is correct both in terms of legal sense and common sense.[2] While the city charter does not specifically state the mayor pro tem should conduct hearings on the veteran's preference act, such a conclusion certainly is implied from § 3 of the city charter.[3]

To hold otherwise would mean that where a party requested and received a hearing under the veteran's preference act, and the mayor refuses for any reason, the hearing could not be held until a new mayor was elected.

Affirmed. No costs.

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[2] Black's Law Dictionary defines "pro tempore" as "For the time being; temporarily; provisionally."

[3] "CHAPTER V

"CITY COUNCIL

* * *

"SECTION 3. The Mayor shall preside at the meetings of the Council. In the absence of the Mayor, the Mayor Pro Tempore shall preside. In the absence of the Mayor and the Mayor Pro Tempore, the Council shall designate one of its number to act as presiding officer."

PEOPLE v GALDONI

OPINION OF THE COURT

1. CRIMINAL LAW—DOUBLE JEOPARDY—WAIVER—RECORD—SWORN AFFIDAVITS.

   A defendant may be deemed to have waived his right not to be placed in double jeopardy where a review of the trial record reveals evidence which supports the prosecutor's claim that defendant waived his double jeopardy rights at a previous trial and where this evidence coupled with sworn affidavits signed by defendant's original counsel and the trial judge leads to the conclusion that defendant waived his double jeopardy rights.

DISSENT BY R. M. MAHER, J.

2. CRIMINAL LAW—DOUBLE JEOPARDY—WAIVER—RECORD—CONSENT.

   A defendant's waiver of his double jeopardy rights must be placed on the record at the time he is first placed in jeopardy, when it is most germane to the proceedings; at that time there should be an affirmative showing on the record that the defendant himself consented to such waiver.

3. CRIMINAL LAW—DOUBLE JEOPARDY—WAIVER—RECORD—AFFIDAVITS—TRANSCRIPTS.

   It is improper to manufacture a record from after-the-fact affidavits and from the transcript of a defendant's second trial in order to show that the defendant waived his protection against double jeopardy during his first trial where no record of such waiver appears on the record of the first trial; the proper record to which the court must look for such waiver is the record of the first proceeding where it is most appropriate.

4. CRIMINAL LAW—DOUBLE JEOPARDY—WAIVER—BASIS—AFFIDAVITS—RECORD—PRIMARY CONTROL.

   Affidavits by a defendant's former attorney and the judge at his first trial are an invalid basis on which to base a finding that a waiver of the defendant's right against double jeopardy was on

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REFERENCE FOR POINTS IN HEADNOTES

[1–4] 21 Am Jur 2d, Criminal Law §§ 473, 475–477.

the record and are insufficient to support a finding of waiver at all where the affidavits allege an in-chambers waiver and do not state that defendant was present, and where the affidavits do not disclose that defendant retained primary control over the course to be followed or disclose a personal manifestation by defendant that he consented to a waiver of the protection against double jeopardy.

Appeal from Livingston, Bert M. Hensick, J. Submitted October 4, 1977, at Lansing. (Docket Nos. 30851, 30852.) Decided March 6, 1978.

Gerald G. Galdoni was convicted of breaking and entering an occupied dwelling with intent to commit larceny and with felonious assault. Defendant appealed. Reversed (unpublished per curiam opinion). The Court of Appeals granted the people's motion for a rehearing. On rehearing, defendant's convictions are affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Frank R. DelVero,* Prosecuting Attorney (Prosecuting Attorneys Appellate Service, by *Mark I. Leach,* Assistant Attorney General) for the people.

John S. Lobur, for defendant.

Before: D. C. RILEY, P. J., and J. H. GILLIS and R. M. MAHER, JJ.

J. H. GILLIS, J. Defendant was convicted by a jury of breaking and entering an occupied dwelling with intent to commit a larceny therein, contrary to MCLA 750.110; MSA 28.305, and felonious assault, contrary to MCLA 750.82; MSA 28.277.

Defendant was originally charged with a total of four counts, including the two referred to above. He was previously convicted in a bench trial of the second count, statutory rape, contrary to MCLA

750.520; MSA 28.788, and the third count, kidnapping, contrary to MCLA 750.349; MSA 28.581.

Defendant appealed to this Court as of right alleging five instances of error in respect to his later convictions. This Court, in an unpublished per curiam opinion, reversed his convictions concluding that defendant was subject to double jeopardy when he stood trial on the first and fourth counts nine months after being convicted on the second and third counts.

The prosecution alleged that defendant had waived his double jeopardy rights. However, this Court noted that no formal waiver appeared on the record, and, accordingly, concluded that defendant could properly raise the issue on appeal. Since the prosecution did not dispute defendant's arguments, the issue was decided in favor of defendant and his convictions were reversed.

Our second review of the record reveals evidence which supports the prosecution's claim that defendant waived his double jeopardy rights:

"*The Court:* Back on the record. Mr. Florey, you've indicated that you had a motion to make. You may proceed.

"*Mr. Florey:* [defendant's attorney] Actually, Your Honor, I have two. One is a motion that I might have properly made before, a motion to dismiss both of these charges under the double jeopardy ruling that the Michigan Supreme Court has made in *People v White* [390 Mich 245; 212 NW2d 222 (1973)], especially concerning the bringing and entering a charge, the Indictment. The Information in this case shows, alleges that the offense took place on September 15th, a time prior to that of two other offenses for which this defendant has been charged.

"*The Court:* Counsel, I don't want to interrupt you, and normally wouldn't, except that I think you'll find that your predecessor counsel, at the time of the previ-

ous non-jury trial, waived any objection that you might have had for not trying all of these cases together. I think the record would reflect that—I'm sorry. Neither one of you were present.

"*Mr. Florey:* No.

"*The Court:* But, I am reasonably certain we can check the record, if you choose.

"*Mr. Florey:* If that's true, of course, Your Honor, I wouldn't—

"*The Court:* Well, with that understanding and that belief of the Court, then I think your arguments would be wasted time. I understand your arguments and, quite honestly, if there were no waiver, and had not been a discussion between the Court and counsel concerning it, I would give serious consideration to an argument under *People v White,* but the three charges were made, the two trials here—the two charges here involved, I think, were specifically waived insofar as trial was concerned, so that they might be tried at a later date, and that was with the concurrence of Mr. Gladner for the prosecution and Mr. Goldstein for the defendant. We even have a different court reporter.

"*Mr. Florey:* Is Mr. Burchfield still here? He might remember that. Well, at any rate, Your Honor, it's either part of the record or it's not. I think you know the argument here is the same transaction.

"*The Court:* I'm sorry I interrupted you. You are certainly entitled to put it on the record.

"*Mr. Florey:* No, I just want to make sure that it is on the record should your memory not be absolutely correct.

"*The Court:* Very well.

"*Mr. Florey:* And I wouldn't be surprised if it wasn't under the circumstances.

* * *

"*The Court:* I am certain in my own mind, without having any of the transcript before me, that the entire question of *People v White,* of speedy trial, of all of the rights of this defendant and Mr. Gembarowicz in connection with both of these items, were gone into by this Court and both attorneys, and in what they felt—and I'm speaking of the attorneys—was in the best interest

of their clients. They said, 'No, Judge, we don't want to try those other two cases until afterwards. We want to try the kidnapping/rape charges, and we'll see where we go from there.' I concurred in that decision, feeling that this was the right of the defendants, through their attorneys, and I've got to assume they discussed with the individual defendants, and thereby allowed only the kidnapping/rape charge to be tried."

This dialogue strongly suggests that defendant did in fact waive his double jeopardy rights.

This evidence coupled with sworn affidavits signed by defendant's original counsel and the trial judge leads us to the conclusion that defendant waived his double jeopardy rights.

Accordingly, defendant's convictions are affirmed.

D. C. RILEY, P. J., concurred.

R. M. MAHER, J. *(dissenting).* On rehearing, I find no reason to reverse this panel's original decision. No waiver was placed on the record in this case. The prosecutor attempts to demonstrate that defendant waived his double jeopardy rights by submitting affidavits from defendant's former attorney and from the trial judge. Neither is the result of contemporaneous writings or notations by the party.

The people also submit and the majority cites a lengthy excerpt from the transcript of defendant's *second* trial, that for breaking and entering an occupied dwelling with intent to commit a larceny therein and for felonious assault. I need only repeat that the excerpt is from defendant's second trial to demonstrate its improper use here. The waiver must be on the record at the time it is most germane to the proceedings. That time was at defendant's first trial, when the trials for the various counts were severed. *At that time,* there should have been an affirmative showing *on the*

record that defendant consented. *People v Alvin Johnson,* 396 Mich 424; 240 NW2d 729 (1976).

It is totally improper for the majority to say "the record * * * supports the prosecution's claim". It does not. The proper record to which we must look is the record of the first proceeding. As the trial court admits, no waiver was on that record. The majority's attempt to manufacture a record from after-the-fact affidavits and from the transcript of a second trial must be condemned as a subversion of defendant's right not to be placed twice in jeopardy. It is not too much to ask that the waiver be placed on the record at the appropriate time. This is what the law requires. *People v Alvin Johnson, supra.* The majority completely skirts this requirement and fashions a new and dangerous rule, heedless of defendant's rights. I cannot be so careless of his constitutional rights.

Moreover, I find the affidavits, assuming they could even be used, inadequate to support a finding that defendant himself waived his double jeopardy rights. The affidavits allege an in-chambers waiver and do not state that defendant was present. Nowhere does either affidavit disclose that defendant retained primary control over the course to be followed. See *United States v Dinitz,* 424 US 600; 96 S Ct 1075; 47 L Ed 2d 267 (1976). There is no showing that defendant did anything positive to indicate he was exercising that control. *People v Alvin Johnson, supra.* There is no disclosure of a personal manifestation by defendant that he consented to a waiver of the protection against double jeopardy. *People v Hoffman,* 81 Mich App 288; 265 NW2d 94 (1978) (MAHER, J., concurring). Not only are the affidavits an invalid basis on which to base a finding that the waiver was on the record, they are insufficient to support a finding of waiver at all.

I would reverse defendant's convictions.

DISTCO LAMINATING, INC. v UNION TOOL CORPORATION

1. SALES—CONTRACTS—RESCISSION OF CONTRACTS—USE BY PURCHASER—"OWNERSHIP LIKE" USE—FINDING OF FACT—APPEAL AND ERROR.

   A finding by a trial court, in an action for rescission of a contract to purchase a laminating machine, that the plaintiff's use of the machine after commencement of the action was not sufficient to bar rescission, although the use was admittedly "ownership like", will not be set aside where the finding was not clearly erroneous.

2. APPEAL AND ERROR—FINDINGS OF FACT—TRIAL COURT.

   Findings of fact by a trial court are given great weight and are not set aside unless clearly erroneous.

3. SALES—CONTRACTS—RESCISSION OF CONTRACTS—USE BY PURCHASER—SUBSTANTIAL USE—REMEDY OF DEFECTS—STATUTES.

   A purchaser's substantial use of a machine following the purchaser's commencement of a suit to rescind the contract wherein the machine was purchased may not be so substantial as to equal acceptance of the machine through "an act inconsistent with the seller's ownership"; a buyer's efforts to remedy defects do not constitute a waiver of the right of rescission (MCLA 440.2606[1][c]; MSA 19.2606[1][c]).

4. SALES—UNIFORM COMMERCIAL CODE—CONSTRUCTION—POLICIES—STATUTES.

   The Uniform Commercial Code is to be liberally construed so as

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 67 Am Jur 2d, Sales §§ 215, 719.
Use of article by buyer as waiver of right to rescind for fraud, breach of warranty, or failure of goods to comply with contract. 41 ALR2d 1173.
[2] 5 Am Jur 2d, Appeal and Error § 839.
[4] 67 Am Jur 2d, Sales § 19.
[5] 5 Am Jur 2d, Appeal and Error § 566.
[6] 46 Am Jur 2d, Judgments § 142.
[7] 67 Am Jur 2d, Sales § 669.
[8] 46 Am Jur 2d, Judgments § 117.

to promote its underlying purposes and policies (MCLA 440.1102 et seq.; MSA 19.1102 et seq.).

5. APPEAL AND ERROR—MATTERS NOT RULED UPON BY TRIAL COURT.
Generally, matters not ruled upon by the trial court will not be acted upon for the first time on appeal.

6. MOTIONS—DIRECTED VERDICT—JUDGMENT NOTWITHSTANDING THE VERDICT—PREREQUISITES—COURT RULES.
A motion for a directed verdict is a prerequisite to a motion for a judgment notwithstanding the verdict (GCR 1963, 515.2).

7. SALES—CONTRACTS—RESCISSION OF CONTRACTS—INTEREST EXPENSES—RECOVERY OF INTEREST EXPENSES—STATUTES.
Interest expenses incurred by a purchaser are not recoverable from the seller in the purchaser's action to rescind the sales contract because the item purchased failed to meet contract specifications where the seller did not have reason to know of the purchaser's borrowing to make the purchase (MCLA 440.2714; MSA 19.2714).

8. MOTIONS—COURT OF APPEALS—JUDGMENT NOTWITHSTANDING THE VERDICT—EVIDENCE—NONMOVING PARTY.
The Court of Appeals, in reviewing a motion for a judgment notwithstanding the verdict, should view the evidence in the light most favorable to the party against whom the motion is directed.

Appeal from Kent, John T. Letts, J. Submitted February 9, 1978, at Grand Rapids. (Docket No. 31469.) Decided March 6, 1978.

Complaint by Distco Laminating, Inc., against Union Tool Corporation seeking rescission of a contract and for damages for breach of contract. Judgment for plaintiff rescinding the contract and awarding nominal damages. Defendant appeals. Plaintiff cross-appeals. Affirmed.

Murray & Mroz (by *James R. Hulbert),* for plaintiff.

Smith, Haughey, Rice & Roegge (by *Lance R. Mather),* for defendant.

Before: J. H. GILLIS, P. J., and R. B. BURNS and ALLEN, JJ.

ALLEN, J. Defendant appeals of right from a judgment which rescinds a contract for the purchase by plaintiff of a vinyl laminating machine, orders return to the defendant of the machine and orders defendant to return $103,819.50 paid by plaintiff for said machine. Plaintiff cross-appeals from that part of the judgment which awarded plaintiff nominal damages of $1.

Plaintiff is engaged in the vinyl laminating business at Grand Rapids, Michigan. Defendant is a manufacturer of laminating machines at Warsaw, Indiana. On September 24, 1973, plaintiff placed an order with defendant for the purchase of a fully automated machine for $115,335. The machine is some 70 feet long, 9 feet high and 64 inches wide. It is made up of several components allowing it to perform separate but related functions. One part of the machine brushes and cleans substrate boards. Another part applies glue to the separate pieces of substrate boards which travel the length of the machine on a conveyer belt. A third portion of the machine presses vinyl onto the substrate boards. Specifications called for production at a rate from 50 to 150 lineal feet per minute.

Events prior to suit for rescission

When the machine was completed in July 1974, defendant contacted plaintiff who had four of its trucks pick up the machine at defendant's Warsaw plant and deliver it to Grand Rapids. During August, 1974, it was aligned and anchored, and electrical and compressed air outlets arranged for. In September, an employee of defendant's plant connected the control panel and commenced test runs.

The runs were unsuccessful and there followed some 2-1/2 months of adjustments, changes and various modifications made both by plaintiff and defendant. Though the test runs were unsuccessful, each party blamed the other for the failure of the machine to operate properly. On November 26, 1972, plaintiff wrote defendant threatening rescission and requesting return of the money paid for the machine. Defendant again dispatched technicians to Grand Rapids where additional changes and modifications were made in the machine but all to no avail. On January 29, 1975, plaintiff filed suit for rescission and return of the monies paid on the contract price.

Events following suit for rescission

Following filing of the suit for rescission, plaintiff continued in attempts to make the machine operative. A new electric motor and a new hood were installed on that portion of the machine which performed the cleaning function. The dust collector motor was wired so as to become operative. A witness for plaintiff testified that the machine was used to clean some 1400 substrate boards 49 inches by 104 inches in size. This function was performed with the machine running at 5 to 6 feet per minute. At this speed, the cleaning operation would require 33-1/3 hours to complete. However, had the machine functioned at the speed for which it was designed, the cleaning operation could have been performed in approximately eight hours.

Multiple slits on a newly installed conveyor belt indicated that the machine had been used to laminate vinyl to boards. However, the evidence did not indicate whether such use of the machine was for production or for testing. There was also testi-

mony that plaintiff purchased the machine primarily, though not exclusively, to laminate boards for Herman Miller Corporation but that in October, 1974, Herman Miller Corporation stopped purchasing boards from plaintiff because the boards did not meet fire rating requirements.

Trial was by jury but because of the equitable nature of the suit, the jury was instructed that on the issue of rescission its verdict would be advisory but on the issues of damages its verdict would be controlling. The jury returned a verdict in favor of plaintiff on the claim for rescission and, as to damages, returned a verdict of $1 in favor of plaintiff and denied defendant's counter-claim for the balance of the purchase price and damages. The comprehensive written opinion of the trial court reads in pertinent part:

"It is also indicated that as late as February 1975 after the commencement of this action there was evidence of equipment being installed on the machine by the plaintiff, subsequent to a request (by the latter) for rescission, and *that there was substantial use of the machine by plaintiff after the commencement of this action.* The Court is also convinced that the cut marks made in the conveyor belt were caused by the plaintiff's use of tools on material moving over the belt; although, there was conflicting testimony that 'machine has not been used, not to my knowledge' (testimony of Phillip Bruce Mc Keel, an employ *[sic]* of the plaintiff).

"The Court finds, that although the evidence presented in this case does demonstrate that after plaintiff attempted to rescind his contract with the defendant it did treat the defendant's machinery in an ownership like manner; *such use was not sufficient, in the opinion of this Court, to bar rescission."* (Emphasis supplied.)

The litigants agree that the present dispute is governed by the Uniform Commercial Code, 1962

PA 174; MCLA 440.1101 *et seq.;* MSA 19.1101 *et seq.,* but disagree as to which section of the code controls. Plaintiff contends that MCLA 440.2601; MSA 19.2601 which provides that a buyer may reject goods where the goods fail to conform to the contract applies. In support of this position, plaintiff points out that the trial court found that the machine did not conform to the contract. On the other hand, defendant argues that MCLA 440.2606; MSA 19.2606[1] which provides that a buyer accepts goods when the buyer "does any act inconsistent with the seller's ownership" governs. Plaintiff's actions following filing of the suit for rescission, says defendant, were so substantial as to constitute legal acceptance. Further, defendant argues, since the trial court itself found the subsequent use "substantial" and not in mitigation of damages, the trial court erred as a matter of law in granting rescission. Our examination of the file and transcript leads us to reject defendant's skillfully presented arguments.

There was abundant evidence at trial that the laminating machine did not conform to contract specifications. The trial court so found. The trial court also found that plaintiff's use of the machine following commencement of the action for rescission, though admittedly "ownership like", was not sufficient to bar rescission. We agree. Findings of

[1] "Sec. 2606. (1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of section 2602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) *does any act inconsistent with the seller's ownership;* but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

"(2) Acceptance of a part of any commercial unit is acceptance of that entire unit." (Emphasis supplied.) MCLA 440.2606; MSA 19.2606.

fact by a trial court are given great weight and are not set aside unless clearly erroneous. GCR 1963, 517.1; *Ford v Howard,* 59 Mich App 548, 552; 229 NW2d 841 (1975). Defendant errs in concluding that whenever a buyer's conduct over the goods following commencement of rescission is "substantial" and not in mitigation of damages, such conduct as a matter of law becomes "an act inconsistent with the seller's ownership" as that phrase is used in subsection 606(1)(c) of the Uniform Commercial Code. Post-rescission conduct may still be substantial and yet not be so substantial as to equal acceptance. See Anno: *Use of Goods by Buyer as Constituting Acceptance Under UCC § 2-606(1)(c),* 67 ALR3d 363. Cases cited in that annotation which hold that use constitutes acceptance involve considerably more use than appears in the instant case.

With the single exception of the cleaning operation of some 1400 substrate boards, plaintiff's post-rescission action was directed towards making the equipment function rather than use of the equipment in production. With over $103,000 invested in the machine it was not abnormal or unusual to make one more effort to make the machine work. A buyer's efforts to remedy defects do not constitute a waiver of the right of rescission. 46 Am Jur, Sales, § 765, p 897. See also *MacLaren v Dermody White Truck Co,* 9 Mich App 402; 157 NW2d 459 (1968). The single production run of 1400 boards involving an estimated 33-1/2 hours productive use of the machine is minimal when compared with the reasonably expected lifetime productivity of the machine. Comparatively, it is one spin around the earth of a space capsule designed to orbit the globe a year in time. Plaintiff's purchase of the exhaust fan, enlarged motor and other post-

rescission suit equipment modifications involved efforts by the plaintiff to make the equipment perform to contract specifications. Slits in the conveyor belt were not proved to have resulted from vinyl-lamination production as opposed to testing of the machine. Furthermore, plaintiff's testimony that its business had substantially increased between the date it placed the order for the machine in September 1973, and the date rescission was commenced in January 1975, offset defendant's argument that plaintiff rejected the machine because of the loss of the Herman Miller account in 1974.[2]

Greater use by the buyer following the buyer's rejection of the goods or article purchased than appears in the instant case has been found not to constitute acceptance in several Michigan cases. In *Valley Die Cast Corp v ACW Inc,* 25 Mich App 321; 181 NW2d 303 (1970), defendant continued to use until May a defective car wash system which defendant had notified the seller it was rejecting in January. Our Court held that the buyer's use after rejection did not necessarily constitute acceptance under MCLA 440.2606; MSA 19.2606 and that the ultimate fact of acceptance or rejection under the facts of that case was for the jury to determine. In *Minsel v El Rancho Mobile Home Center, Inc,* 32 Mich App 10; 188 NW2d 9 (1971), plaintiff-buyer in September tendered notice of intent to rescind the purchase contract but did not vacate the mobile home until some six weeks later. Our Court first noted that the Uniform Commercial Code was to be liberally construed and then concluded that the mere six weeks of continued occupancy did not legally constitute an exercise of

[2] Testimony by plaintiff showed that its gross business for 1973 was $1.75 million; for 1974, $3.0 million; for 1975, $2.4 million and for the first quarter of 1976, $1.1 million.

ownership by the buyer of the goods purchased. Similar decisions finding that post-rescission continued use of otherwise defective purchased equipment does not constitute acceptance, are found in *Stroh v American Recreation & Mobile Home Corp of Colorado,* 35 Colo App 196; 530 P2d 989 (1974), and *Moore v Howard Pontiac-American, Inc,* 492 SW2d 227 (Tenn App, 1972).[3] In our opinion the comparatively limited use of the laminating machine in the instant case is an act substantially less "inconsistent with the seller's ownership" than the buyers' actions in *Minsel, Stroh* and *Moore.*

Plaintiff's cross-appeal for damages

Plaintiff has cross-appealed from the failure of the trial court to rule favorably on plaintiff's motion for judgment notwithstanding the verdict.[4] According to plaintiff, it is totally inconsistent and against the great weight of the evidence to allow rescission but deny reimbursement for the expenses incurred as a result of defendant's breach of contract. Expenses of $26,274.02 were presented at trial, of which $12,392.85 was incurred in electrical connections, a dust collection system, an

[3] In both *Stroh* and *Moore,* the court did find that the buyers' continued use of the mobile home and automobile depreciated the value of the purchased article and allowed the seller an offset in plaintiffs' damages. In the case before us we do not find that the limited use of the machine for the short period of time involved following suit for rescission depreciated the value of the machine.

[4] Plaintiff's motion was not directly ruled upon by the trial court. It was mentioned but never passed upon in the court's written opinion. It was neither mentioned nor acted upon in the formal order of judgment December 6, 1976, which was drafted by plaintiff's attorney. Generally, matters not ruled upon by the trial court will not be acted upon for the first time on appeal. *Three Lakes Association v Whiting,* 75 Mich App 564; 255 NW2d 686 (1977). However, we do not base our rejection of the cross-appeal on this technicality since it is clear to us that, at least inferentially, the trial court did deny plaintiff's motion.

overhead crane and pneumatic power connection costs, and $13,881.17 represented interest paid to the date of trial to the Michigan National Bank for the loan to purchase the machinery. For reasons in part procedural and in part substantive, we reject the cross-appeal.

GCR 1963, 515.2 provides:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the moving party may move * * * to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict."

A motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict. *Smith-Douglass, Division of Borden Chemical v Walch,* 391 Mich 201, 204–205; 215 NW2d 142 (1974). In the instant case no motion for a directed verdict was made.

Nor is this a situation falling within the exception to Rule 515.2[5] where, upon a new trial, no different result could be reached. The necessity for the expenditures made by the plaintiff was sharply contested by the defendant who claimed that plaintiff's modifications and adjustments totaling $12,392.85 were made without consultation with the defendant's experts and that in many instances the plaintiff dragged its feet and failed to cooperate with the defendant. On cross-examination, plaintiff's witnesses admitted that the purchase of the hoist, the panel control wiring and some related expenditures were improvements which could be used in other aspects of plaintiff's business. It is very possible that the jury believed

[5] *See* 2 Honigman & Hawkins, Mich Court Rules Annotated, 1977 Supp, p 156.

defendant's testimony as to damages even though the jury also concluded that the machine failed to meet contract specifications.

For similar reasons we are not persuaded that the jury erred in denying plaintiff a return of interest charges of $13,881.17 on the loan from the bank. Such charges are recoverable as damages under § 2714 of the Uniform Commercial Code, MCLA 440.2714; MSA 19.2714, if the seller had reason to know of the borrowing. *Carl Beasley Ford, Inc v Burroughs Corp,* 361 F Supp 325 (ED Pa, 1973). Based on the limited testimony in this case we cannot conclude that Union Tool had reason to know Distco required a loan to make payment for the article purchased.[6]

In reviewing a motion for judgment notwithstanding the verdict, this Court must view the evidence in the light most favorable to the party against whom the motion is directed. *Savage v Peterson Distributing Co, Inc,* 379 Mich 197; 150 NW2d 804 (1967). Even the trial judge found as a fact that plaintiff's alleged damages resulted from alterations made without prior consultation with defendant. In the fact of such testimony and findings, we cannot find that the trial court erred in failing to grant plaintiff's motion for judgment notwithstanding the verdict.

Affirmed, no costs, neither party having prevailed in full.

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[6] Nor are we persuaded that knowledge of borrowing may be imputed under the "it follows from the normal course of events" doctrine set forth in *Certain-Teed Products Corp v Goslee Roofing & Sheet Metal, Inc,* 26 Md App 452, 473; 339 A2d 302, 314–315 (1975). If the "normal course of events" theory is inapplicable, then the question of whether interest paid on a loan required to pay for the purchase is recoverable is a question entirely for the jury to decide according to the equities of the situation. *A & A Masonry Contractors, Inc v Polinger,* 259 Md 199; 269 A2d 566 (1970). In the instant case, the jury determined that the interest was not recoverable.

C. I. T. FINANCIAL SERVICES, INC. OF MICHIGAN v LEWIS

GARNISHMENT—COSTS—ATTORNEY'S FEES—JUDGE'S DISCRETION—APPEAL AND ERROR—COURT RULES.

A trial court in a garnishment action may award a garnishee-defendant reasonable attorney's fees incurred in filing a disclosure and other necessary costs; the award of such fees and costs is discretionary with the trial court and the Court of Appeals is limited in its scope of review to the question of whether the trial court's action amounted to an abuse of discretion (GCR 1963, 526.9).

Appeal from Wayne, James N. Canham, J. Submitted November 14, 1977, at Detroit. (Docket No. 31543.) Decided March 6, 1978.

C. I. T. Financial Services, Inc. of Michigan secured judgment against Lonnie Lewis for money owing and subsequently obtained judgments of garnishment against his employer, General Motors Corporation. General Motors moved for payment of costs and attorney fees incurred in the garnishment proceedings. A judgment was entered awarding some costs and fees to General Motors. General Motors appeals, contending the award was inadequate. Affirmed.

Wendell R. Tucker, for garnishee-defendant General Motors Corporation.

REFERENCES FOR POINTS IN HEADNOTE

[1] 6 Am Jur 2d, Attachment and Garnishment § 407.

Attorneys' fees: amount of compensation of attorney for services in garnishment proceeding in absence of contract or statute fixing amount. 56 ALR2d 111.

Before: BRONSON, P. J., and ALLEN and T. M. BURNS, JJ.

BRONSON, P. J. Garnishee-defendant General Motors Corporation appeals as inadequate an order awarding it costs in a garnishment proceeding against an employee. General Motors requested costs including attorney fees of $868.81. The trial court awarded General Motors $350.

Plaintiff contested every item of General Motors' bill of costs in the court below, arguing *inter alia* that it had paid the requisite disclosure fee, GCR 1963, 738.4(1), that General Motors is required by law to maintain a resident agent for service of process for which plaintiff should not be required to pay, that expenses incurred in discovery were caused by General Motors' failure to make adequate disclosure and that expenses incurred in moving for costs were not "necessary" expenses.

General Motors, on the other hand, argues that it is an innocent stakeholder, that GCR 1963, 526.9 allows a garnishee to recover "necessary" expenses and that all costs should be awarded unless there is collusion between the garnishee defendant and the principal defendant.

GCR 1963, 526.9 provides in part:

> "Costs in Garnishment Proceedings. Costs in garnishment proceedings shall be allowed as in civil actions. The judge in awarding costs may
>
> "(1) in case the issue of the garnishee's liability to the principal defendant is not brought to trial, award the garnishee as costs against the plaintiff such reasonable attorney's fees as the garnishee incurred in filing his disclosure and other necessary expenses."

Costs are discretionary with the trial judge as GCR 1963, 526.9 states that the trial court "may"

award "reasonable attorney's fees" and other "necessary" costs.

In the case at bar, the court, faced with a contested bill of costs, awarded General Motors what it felt was a reasonable amount. While we may have made a different award had we been in the position of the trial court, our scope of review of a discretionary action by a trial court is limited, under these facts, to whether that action amounted to an abuse of discretion.

We believe trial courts should be sensitive to garnishee defendants' claims for costs. We are troubled by the possibility that large corporate garnishees such as General Motors are being required to underwrite the collection expenses of finance companies such as plaintiff. This is not the result anticipated by GCR 1963, 526.9.

Affirmed. No costs.

ENGLISH v SAGINAW COUNTY TREASURER

McKENZIE v SAGINAW COUNTY DRAIN COMMISSIONER

1. DRAINS—DRAIN ORDERS—REIMBURSEMENT—GENERAL FUND—DRAIN FUND—STATUTES.

The Drain Code of 1956 does not provide a method for the holders of drain orders to make a demand for reimbursement of such orders from the general fund of a county where the drain fund upon which such orders are drawn is insufficient to pay the orders (MCLA 280.244; MSA 11.1244).

2. STATUTES—AMENDMENT—LEGISLATURE—PHRASEOLOGY CHANGES—PRESUMPTIONS.

It is presumed that the Legislature intended to make some change in existing law when the Legislature adopts an amendment to a statute; courts must give some meaning to a legislative amendment; a change of phraseology in a statute raises the presumption that a change of meaning was intended.

3. DRAINS—DRAIN COMMISSIONER—DUTY OF REASSESSMENT—DRAIN FUND—MANDAMUS—STATUTES.

A drain commissioner has a duty to reassess in order to make up any deficiency in a drain fund; an action for a writ of mandamus should be directed against the drain commissioner where a holder of unpaid drain orders seeks a reassessment (MCLA 280.245, 280.280; MSA 11.1245, 11.1280).

Appeal from Saginaw, Joseph R. McDonald, J. Submitted November 2, 1977, at Grand Rapids. (Docket Nos. 77-940, 77-941.) Decided March 6, 1978.

Complaints by Volney English and Helen English against the Saginaw County Treasurer, Sagi-

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 25 Am Jur 2d, Drains and Drainage Districts § 53.

[2] 73 Am Jur 2d, Statutes § 236.

[3] 25 Am Jur 2d, Drains and Drainage Districts, §§ 42, 48.

naw County Clerk and the County of Saginaw and by Basil McKenzie against the above-named defendants, the Saginaw County Drain Commissioner and Charles Nagel seeking writs of mandamus directing defendants to make payment on certain drain orders from the general fund of the county and for other relief. Lamar Corporation was permitted to intervene as a plaintiff. The cases were consolidated for trial. Default judgment for plaintiff McKenzie against Nagel. Summary judgment for plaintiffs. Defendants Saginaw County Treasurer, Saginaw County Clerk and the County of Saginaw appeal. Reversed.

Montigel, Mackie & Harris, for plaintiff-appellees English.

Fortino, Plaxton & Moskal, for appellee McKenzie.

Porter, Day & Sawdey (by *William A. Hubble),* for intervening plaintiff-appellee Lamar Corporation.

Smith Bovill, P. C., for defendant-appellants.

Amicus Curiae: County of Wayne, Michigan, *Aloysius J. Suchy,* Corporation Counsel (by *Lawrence O. Hinkle).*

Before: R. M. MAHER, P. J., and M. F. CAVANAGH and N. J. KAUFMAN, JJ.

N. J. KAUFMAN, J. This appeal involves a rather arcane body of statutory law, The Drain Code of 1921, 1921 PA 64, as amended. On October 2, 1975, Volney and Helen English filed a complaint against the Saginaw County Treasurer, Saginaw County Clerk and County of Saginaw requesting a

writ of mandamus directing defendants to make payment on certain drain orders from the general fund of the county. Lamar Corporation was permitted to intervene as a plaintiff on March 31, 1976.

On April 5, 1976, Basil McKenzie filed a complaint against the above-named defendants, the Saginaw County Drain Commissioner, and Charles Nagel also requesting a writ of mandamus directing defendant county officials to make payment on certain drain orders and for other relief.

On September 16, 1976, the two cases were consolidated for trial. Default judgment for plaintiff McKenzie against Charles Nagel was granted on January 17, 1977. Summary judgment for plaintiffs was granted on February 25, 1977. Defendants Saginaw County Treasurer, Saginaw County Clerk and County of Saginaw appeal as of right.[1]

The relevant facts are not in dispute. During 1969, 1970 and 1971, the Saginaw County Drain Commissioner issued drain orders to pay for the construction of a special assessment drain known as the Herman Extension of the King Street Drain. Plaintiffs English and McKenzie are assignees of drain orders issued to Charles Nagel. Intervening-plaintiff Lamar Corporation is an original holder of drain orders.

The drain orders were drawn upon the Herman Extension Drain Fund. Deposits were made to this fund primarily from special assessment taxes collected from property owners benefitted by the new drain.

Special assessment taxes on a 48-acre portion of land affected by the drain were not paid. The

[1] On April 19, 1977, this Court permitted Wayne County to intervene as amicus curiae on appeal.

property in question was conveyed to the State of Michigan following a tax sale. This property was later conveyed to the County of Saginaw for one dollar.

On May 22, 1972, the Herman Extension Drain Fund became exhausted, leaving the drain orders in question unpaid. Plaintiffs seek payment from the general fund of the county pursuant to MCLA 280.244; MSA 11.1244 of the 1956 drain code, successor to the 1921 drain code.

To determine the validity of plaintiffs' claims, it is necessary to make an historical analysis of the drain code provision in question.

1921 PA 64 explicitly gave a holder of a drain order the right to demand payment from the general fund of the county where the drain fund was insufficient to pay the order and where the lands on which the taxes have become delinquent have been offered for sale. 1921 PA 64 provided in part as follows:

> "That the holder of such order may, if he so desires, have the right to require payment thereof out of any moneys in the general fund of the county treasury that may be available, if the drain fund is insufficient for such purpose because of delinquency in the payment of drain taxes after the lands on which the said taxes shall have become delinquent have been offered for sale. In any such case where payment is made by the county treasurer out of the general fund any and all delinquent drain taxes received by said treasurer thereafter shall be credited to the general fund until the same is reimbursed."

In 1933 this provision of the drain law was amended "in such manner as to transfer to the county drain commissioner the right to require payment out of the general fund of the county". *Gerweck v Monroe County Treasurer,* 317 Mich

53, 64; 26 NW2d 864 (1947). The language which had given a holder of a drain order the right to demand payment from the county general fund was deleted. Language was substituted in its place which gave this right to the drain commissioner. (See 1933 PA 216, § 4.)

In 1949, pursuant to 1949 PA 247, the statute was again amended. The language giving the drain commissioner the right to demand payment from the general fund of the county was deleted. Language giving a holder of a drain order the right to demand payment from the county general fund was not reinstated.

The present statute in dispute, MCLA 280.244; MSA 11.1244, provides in part:

> " * * * If the drain fund is insufficient for such purpose because of delinquency in the payment of drain taxes after the lands on which the said taxes shall have become delinquent have been offered for sale, in any such case where payment is made by the county treasurer out of the general fund and all delinquent drain taxes received by said treasurer thereafter shall be credited to the general fund until the same is reimbursed. * * * "

It should be noted that while there are cases prior to the 1949 amendment there are none since.[2] *Graves v Bliss,* 235 Mich 364; 209 NW 142 (1926), *Gerweck v Monroe County Treasurer,* 317 Mich 53; 26 NW2d 864 (1947).

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[2] The only case we could find since 1949 does not deal with the question involved in this case. In *Ray v Mason County Drain Commissioner,* 48 Mich App 559, 560; 210 NW2d 810 (1973), Judge MCGREGOR aptly noted:

"At the center of this dispute is the Drain Code of 1956, MCLA 280.1 *et seq.;* MSA 11.1001 *et seq.,* an exceedingly complex statute, the provisions of which apparently are known by few in the profession and understood by far fewer."

We can only say "Amen".

After tracing the various statutes and amendments of the drain act it is clear that until 1949 the Legislature provided that holders of drain orders would be reimbursed by being paid either by the holders themselves making a request from the general fund or the drain commissioner making a request from the general fund. However, this was eliminated and the 1956 act does not have a method for the holders to make a demand on the county. We cannot reinstate the previous method.

As noted in *Jones v Grand Ledge Public Schools,* 349 Mich 1, 11; 84 NW2d 327 (1957):

> "The language of the statute must be construed as it reads. It is not within the province of this Court to read therein a mandate that the legislature has not seen fit to incorporate. Our duty is to apply the law as we find it."

Thus, when the Legislature adopts an amendment to a statute, it is presumed that the Legislature intended to make some change in existing law. Courts must give some meaning to a legislative amendment. A change of phraseology in a statute raises the presumption that a change of meaning was intended. *Lawrence Baking Co v Unemployment Compensation Commission,* 308 Mich 198, 205; 13 NW2d 260 (1944).

In this case, plaintiffs can make no demands on the county. Therefore, defendant county and defendant county officials cannot be compelled to satisfy plaintiffs' demands by a writ of mandamus. As the trial court improvidently granted a writ of mandamus, its decision must be reversed.

We sympathize, however, with the apparent dilemma in which the trial court found itself. Finding that plaintiffs should get relief, in granting the

writ, the trial court was motivated by its concern that:

" * * * a refusal to grant the relief requested by plaintiffs would leave them without a remedy; * * * ".

However, we do not share that concern because we find that MCLA 280.245; MSA 11.1245, in conjunction with MCLA 280.280; MSA 11.1280, provides for a method of reassessment in order to make up any deficiency.[3] There is a duty upon the

[3] MCLA 280.245; MSA 11.1245 reads as follows:

"All drain orders made by the commissioner shall state the services rendered in brief form, shall be numbered and recorded and signed by the commissioner. Such order, when due, shall be presented to the county clerk and he shall immediately ascertain from the county treasurer if the particular fund on which said order is drawn is sufficient to pay said order. If such fund is sufficient, the county treasurer shall so certify on the back of said drain order and the county clerk shall thereupon issue the usual county warrant upon the county treasurer for the payment of said order, taking said order so certified as his voucher. If such particular fund is insufficient when such order is presented for payment, the county treasurer shall so certify upon such order and such order shall then draw interest at the rate of 6% per annum from the date of presentation until such particular fund is sufficient to pay the same, said interest to be computed and paid with the principal out of the proper fund on which it was drawn, when there are sufficient funds to pay the same. The county treasurer shall keep a record in which he shall note each drain order presented for payment on a drain account which was insufficient to pay such order on the date of presentation. He shall note in such record the amount, number, drain account and the date of original presentation for payment. When there are sufficient moneys in the particular drain account to pay the order, plus interest, the county treasurer shall note the date of such sufficiency on such record and shall transfer sufficient moneys to pay such order and interest then due from the particular drain account and drain fund to a drain order redemption fund and the drain order shall cease to earn interest as of that date. Transfers to the drain order redemption fund shall be made in the order of priority in which the drain orders were originally presented for payment. Payment of such orders, including interest earned as provided herein, shall thereafter be made by the county treasurer from the drain order redemption fund. Drain orders at any time during the year in which such drain order becomes due and payable and for a period of 30 days prior to such year shall be accepted for the payment of drainage taxes. The county treasurer shall report to the commissioner the amount paid as interest on any and all such drain orders. The county treasurer shall at the first of

each month furnish the drain commissioner with a report of all drain orders cashed during the preceding month, including the name of the drain upon which the order was drawn, the amount, the number of the order, and the date of payment."

MCLA 280.280; MSA 11.1280 reads as follows:

"If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature, or any drain orders, to pay all outstanding bonds or drain orders with interest, or to reimburse the county for money which it has been obliged to advance pursuant to section 275 of this act, whether such insufficiency is due to the anticipation of installments as provided in section 279, or to failure to sell any lands for delinquent taxes, or to any other cause, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency which shall be spread in not to exceed 7 annual installments; and if the commissioner determines that the entire amount, if spread in 1 year, would be an undue burden or create unnecessary hardship, he may order it spread over any number of years up to but not exceeding 7; and in case bonds or other evidences of indebtedness are issued pursuant to Act No. 13 of the Public Acts of 1932, First Extra Session, as amended, and Act No. 202 of the Public Acts of 1943, as amended, being sections 131.1 to 138.2, inclusive, of the Compiled Laws of 1948, to refund the outstanding indebtedness of a drain district, the governing body of such drain district shall provide, subject to the directions of the municipal finance commission, for such additional levies of assessments prior to the maturity of such refunding obligations as it shall deem necessary to prevent default in payment of interest on such obligations, and the maintenance of a sinking fund for their retirement, and it shall be the duty of every officer charged with the determination of the amount of taxes to be raised, or the levying of such taxes, to make or cause to be made the additional levies as provided. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain.

"Such additional assessments shall only apply to drain orders or bonds issued after the effective date of this act and shall be apportioned, assessed, levied and collected as provided in the first instance. As to deficiency assessments levied for drain orders or bonds issued after the date of this act there shall be no lands exempted therefrom, except those which at the time of such additional assessments are owned or used as follows: First, lands owned by the United States; second, lands owned by the state of Michigan, except licensed homestead lands, and except lands held under land contracts issued pursuant to Act No. 155 of the Public Acts of 1937, as amended, being sections 211.351 to 211.364, inclusive, of the Compiled Laws of 1948; third, lands owned by any county, city, village, township or school district and used for public purposes; fourth, lands used exclusively for burial grounds; fifth, lands dedicated to the public and actually used as a highway or alley, and not used for gain: Provided, That no such additional assessment shall be levied or collected for the purpose of paying the principal or interest upon any bonds or obligations which have heretofore been held to be invalid, nor shall any such

drain commissioner to reassess, at some point, in order to make up the deficiency.

We note that in this case reassessment is made more difficult by the second part of MCLA 280.280; MSA 11.1280 which exempts counties from paying any assessment on property used for public purposes.

We specifically do not decide whether the property acquired by the county from the state for $1 is used for public purposes and therefore cannot be assessed. We suggest that immediately prior to reassessing the property (whenever that occurs) in order to make up the deficiency, the public purpose question be decided first. This would comply with the statutory mandate of MCLA 280.280; MSA 11.1280. In that way if the property that the county owns is not assessed under MCLA 280.280; MSA 11.1280, the other people who are assessed will make up the difference, and a single reassessment will suffice. On the other hand, if this question is not decided and it is later found that the county is not liable, another assessment under the provisions of MCLA 280.245; MSA 11.1245 and MCLA 280.280; MSA 11.1280 would be required.

We would finally note that it appears that plaintiffs started their action against the wrong parties. The action for mandamus should be started against the drain commissioner to reassess. While we can understand and sympathize with the trial court's dilemma, we must administer the statute the way it reads.

Reversed. No costs, a public question being involved.

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additional assessment be apportioned, assessed, levied or collected for the purpose of paying any bonds, interest or obligations for the payment of which assessments have heretofore been made."

PEOPLE v ABDO

1. WITNESSES—RES GESTAE WITNESSES—CRIMINAL LAW.

   A res gestae witness is one who was an eyewitness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense.

2. WITNESSES—RES GESTAE WITNESSES—PROSECUTORS—INDORSEMENT OF WITNESSES—STATUTES.

   A prosecutor is required to indorse on an information and produce at trial all res gestae witnesses (MCLA 767.40; MSA 28.980).

3. WITNESSES—RES GESTAE WITNESSES—CRIMINAL LAW—CRIMINAL TRANSACTION—RELEVANCE OF TESTIMONY.

   A trial court erred in finding that certain witnesses were not res gestae witnesses because they had not witnessed a shooting, where the criminal transaction involved included an altercation in a restaurant, with several participants, followed by the shooting on the street outside the restaurant, and where the only witness to testify as to direct knowledge of the shooting was the victim; the testimony of the unindorsed witnesses to the events inside the restaurant would be relevant to the questions of identity of the assailant and of motive.

4. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—NEW TRIAL.

   A defendant was entitled to a new trial where the evidence upon which he was convicted was not overwhelming, credibility was a key issue, the identity of the defendant as the perpetrator of

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REFERENCES FOR POINTS IN HEADNOTES

[1, 3, 4] 29 Am Jur 2d, Evidence § 708.

Admissibility, as part of res gestae, of accusatory utterances made by homicide victim after act. 4 ALR3d 149.

[2, 5] 41 Am Jur 2d, Indictments and Informations §§ 55, 56, 60.

Power of assistant or deputy prosecuting or district attorney to file information, or to sign or prosecute it in his own name. 80 ALR2d 1067.

[3] 29 Am Jur 2d, Evidence § 711.

[4] 29 Am Jur 2d, Evidence §§ 717–721, 736.

the crime was contested, and where several witnesses whose testimony if allowed to be presented would have been primarily noncumulative and in support of the defense, were erroneously found at a post-trial hearing not to be res gestae witnesses.

5. WITNESSES—CRIMINAL LAW—RES GESTAE WITNESSES—INDORSEMENT OF WITNESSES—CROSS-EXAMINATION.

The fact that a res gestae witness is called as a defense witness does not excuse the prosecutor's failure to indorse the witness; part of the purpose of the res gestae rule is to allow the defendant to cross-examine witnesses called as res gestae witnesses.

Appeal from Wayne, John M. Wise, J. Submitted January 16, 1978, at Detroit. (Docket No. 28476.) Decided March 7, 1978.

Mohammed D. Abdo was convicted of assault with intent to commit great bodily harm less than murder. Defendant appeals. Reversed and remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *William L. Cahalan,* Prosecuting Attorney, *Edward R. Wilson,* Principal Attorney, Appeals, and *William Wertheimer,* Assistant Prosecuting Attorney, for the people.

Gromek & Bendure, for defendant on appeal.

Before: T. M. BURNS, P. J., and M. F. CAVANAGH and D. C. RILEY, JJ.

D. C. RILEY, J. Defendant Mohammed Daifullah Abdo, arrested and charged with assault with intent to commit murder, MCLA 750.83; MSA 28.278, was found guilty at a bench trial of assault with intent to commit great bodily harm less than murder, MCLA 750.84; MSA 28.279, and sentenced to a prison term of two and one-half to ten years.

He brings the present appeal raising several issues, of which two involve the extensive testimony presented to the trial court.

The incident in question took place during the early morning hours of November 3, 1975, inside and in front of Uncle Sam's restaurant in Dearborn, Michigan. The complainant, Alan Amen, worked as a special claims investigator for the Michigan Employment Security Commission, concentrating on assisting Arabic-speaking claimants. On November 3, Amen attended a party at the restaurant commemorating the owner's loss of his liquor license. There were approximately 200 persons at the restaurant party, with a significant number being of various Arabic nationalities.

Amen testified that the incident began when he was approached by Sultan Saleh, who had acted as an interpreter for an unemployment claimant named Quayed Alhidais. Saleh allegedly accused Amen of abandoning Alhidais' claim and of being anti-Arab. The argument erupted into an attack on Amen, according to his testimony, by various persons including Saleh, Abdullah Nassar, and defendant Abdo. At this point several people, including Houssain (Sam) Mallad, the owner of the restaurant, interceded to break up the fight.

Amen stated that he fled the restaurant when the fighting was quelled. After exiting through the front door, he took two or three steps out into the street in front of the restaurant, and then turned at the sound of activity behind him. He testified that on turning he saw defendant on the sidewalk in front of the restaurant pointing a handgun in his direction, and Sam standing just outside the front door. As he turned back to run, Amen was shot through the arm. He stated that defendant followed him partially across the street and aimed

the gun at him again, but he was not sure if any additional shots were fired.

In addition to Amen, the prosecution presented testimony from four other endorsed witnesses who were present on the night of the shooting. Allen Mallad, the son of Sam Mallad, testified that he saw the start of the fight and eventually wrestled Nassar away from Amen. He did not see or hear the actual shooting, and did not see defendant with a weapon.

Mason Baydoun testified about the argument between Amen and Sultan Saleh, stating that he tried to break up the argument, but that he did not see any fight nor did he see or hear the shooting. He did not remember seeing defendant at the restaurant.

Sultan Saleh admitted arguing with Amen, but denied threatening or striking him. He stated that he left the restaurant by the back door while Amen was still inside. On further examination, it was brought out by the prosecutor that Saleh had been convicted of assault and battery on Amen in Dearborn district court, the charge having arisen from this same incident.

Houssain (Sam) Mallad testified that he had attempted to break up the fight inside of the restaurant. He tried to hold onto Amen but he slipped out of Sam's grasp and went out the front door. Immediately thereafter several other people also slipped past Mr. Mallad and exited from the building. After Sam finally got the door closed, and while *inside* of the building, he heard several shots. He then went outside and saw Amen in the middle of the street. He also saw a group of people, including defendant, on the sidewalk to the right of the front door. He did not see anyone with a gun and did not see Amen shot.

Following all of this testimony, defendant waived the production of several endorsed witnesses, one being Jamal Attareb and the others being police officers and a doctor. The final prosecution witness was Dearborn Police Sergeant Forrest Henry, the arresting officer in charge of the case. Sgt. Henry related the details of defendant's arrest and the substance of a statement made by defendant following his arrest. In the statement defendant said that he was at the restaurant with Sam Mallad, Jeffery Saleh, Mohsen Said (an alias of Abdullah Nassar), and a David (possibly also an alias of Abdullah Nassar). He stated that he attempted to break up the fight between Sultan Saleh and Amen, and later walked outside with Sam Mallad. He denied having a gun, seeing or hearing Amen shot, or doing the actual shooting.

The defense then presented a number of witnesses. Jeffery Saleh (no relation to Sultan Saleh) stated that he saw defendant attempt to break up the fight between Sultan Saleh and Amen. He did not see defendant strike Amen. Just after Amen left the restaurant he, defendant, and around 10 to 15 other persons left, with he and defendant at the head of the group. As the group was walking down the sidewalk to a different restaurant, they heard shots. Jeffery Saleh did not see any shots fired and did not see defendant with a gun.

This testimony of Jeffery Saleh was essentially corroborated by that of Ali Kahdi, Ali Aboubaker, and Abdul Ali, all of whom testified that they were in the group that left Uncle Sam's with Jeffery Saleh and defendant. None of these witnesses saw the shooting.

Defendant Mohammed Abdo was the final defense witness. His testimony coincided with the substance of the previous defense testimony. He

denied threatening, hitting, or shooting Amen and stated that while he heard shots, he did not know that Amen had been shot until the following day.

Following closing arguments, the trial court made the following findings of fact:

"This Court had no difficulty in understanding the witnesses.

"Many of these witnesses were reluctant to testify to part of the happenings of that morning, testifying that they saw nothing. However, it has been established by the complaining witness, and the testimony, that he was shot by the Defendant whom he had seen earlier in Uncle Sam's Restaurant and Bar. The complaining witness's testimony was convincing and forthright. His testimony was substantiated in part by portions of the testimony of both the People's and the defense's witnesses, and when interwoven and taken as a whole, leaves no doubt in the Court's mind.

"I might say that several of the witnesses who testified, such as Sam Mallad and Jeffrey Saleh, who testified for the defense that the Defendant was the first one out of the door after the Complainant had gone out, and there is such other testimony, and the Court does find as a matter of fact, taking into consideration all of the testimony that the People have proven beyond a reasonable doubt, that the Defendant, Mohammed D. Abdo did assault with intent to do great bodily harm less than the crime of murder upon the Complainant, Alan Amen, and does find the Defendant guilty of that offense, the cause having been proven beyond a reasonable doubt as to all the elements of that charge."

Subsequent to appointment of appellate counsel,[1] the case was remanded by this Court, on defendant's motion, to the trial court to allow defendant to bring a motion for new trial. This motion was founded on claims that the decision was against the weight of the evidence and that various al-

[1] Defendant's appellate counsel was not also his trial counsel.

leged res gestae witnesses were not endorsed or produced at the trial. Over the course of several hearings, as mandated by *People v Robinson,* 390 Mich 629; 213 NW2d 106 (1973), testimony was taken from a number of witnesses, including Sgt. Henry, the arresting officer.

Abdullah Nassar (a/k/a Mohsen Said) testified that he did not see the shooting, did not see defendant with a gun, and that he was only contacted to testify after the trial by defendant's appellate counsel.

He admitted that he did participate in a struggle with Alan Amen, but asserted that the fight was in part precipitated by racial slurs uttered by Amen. Nassar testified that Amen was wearing glasses at the time, that Amen removed his glasses during the fight, and that Amen did not retrieve the glasses prior to leaving the restaurant. It was also brought out that Nassar had been convicted of assault on Amen arising from this incident.

Hussain Dubaishi, Saif Abdullah, Hussain Abdulla and Said Ali all testified that they were at Uncle Sam's on the night of the shooting, but did not see or hear the shots fired. Dubaishi stated that Amen left the restaurant ten minutes before defendant left. Saif Abdullah said that Amen left five minutes before defendant. Hussain Abdulla stated that Amen left the restaurant followed by several people, and then defendant and some others left. Ali testified that he talked to defendant in the restaurant after Amen had left.

Sgt. Henry testified as to the efforts made to locate and endorse res gestae witnesses. No attempt was made to endorse any of the witnesses presented at the *Robinson* hearing, or to endorse Jeffery Saleh. Sgt. Henry also stated that Quayet Alhidais was not endorsed after he told Henry

that he was not at the restaurant on the night of the shooting. Alan Amen had testified at the trial that Alhidais was in Uncle Sam's on November 3, 1975.

Following the presentation of this testimony, the trial court made the following ruling:

"May I say this, Mr. Gromek, you have indicated possible res gestae witnesses, but the testimony of the parties that came in to testify indicated they were not res gestae witnesses. None of them saw the shooting, none of them heard any shots, none of them knew anything would transpire outside.

* * *

"The question involved though, on a Robinson hearing, is whether there are witnesses who should have been indorsed who are res gestae witnesses. On the testimony that I have heard from all the witnesses, I can't say they are res gestae witnesses to the point where this entitles you to a retrial, so the only thing I can say, you have had a complete hearing, you have had an examination under a Robinson Hearing and I find that all the known res gestae witnesses were endorsed and heard, except those waived by defense counsel at the trial and you were not defense counsel. Any names that would have been called to anyone's attention, and that, of course, you are not in a position to know because you didn't try the cause, so you don't know what situation was *[sic],* would have been endorsed.

"I don't see that the witnesses that have been introduced that they can be considered res gestae witnesses, so I will deny your motion."

As has been often said by this Court, there is no precise definition for a "res gestae witness". Various tests have been set forth to establish the parameters of the prosecution's statutory[2] duty to endorse and produce all res gestae witnesses:

[2] MCLA 767.40; MSA 28.980.

"A res gestae witness is one who was an eyewitness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *People v Hadley,* 67 Mich App 688, 690; 242 NW2d 32 (1976).

"The prosecutor is required to indorse on the information and produce at trial all res gestae witnesses. MCLA 767.40; MSA 28.980, *People v Harrison,* 44 Mich App 578; 205 NW2d 900 (1973). This Court has broadly defined a res gestae witness to include not only one who witnesses a crime but one who is present at the time and place of the crime, observes the surroundings, and sees nothing; that is, one whose testimony is necessary to protect the defendant against false accusation or without whose testimony any part of the transaction may remain undisclosed. *People v Anderson,* 64 Mich App 218; 235 NW2d 746 (1975), *People v Harrison, supra.* Persons present at the time and scene of the crime are presumed to be res gestae witnesses and the prosecutor must prove otherwise. *People v Hicks,* 63 Mich App 595; 234 NW2d 720 (1975), *People v Samuels,* 62 Mich App 214; 233 NW2d 520 (1975). Every reasonable doubt should be resolved in favor of indorsing and producing a person as a res gestae witness when a defendant insists on his rights." *People v Abrego,* 72 Mich App 176, 179; 249 NW2d 345 (1976).

While it is clear that the term "res gestae" includes all eyewitnesses to an alleged crime, conversely a person need not be an actual eyewitness to be presumed to be a res gestae witness.

The trial court, at the conclusion of the *Robinson* hearing, held that the witnesses who testified at the hearing were not res gestae witnesses since they neither saw nor heard the actual shooting. Under the broad definitions of res gestae witnesses employed by this Court, we find the trial court's holding to be clearly erroneous. *People v Abrego, supra.*

The "continuum" of the criminal transaction in

the present case included not only the shooting, which took place outside of the restaurant, but also the argument and fighting inside of the bar which presumably precipitated the shooting. Testimony of witnesses to the events inside of the bar would be relevant to crucial questions of identity and motive. The trial testimony itself is ample evidence of the recognition, at least by the prosecution, of this expanded view of the res gestae of the current offense. Of the six endorsed witnesses presented at the trial only one, Alan Amen, testified as to direct knowledge of the shooting. Four of the prosecution witnesses testified *only* as to the events occurring inside the bar and to their observations after the shooting. If these four witnesses were res gestae witnesses at the time of the trial, it cannot be said that the witnesses who testified at the *Robinson* hearing were any less part of the res gestae.

Having found that the trial court erred in failing to hold that the *Robinson* witnesses were res gestae, the question becomes whether that error mandates a new trial. We believe that it does. The trial evidence against defendant was not overwhelming, consisting for the most part merely of Amen's identification of defendant as his assailant. In such a situation, where credibility becomes the key issue, the weight of testimony supporting the respective positions can have a telling effect. The *Robinson* hearing witnesses testified primarily in support of the defense theory. Their testimony at the trial, particularly since it would have been presented by the prosecution, could have had a significant bearing on the decision.[3]

[3] In addition to the witnesses presented at the *Robinson* hearing, the four witnesses called by the defense at trial (excluding defendant) meet the tests for res gestae witnesses as set forth in this opinion. The fact that they were called as defense witnesses does not excuse

In addition, testimony was elicited at the *Robinson* hearing that was clearly non-cumulative to the trial evidence. Abdullah Nassar was the only witness who stated that Amen had been wearing glasses while inside of the restaurant but had lost them prior to the shooting. Hussain Dubaishi and Saif Abdullah placed defendant's departure from the restaurant at five-ten minutes after Amen exited. Hussain Abdulla testified that several people left after Amen but before defendant. All of this evidence was highly relevant on the contested issue of identity. Its absence deprived the trier of fact of a full presentation of the res gestae of the offense:[4]

"The purpose of the statute is to protect defendants from false accusations by requiring disclosure of the whole of the res gestae, by preventing the suppression of testimony favorable to the accused, and by extending to them the benefits of cross-examination." *People v Harrison,* 44 Mich App 578, 588; 205 NW2d 900 (1973).

Since the trial court found that the *Robinson* hearing witnesses were not res gestae, the issues of exceptions to the res gestae rule, such as cumulativeness or exercise of due diligence, were not

the prosecution's failure to endorse them. *People v Harrison,* 44 Mich App 578, 599; 205 NW2d 900 (1973). Part of the purpose of the res gestae rule is to allow the defendant to cross-examine these witnesses. *People v Harrison, supra.*

[4] Although our decision on the res gestae witness issue in itself requires reversal of the conviction, we note in connection with this discussion that defendant also challenges the substance of the court's findings of fact at the trial. We agree with defendant that the court's ruling does not fully comport with our reading of the testimony. We do not view the testimony of Hussain (Sam) Mallad and/or Jeffery Saleh as corroborative of complainant's statements that defendant was the first person out of the bar following him and that, at the moment of the shooting, only himself, defendant, and Sam Mallad were outside of the restaurant. The testimony presented at the *Robinson* hearing only intensifies the conflict between Amen's version of the incident and those of the other witnesses.

reached. Under the facts as presented, we do not feel that any purpose would be served by a remand to determine if the prosecution was excused from calling any or all of these witnesses. We have already discussed why much of this new testimony was not cumulative to the trial evidence. Even though no evidence was presented that the prosecution was aware of the identities of all of these witnesses, due diligence does not excuse the prosecution's failure to endorse. Since the defense discovered some of these witnesses prior to the trial, it must be assumed that a diligent investigation by the police would have resulted in similar discoveries. At least one of the witnesses at the *Robinson* hearing, Abdullah Nassar, was well-known to the police prior to the trial, since he had already been arrested and convicted for his part in the assault on Mr. Amen. We think it advisable that, after the prosecution endorses all res gestae witnesses on a possible retrial, the questions of exceptions to the res gestae rule, particularly in some areas of cumulativeness, be handled by the trial court.

Defendant's conviction is reversed and the cause remanded.

DECKER v NORFOLK AND WESTERN RAILWAY COMPANY

1. NEGLIGENCE—INSTRUCTIONS TO JURY—RAILROADS—WARNING DEVICES—STATUTES.

Refusal of a trial court to give a defendant's requested instruction to the jury was proper where the instruction, regarding the issue of whether a railroad breached its duty to maintain a crossing in a reasonably safe condition, would have precluded the jury from considering whether the railroad should have utilized other methods of warning in addition to the sign which was erected at the crossing; a statute which prohibits the erection of warning devices at a crossing without authorization does not abrogate a railroad's duty to maintain a crossing in a safe condition (MCLA 257.615; MSA 9.2315).

2. NEGLIGENCE—INSTRUCTIONS TO JURY—RAILROADS—WARNING DEVICES.

A trial court properly instructed a jury that they should determine whether in light of all the facts and circumstances reasonable prudence required a defendant railroad to maintain warning devices at a highway crossing in addition to the signs required by law where the evidence showed that the crossing in question was a double-track crossing which intersected the roadway at an angle such that a person in an automobile had to turn his whole body to see down the tracks, and at the time of a collision between a train and an automobile visibility was

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] Flagman: duty to maintain. 24 ALR2d 1161.

Signals: failure of signaling device at crossing to operate, as affecting railroad company's liability. 90 ALR2d 350.

Railroad crossing: customary or statutory signal from train as measure of railroad's duty as to warning at highway crossing. 5 ALR2d 112.

[3] 76 Am Jur 2d, Trial §§ 1154–1162.

[4] 5 Am Jur 2d, Appeal and Error § 836.

22 Am Jur 2d, Damages § 366.

Constitutional or statutory provision forbidding re-examination of facts tried by a jury as affecting power to reduce or set aside verdict because of excessiveness or inadequacy. 11 ALR2d 1217.

only 100 to 150 feet, during an evening snowstorm, and the train was traveling at 70 miles per hour.

3. JURY—JURY VERDICTS—INCONSISTENT VERDICTS—NEGLIGENCE—DUTY OF CARE.

Jury verdicts which have a logical explanation will not be found inconsistent; a verdict in favor of an automobile driver who was injured in a collision with a train, which held the railroad to be negligent but found no cause of action as to the train's engineer, was not thereby inconsistent because the railroad's duty of care extended beyond the actions taken by the engineer.

4. DAMAGES—JURY VERDICT—EXCESSIVE DAMAGES—EVIDENCE—JUST COMPENSATION.

A jury verdict of damages should not be set aside as excessive so long as the amount awarded is within the range of the evidence and within the limits of what reasonable minds might deem just compensation for such imponderable items as personal injuries sustained and pain and suffering.

Appeal from Wayne, George T. Martin, J. Submitted December 14, 1977, at Detroit. (Docket No. 30938.) Decided March 7, 1978. Leave to appeal applied for.

Complaint by Harvey Decker, Jr., and Delores Decker against Norfolk and Western Railway Company and John B. Miller for damages for injuries received by Harvey Decker, Jr., in an automobile-train collision. Judgment for plaintiffs as against Norfolk and Western only. Norfolk and Western appeals. Affirmed.

Lampert, Fried & Levitt, P. C., for plaintiffs.

Bodman, Longley, Bogle & Dahling (by *Frederick C. Nash),* for defendant Norfolk and Western Railway Company.

Before: N. J. KAUFMAN, P. J., and BRONSON and D. E. HOLBROOK, JJ.

D. E. HOLBROOK, J. This personal injury action

arises from a January 29, 1971, accident at a railroad crossing in Van Buren Township, Wayne County, Michigan, between plaintiff's automobile and defendant's train. At approximately 8 p.m., plaintiff, Harvey Decker, Jr., was struck by a train owned and operated by defendant, Norfolk and Western Railroad, at the intersection of Martz Road and the Norfolk and Western's tracks. At the time of the accident, the train was traveling approximately 70 miles per hour. It was dark with a heavy snow falling which made visibility very poor. Because of the poor visibility, the plaintiff testified that he was not able to see more than 100 to 150 feet down the railroad tracks. After trial by jury, a verdict was returned in favor of Harvey Decker, Jr., in the amount of $800,000 and in favor of Delores Decker, his wife, in the amount of $100,000 in her claim for loss of consortium, services and companionship. On October 14, 1976, defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. Defendant thereupon claimed an appeal to this Court.

The first issue defendant raises is that the trial court erred in refusing to instruct the jury as requested by defendant that there was no duty on the railroad to install advance or automatic crossing protection at the Martz Road crossing at or before the time of the accident.

The defendant requested the following supplemental instruction: "There has been testimony concerning advance or automatic crossing protection. You are instructed that there is no duty upon the Railroad to install such protection in this case and such testimony shall play no part in your deliberations." The request was denied by the trial court.

This issue was raised by defendant in its motion

for judgment notwithstanding the verdict or for a new trial. The trial judge held: "1. Defendant's supplemental request to charge (No. 1) was not given because it would deprive the jury of its determination of testimony regarding protection at the railroad crossing."

Defendant maintains that under MCLA 257.615; MSA 9.2315,[1] the railroad was unable to erect devices at the crossing in addition to the crossbuck sign unless authorized to do so by statute or by an authorized public body or official, and no such authorization had been given. Therefore, it was error not to give the requested supplemental instruction.

Defendant cites *Masters v Grand Trunk W R Co,* 13 Mich App 80, 82–83; 163 NW2d 661 (1968), wherein the Court stated:

"The trial court's interpretation of the statute [MCLA 257.615; MSA 9.2315] was strict and did not deprive the plaintiff of jury consideration concerning the common-law duties of a railroad to act in a manner that a jury might find reasonable under the circumstances, *but merely absolved the railroad from a duty to install additional signs and signals.* In addition to giving the substance of plaintiff's requests on general common-law duties and definitions of negligence, the court instructed the jury in substance that *if the crossing was found by them to be unusually dangerous, outlining the facts and*

[1] "(a) Except with authority of a statute or of a duly authorized public body or official, no person shall place, maintain, or display along any highway or upon any structure in or over any highway any sign, signal, marking, device, blinking, oscillating or rotating light or lights, decoration or banner which is or purports to be or is in imitation of or resembles or which can be mistaken for a traffic control device or railroad sign or signal, or which attempts to direct the movement of traffic, or which hides from view or interferes with the effectiveness of any traffic control device or any railroad sign or signal, and no person shall place or maintain nor shall any public authority permit upon any highway any traffic sign or signal bearing thereon any commercial advertising."

circumstances that could make it such, the railroad must meet the peril by commensurate precautions, but that because of the statute it was not required to post additional warning signs.

"The court properly advised the jury that the duty to maintain crossings in a reasonably safe condition was not abrogated by the statute. *Such other means might include a flagman, whistles or other efficient local warnings* as discussed in *Bauman v Grand Trunk Western Railroad Company* (1965) 376 Mich 675 [138 NW2d 285]. Unlike that case, however, here the issues were presented to the jury and it found no cause of action. *The charge as given fairly reflects the principle that while a railroad is not absolved from its common-law duty of maintaining its crossings in a reasonable manner, it cannot be held accountable for the failure to erect signs where such choice of whether or not to erect is precluded by statute."* (Emphasis added.)

Therefore, defendant claims that the erection of the signs and traffic control devices, such as flashers and gates, is not one of the ways remaining open to the railroad for carrying out its common-law duty. Defendant cites *Masters, supra,* and *Johnson v Grand Trunk W R Co,* 58 Mich App 708; 228 NW2d 795 (1975), and states: "There are unquestionably other ways in which, where the circumstances justify it, the railroad may carry out its common law duty without violating the statute," *i.e.* the use of flagmen, whistles or other efficient local warnings.

Defendant's reliance on the instructions in *Masters, supra,* is misplaced. In *Masters, supra,* at 83, the instruction was:

"[T]he court instructed the jury in substance that if the crossing was found by them to be unusually dangerous, outlining the facts and circumstances that could make it such, the railroad must meet the peril by commensurate precautions, but that *because of the*

statute it was not required to post additional warning signs." (Emphasis added.)

In the instant case, the defendant asked that the jury be instructed: "There has been testimony concerning *advance* or automatic crossing protection. You are instructed that there is no duty upon the Railroad to install such protection in this case and such testimony shall play no part in your deliberations." (Emphasis added.) Defendant in its requested instruction has gone beyond *Masters, supra,* which held that defendant cannot be required to post additional *warning signs.* In the instant case, defendant includes *"advance or automatic crossing protection".* This is too broad and would have had the effect of directing a verdict to defendant and abrogating the defendant's duty to maintain the crossing in a reasonably safe condition. The other means available to maintain a safe crossing as mentioned in *Masters, supra,* and *Bauman v Grand Trunk W R Co,* 376 Mich 675; 138 NW2d 285 (1965), *i.e.,* a flagman, whistles, etc., would be considered "advance" crossing protection and the jury would be prohibited by such an instruction from considering such means of warning in determining if defendant breached its common-law duty to maintain a safe crossing.

The trial judge properly refused to give defendant's supplemental instruction number one and defendant's issue is without merit.

The next issue defendant raises on appeal is that the trial judge erred in instructing the jury that "The jury must determine whether in light of all the facts and circumstances surrounding the Martz Road crossing, reasonable prudence required the railroad, Norfolk & Western, to maintain devices warning the motorist of its approach-

ing train in addition to the crossbuck signs required by law and present at the crossing".

The instruction at issue was contained in the following instructions to the jury:

"I charge you, members of the jury, that the railroad's duty of due care may require it to provide warnings over and above those provided by statutory law or statutory regulations. The test is not whether the conditions were unusually dangerous, but whether what was done under the circumstances met the test of an ordinary prudent man, under the same or similar circumstances.

"I further charge you that compliance with the orders of the Michigan Public Service Commission is among the circumstances and certainly evidence that the jury should consider in determining whether the railroad was negligent, but compliance with the Commission's order is only one of the circumstances that the jury shall consider.

"*The jury must determine whether in light of all the facts and circumstances surrounding the Martz Road crossing, reasonable prudence required the railroad, Norfolk & Western, to maintain devices warning the motorist of its approaching train in addition to the crossbuck signs required by law and present at the crossing.*

"If the jury determines there was such a duty and the railroad failed to provide additional warning devices, the jury must decide whether such failure to provide additional warning devices proximately caused the collision." (Emphasis added.)

The defendant asserts that this instruction was erroneous in its motion for judgment notwithstanding the verdict or for a new trial. The trial judge held:

"The charge given to the jury by the court as to the railroad's duty of due care was conditioned upon the jury's determination from the evidence. The testimony

at trial was sufficient to justify the charge. This court relied upon the law stated in *Emery v Chesapeake & Ohio Railway Co.,* 372 Mich 663 [127 NW2d 826 (1964)]; *Ebel v Board of County Road Commissioners of the County of Saginaw,* 386 Mich 598 [194 NW2d 365 (1972)]; and *Johnson v Grand Trunk Western Railroad Co.,* 58 Mich App 708 [228 NW2d 795 (1975)]."

This Court in *Johnson v Grand Trunk W R Co,* 58 Mich App 708, 716–717; 228 NW2d 795 (1975), stated:

"It is undisputed that Grand Trunk was in compliance with the 1933 and 1946 MPSC orders. However, compliance with MPSC orders does not preclude a finding of negligence. *Emery v Chesapeake & O R Co,* 372 Mich 663; 127 NW2d 826 (1964); *Ebel v Saginaw Road Commissioners,* 386 Mich 598; 194 NW2d 365 (1972). In *Ebel,* plaintiff's car collided with a flasher warning device installed pursuant to a 1928 MPSC order. In remanding for a new trial because of the trial court's refusal to instruct the jury on the railroad's common-law duty to maintain safe crossings, the Court said:

" 'In *Emery v Chesapeake & O R Co,* 372 Mich 663; 127 NW2d 826 (1964), and in *Baldinger v Ann Arbor R Co,* 372 Mich 685; 127 NW2d 837 (1964), this Court treated extensively of the "unusual conditions" or "special circumstances" and "local warnings" rule, and reaffirmed the long-standing rule that the railroad's duty of due care may require it to provide warnings over and above those required by statutory law or safety regulations. The test is not whether the conditions were *unusually* dangerous, but whether what was done under the circumstances met the test of an ordinarily prudent man under the same or similar circumstances.

* * *

" 'Compliance with the commission's orders for the installation and maintenance of certain warning devices are among the circumstances and certainly evidence the *jury* should consider in determining whether

the railroad was negligent, but it cannot be said as a matter of law that compliance with such commission's order is to be equated as freedom from negligence.' *Ebel, supra,* 386 Mich 598, 605–606; 194 NW2d 365, 368." (Emphasis in original.)

Defendant claims that plaintiffs failed to present a prima facie case that defendant had breached its common-law duties, for the reason that there was nothing with respect to the Martz Road crossing from which the jury could reasonably infer that additional safeguards were required. Defendant cites *Baldinger v Ann Arbor R Co,* 372 Mich 685; 127 NW2d 837 (1964), in support of its position. The Court in *Baldinger, supra,* at 690 stated:

"Now we must ascertain whether, on due favorable view, the proof entitled plaintiff to an instruction authorizing jury determination of the posed question, that is, whether the circumstances were of such nature as to call for 'some efficient local warning,' over and above statutory requirements and the requirements of safety regulations promulgated by the public service commission."

The Court in *Baldinger* answered this by stating at 691–693:

"Upon such favorably assembled presentation plaintiff claims that the combination of bad weather and the described obstruction of view presented, for jury consideration, question whether the railroad should, under the aforesaid 'dangerous crossing' rule, have posted 'a flagman or a watchman at the crossing on this day,' or should have stopped the train to 'send a flagman on ahead to warn traffic before crossing this unusually dangerous crossing.' To this we are constrained to reply that no respectable authority has been cited *holding that, at a typical open country single track rail crossing of a secondary road, where there is a partial obstruction of view of a train approaching from given direction on a*

straight track, the highway approach being at the same or substantially same level as that of the track and the upper half of the train being day-time visible for a thousand and more of the approach-feet thereof, such circumstances permit submission to the jury of what we may rightly call the 'dangerous crossing' rule." (Emphasis added.)

The facts in the instant case are not the same as in *Baldinger.* In *Baldinger* there was a single track crossing, but in our case, it was a double track crossing; in *Baldinger* the upper half of the train was day-time visible for 1,000 feet, but in the instant case, the plaintiff could only see 100 to 150 feet. In *Baldinger* the tracks intersected with the road at a 90-degree angle allowing a full view both ways down the tracks, but in the case at bar, the tracks intersected at a 40-degree angle and a person had to turn their whole body to see down the tracks; also, in *Baldinger* the accident occurred at noon on a rainy day in July, whereas this collision occurred during an evening snowstorm; additionally, in *Baldinger* the train was traveling 37 to 45 miles per hour, but, in the instant case, the train was traveling at 70 miles per hour.

This Court takes notice that the defendant in its closing argument described the Martz Road crossing as a "dangerous crossing" and inferred it was an "exceeding dangerous crossing". We find it incongruous that the defendant should characterize this crossing as "dangerous" in its closing argument but on appeal argue that the jury should not consider whether additional crossing protection should have been provided.

Thus, there was sufficient evidence to support the instructions to the jury and the issue was properly submitted to them. Defendant's second issue is without merit.

Next, the defendant alleges that the jury verdict in favor of plaintiffs was inconsistent as a matter of law with the verdict returned in favor of the train engineer.

This issue was raised in defendant's motion for a judgment notwithstanding the verdict or for a new trial. The trial judge held:

"2. Defendant claims plaintiff Harvey Decker was guilty of contributory negligence as a matter of law. This contention springs from the jury's verdict of no cause of action as to the defendant railroad engineer. However, defendant railroad's conclusion does not necessarily follow from the jury's verdict. There are other interpretations of the no cause verdict than the one favored by defendant railroad.

"Furthermore, such verdict does not dictate that plaintiff Harvey Decker was contributorily negligent, and that such negligence was a proximate cause of the accident. This view is suggested in *Cookson v Humphrey,* 355 Mich 296 [93 NW2d 903 (1959)].

" 'Jury verdicts which have a logical explanation will not be found inconsistent.' *National Pharmaceutical Services, Inc v Harrison Community Hospital,* 67 Mich App 286 [241 NW2d 76 (1976)]. The jury's verdict in this case has the logical explanation that the engineer was not negligent so as to be a proximate cause of the accident, whereas the defendant railroad was so negligent."

Defendant is bootstrapping its position in maintaining that because the jury returned a verdict in favor of the train engineer, the jury must have found that the speed of the train was reasonable, that the headlight was properly working, and that the whistle was properly sounding. Therefore, as a matter of law, plaintiff was contributorily negligent in failing to heed the warnings and that such negligence was a proximate cause of the accident. However, this does not necessarily follow. The

verdict in favor of the train engineer does not mean that the jury found that the train's whistle was blowing or that the headlight was shining. It is also possible that the jury may have concluded that the engineer was negligent, but that his negligence was not a proximate cause of the accident. See *Johnson v Grand Trunk W R Co*, 58 Mich App 708; 228 NW2d 795 (1975).

Defendant's common-law duty of care extended beyond the actions taken by the engineer. The jury's verdict as to the engineer does not require that the plaintiff must have been contributorily negligent and that such negligence must have been a proximate cause of the accident. Defendant's issue is without merit.

The last issue of defendant claims that the damage awards to Mr. Decker of $800,000 and Mrs. Decker of $100,000 are excessive.

Defendant maintains that Mr. Decker's preexisting conditions of heart disease, ulcers, weight problems and degenerative disc disease would have eventually caused the pain that resulted from the car-train accident. Thus, the myelogram and the two cervical laminectomies would have had to have been performed eventually and the effect of the accident was to accelerate the symptoms which necessitated the operations. Plaintiffs claim that the jury verdict is within the range of evidence and should be upheld.

This Court in the recent case of *Pippen v Denison Division of Abex Corp*, 66 Mich App 664, 674–676; 239 NW2d 704 (1976), *lv den* 399 Mich 823 (1977), set out the principles by which this Court will review jury awards for excessiveness. In *Pippen, supra*, the plaintiff, aged 67, lost an arm in a power press. He sued for breach of warranty and negligence. His wife, also 67, sued for loss of

consortium. The jury returned a verdict of $1,250,-000 for the husband and $500,000 for the wife. The trial court ordered *remittitur.* This Court reversed and held:

"Clearly, the trial judge is not empowered to go through *de novo* review of the verdict returned by the jury. The *remittitur* power should be exercised with restraint. The courts are even more reluctant to allow jury verdicts in personal injury cases to be disturbed. The rationale for that deference to the jury is found in the early case of *Watrous v Conor,* 266 Mich 397; 254 NW 143 (1934):

" 'There is and can be no absolute standard by which we can measure the amount of damages in personal injury cases. Individual opinions may differ as to the correctness of awards, even those made by trial judges. It has yet to be determined whether the judgment of a one-man jury is sounder than that of 12. * * * Adopting defendant's contention that, at best, the showing here is only one of pain and suffering, plus expenses for medical services and hospitalization attention, we still prefer our rule stated in the case of *Weil v Longyear,* 263 Mich 22 [248 NW 536 (1933)], that the amount allowed for pain and suffering must rest in the sound judgment of the trier of the facts. Assuming even that our verdict might be in a different amount, we are loath to disturb verdicts for personal injuries on the ground that the amount is excessive.' 266 Mich at 401.

See also, *O'Grady v Rydman,* 347 Mich 606; 81 NW2d 383 (1957), *Cleven v Griffin,* 298 Mich 139; 298 NW2d *[sic]* 482 (1941), *Morgan v Engles,* 13 Mich App 656; 164 NW2d 702 (1968), *shirley [sic] v The Drackett Products Co,* 26 Mich App 644; 182 NW2d 726 (1970), and *Dillard v Braunstein,* 32 Mich App 216; 188 NW2d 203 (1971), for similar reasoning.

"With the extra regard for the jury assessment in personal injury cases, the 'shock the conscience' test becomes:

" ' "As long as the amount awarded is within the range of the evidence, and within the limits of what reasonable minds might deem just compensation for

such imponderable items as personal injuries sustained and pain and suffering, the verdict rendered should not be set aside." ' *Stevens v Edward C Levy Co,* 376 Mich 1, 5; 135 NW2d 414 (1965).

* * *

"The original jury verdict of $1,750,000 for plaintiffs was supported by the record, and does not 'shock' our 'judicial conscience'. The plaintiff John Pippen testified as to intense pain and suffering from his injuries, and Evelyn Pippen told of the problems that had resulted to their relationship as husband and wife." *Pippen, supra,* at 674–676.

See also, *Kulhanjian v The Detroit Edison Co,* 73 Mich App 347; 251 NW2d 580 (1977), wherein this Court upheld a jury verdict of $1,000,000 as not being excessive. The plaintiff had backed into a hot wire and was seriously injured.

There appears to be no argument with the testimony of Dr. Henderson, an economics professor at Michigan State University, that Mr. Decker's earning capacity from the date of the accident until the end of his normal life expectancy is $306,823. Mr. Decker's medical bills were around $20,000 and, therefore, approximately $473,000 was awarded for pain and suffering.

The plaintiff was 38 years of age at the time of the accident. After spending four to five days in the hospital, plaintiff was released. Plaintiff complained of excruciating headaches, dizziness and pains in his arms. He visited his family doctor, whose diagnosis was that plaintiff suffered post concussion syndrome, laceration of the right ear, abrasions and contusions of both knees, hematoma of the left anterior tibial area, hematoma of the right shoulder area, hematoma of the left upper arm and general traumatic right-sided fibro myositis.

Plaintiff was sent to a neurosurgeon whose diag-

nosis was post cerebral concussion syndrome, which was the result of the injury to the head and the jarring of the brain, post traumatic cervical and epidoural strain, and lypertrophic osteoarthritis of the spine. Plaintiff was then placed in the hospital for three weeks where a myelogram was performed and he was put in traction. After his release from the hospital, plaintiff had to be in traction at home for two out of three waking hours. Plaintiff's pain continued and another doctor found a pinching of the nerve between the sixth and seventh neck bone. In order to correct this, a cervical laminectomy was performed. This operation is a dangerous one and can result in paralysis or death. The operation seemed to be a success and plaintiff was able to work again. However, the pain returned to plaintiff's left shoulder and arm and a second cervical laminectomy was performed.

Plaintiff continued to have pains in his arm and shoulder, however, the doctor refused to do a third laminectomy because the risk was too great. Plaintiff has continued to have headaches and pains in his arms and shoulder since the accident and may continue to have these problems in the future.

In addition, Mr. Decker no longer enjoys the outdoor recreational activities that he had in the past, including hunting and fishing. In the past plaintiff worked with the Boys Scouts, but now is unable to do so because of his nerves. His wife testified as to his change of moods toward her and the children. Also, their sexual relationship is no longer the same.

We agree with the trial judge that a verdict of $800,000 for Mr. Decker and $100,000 for Mrs. Decker was properly returned by the jury and within the range of evidence.

Affirmed, costs to plaintiffs.

EARL DUBEY & SONS, INC. v MACOMB CONCRETE CORPORATION

1. APPEAL AND ERROR—DIRECTED VERDICT—EVIDENCE—JURY QUESTION—JUDGMENT—JUDGMENT NOTWITHSTANDING VERDICT—FACTS AND INFERENCES.

   The Court of Appeals must view evidence in a light most favorable to the plaintiff when reviewing a denial of a directed verdict and if, in doing so, the Court determines that there is any evidence which was competent and sufficient to support the jury's determination, the jury's resolution of the case should be affirmed; a motion for judgment notwithstanding the verdict is reviewed even more strictly, since the facts are viewed inferentially in favor of the non-moving party.

2. CONTRACTS—SIGNATURES—MULTIPLE PARTIES—BURDEN OF PROOF—INTENTION—EVIDENCE—QUESTION OF FACT.

   A contract signatory who claims that the contract is void because all of the intended parties did not sign has the burden of proving that it was the intent of all the parties that none should be bound unless all signed; intention governs, and whether the signers of a contract intended to be bound by its terms even though less than all the named persons sign is a question of fact to be decided upon the evidence.

3. APPEAL AND ERROR—DIRECTED VERDICT—CONTRACTS—EVIDENCE—JUDGMENT—JUDGMENT NOTWITHSTANDING VERDICT—FACTS AND INFERENCES.

   The denial of a defendant's motion for judgment notwithstanding the verdict is not error where the facts, viewed inferentially, are in the plaintiff's favor.

4. CONTRACTS—CONSIDERATION—WILL OF PROMISOR—UNENFORCEABLE PROVISIONS.

   A promise to advance money which is dependent on the will of the promisor is unenforceable.

REFERENCES FOR POINTS IN HEADNOTES

[1, 3] 75 Am Jur 2d, Trial § 474.
[2] 17 Am Jur 2d, Contracts §§ 18–22, 245.
[4] 17 Am Jur 2d, Contracts §§ 10–13.
[5, 6] 17 Am Jur 2d, Contracts §§ 230, 231.
[7] 22 Am Jur 2d, Damages § 161.

5. CONTRACTS—ENFORCEABLE PROMISES—UNENFORCEABLE PROMISES—INDEFINITENESS—ENFORCEMENT OF VALID PROMISES.

Unenforceable promises in a contract will not vitiate the entire contract where there are promises that are enforceable; if portions of a contract are unenforceable by the terms of the agreement, it will not affect the enforceability of other portions of the contract that are valid.

6. CONTRACTS—CONSIDERATION—ENFORCEABLE AND UNENFORCEABLE PROVISIONS.

Adequate consideration in exchange for an enforceable promise in a contract having both enforceable and unenforceable provisions makes the enforceable portion of the contract binding on both sides.

7. DAMAGES—CONTRACTS—PREVENTION OF PERFORMANCE—LOSS OF PROFITS—SPECULATIVE DAMAGES—ACTUAL EXPENDITURES—VALUE OF SERVICES—RELIANCE DAMAGES.

Generally, the measure of damages from the prevention of performance of a contract would be the loss of profits to the plaintiff, but where the profits are wholly speculative and unprovable, the one who prevents performance should not go scot-free because the claimant should at least be made whole for his losses and expenditures; where profits are speculative, the measure of damages is the actual expenditures and value of services reasonably spent in an attempt to perform the contract or in reliance upon it; therefore, a plaintiff may properly seek reliance damages based on the reasonable expenses incurred in attempting to perform the contract.

Appeal from Macomb, Robert J. Chrzanowski, J. Submitted January 5, 1978, at Lansing. (Docket No. 77-216.) Decided March 7, 1978. Leave to appeal applied for.

Complaint by Earl Dubey & Sons, Inc., against Macomb Concrete Corporation for rescission of and seeking damages for fraud, misrepresentation and breach of contract. Sentry Insurance, Dubey's surety, was added as a party plaintiff by stipulation of the parties. Counter-complaint by Macomb Concrete against Dubey and Sentry seeking damages for breach of contract. Judgment for plaintiff

Dubey. Defendant appeals by leave granted. Affirmed.

Freihofer, Oosterhouse, DeBoer, Barnhart & Cooper, P. C. (by *Peter R. Tolley),* for plaintiff.

Robert P. Dank, P. C., for defendant.

Before: V. J. BRENNAN, P. J., and D. E. HOLBROOK and R. B. MARTIN,* JJ.

D. E. HOLBROOK, J. Plaintiff, Earl Dubey and Sons, Inc., commenced this action for rescission of an agreement as the result of the anticipatory breach by defendant, Macomb Concrete Corporation, and for damages in excess of $300,000. Plaintiff, Sentry Insurance, sought discharge of its liability on a performance bond. Defendant Macomb counter-claimed that plaintiffs were in default under the agreement and Macomb sought damages for fulfilling the contract by other means. Following a five-week trial, plaintiffs' equitable claims were taken from the jury and resolved adversely to plaintiffs by the trial judge. These theories were fraud, misrepresentation, mutual mistake and economic impossibility of performance. However, the trial court ruled that the breach of contract claim should be submitted to the jury. On April 26, 1976, the jury returned a verdict in plaintiff Dubey's favor for $313,661.56. Defendant's motion for judgment notwithstanding the verdict was denied on September 13, 1976. Thereafter, defendant claimed an appeal as of right to this Court, but on motion of plaintiffs, the claim was dismissed as not timely filed. Defendant then made application for delayed appeal and on June 1, 1977, this Court granted leave.

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

To have a proper understanding of this case, a complete recitation of the facts is necessary.

Plaintiff Earl Dubey and Sons, Inc. is a Michigan corporation located in Alpena, Michigan, and primarily engaged in the business of excavating, gravel crushing and sand and gravel production.

Defendant Macomb Concrete Corporation, now known as Macomb Contracting Corporation, is a Michigan corporation located in Fraser, Michigan, and is primarily engaged in highway and airport runway construction.

Plaintiff Sentry Insurance was Dubey's surety on certain performance bonds concerning a sand and gravel production contract between Dubey and Macomb.

In 1973, the City of Houston, Texas, decided to resurface runways 14 and 32 of the Houston Intercontinental Airport. Macomb Concrete was one of four bidders for the contract, and was awarded that contract by resolution of the city commission on November 13, 1973. Macomb's bid of $10,057,-607 was $2,000,000 less than the next lowest bidder.

In order to construct the concrete overlays for the runways and associated taxiways at the airport, Macomb was required under the city contract to locate and have available 243,000 tons of aggregate materials which were comprised of 100,000 tons of coarse aggregate (gravel) and 143,000 tons of fine aggregate (sand). The City of Houston's contract carefully specified both the quality and size of the sand and gravel aggregates which could be used for the making of the concrete. It was the various sizes of the fine aggregate (sand) which eventually led to this entire protracted litigation. According to these specifications, with respect to the sand aggregate, out of a 100 per cent sample, a

certain percentage had to fall within a certain size category. There were eight such size categories. Specifications were set out as follows:

Sieve Designation (Square Openings)	Percentage by Weight Passing Sieves
3/8 inch	100
No. 4	95–100
No. 8	65–80
No. 16	45–60
No. 30	30–45
No. 50	15–30
No. 100	5–10
No. 200	0–2

The specifications also specifically proscribed against acquiring the sand aggregates from an area in Texas known as the San Jacinto River Basin which is located in close proximity to the City of Houston. This is an area known geologically to contain aggregates much too fine in size to meet the city's contract specifications. Despite this specific proscription, Macomb selected a site near Houston called the Cle-Tex pit from which it planned to get its sand and gravel. *This pit was located in the San Jacinto River Basin.* Dubey testified that he saw the language in the contract, "local fine, dirty, unsound fine sand (called field sand) as produced from the San Jacinto River or the Montgomery Formation is not permissible" but that William Buck, the vice-president of Macomb Contracting, said that the materials from the Cle-Tex pit could be used and would pass for the qualities required by the City of Houston. Macomb contracted with an engineering firm known as Murillo Testing Company to do an analysis of the Cle-Tex pit. The conclusion of the firm was that the sand and gravel met all the requirements of the specifications except for gradation, but this condition

could be remedied by careful quality control during production. The sieve analysis as to the gradation of the sand by the engineering firm indicates that the sand was too fine to meet contract specifications.

Sieve Size	Percent Passing	City Specifications
3/8	100	100
No. 4	98	95–100
No. 8	93	65–80
No. 16	87	45–60
No. 30	75	30–45
No. 50	37	15–30
No. 100	4	5–10
No. 200	–	0–2

Macomb contacted Dubey and negotiated a contract with Dubey to produce the sand and gravel out of the Cle-Tex pit, which then would be delivered to Macomb in Houston to make the concrete for the airport runways. This contract was executed on January 31, 1974, and required Dubey to produce the required tonnage of coarse and fine aggregates (sand) from the Cle-Tex pit for the contracted price of $543,000. Macomb required of Dubey that it supply performance bonds in such an amount, and such bonds were in fact provided by Sentry Insurance. Dubey was to produce the sand and gravel materials within 180 days or by June 3, 1974.

The contract was signed by Macomb and Dubey after extensive negotiations, including at least four preliminary drafts each containing various modifications. Prior to the execution of the contract, Macomb had advanced $20,000 to Dubey towards expenses of design and shipment of plant equipment. The contract called for further advances of $43,000 upon signing, and an additional $100,000

for plant and site preparation which was paid by Macomb before production was attempted.

Dubey took possession of the Cle-Tex site in February of 1974, and had no difficulty in producing the gravel requirements under its contract with Macomb, but soon discovered the deficiency of the sand deposits and the fact that specification sand could not be made from the Cle-Tex pit. Despite the introduction of special equipment and the development of new and novel mining devices, no specification sand could be produced without wasting up to 60 per cent of the materials being mined at Cle-Tex.

By May of 1974, no specification sand had been produced, although Dubey was producing specification gravel. Macomb then hired a specialist by the name of Finis White who was to work and consult with Dubey in an effort to produce the specification sand. It is not contested that Mr. White was considered to be the foremost authority in the southwest, if not the country, on sand and gravel production. Like Dubey, he failed to find a way to produce specification sand from the Cle-Tex pit without "blending"; that is, by mixing Cle-Tex aggregates with materials brought in from another site.

By the end of May 1974, and although Dubey had been on the production site for approximately three months, no specification sand could be produced. On May 28, 1974, Dubey and Macomb amended the original contract. This agreement acknowledged difficulties in producing the sand from the Cle-Tex pit, and provided for an extension of time within which Dubey was to complete performance, and also provided that Macomb was to advance against Dubey's original contract price

certain payments to creditors. The contract provided that Dubey was to be able to substantially perform within 14 days at the rate of 2,000 tons a day and if it could not produce 20,000 tons between the 14th and 24th day, he was to quit the premises. Macomb advanced $25,000 jointly payable to Dubey and his creditors and also agreed to advance $33,000 to Westinghouse Credit Corporation, the lienholder on Dubey's plant.

The parties operated under the May 28 agreement until the end of June 1974, and at that time no economical way could be found to produce specification sand. Dubey left Texas and returned to Michigan in an attempt to negotiate a further extension of time and still more advances on the contract. In Michigan, Dubey was told by Jim Hicks, Macomb's executive vice-president, that Macomb would not advance Dubey any further funds.

On July 12, 1974, a meeting was held at the offices of Bracewell and Patterson, Macomb's Texas counsel. Present at the meeting were Wayne Dubey; counsel for Dubey; Orville Loos, the president of the lessor, Cle-Tex; counsel for Cle-Tex; a representative from Sentry Insurance, Dubey's bonding company; a representative of Westinghouse Credit and representatives of Macomb. At this meeting, Cle-Tex accused Macomb of being in breach of its lease through the actions of Dubey in allowing a labor and materials lien to attach to the leased pit and threatened to evict Macomb from the leased pit. Discussions occurred about further advances of funds to Dubey and a further extension of time, but no agreement was reached. A further meeting was held sometime between July 12 and July 17. Present were the same parties with the exception of Dubey's counsel. Cle-Tex again alleged a breach of Macomb's lease which

created a default and alleged a breach of a June 1 equipment lease by Dubey.

The parties entered into the last amendatory agreement, this one dated July 17, 1974. By this agreement Macomb agreed to further extend time for Dubey's performance and to pay certain of Dubey's creditors as an advance towards his original contract price. These payments to Dubey's creditors were made optional and discretionary with Macomb. In exchange for this, Dubey agreed to perform phase one of the original contract by blending sand from the Cle-Tex pit with a coarser sand found approximately 150 miles north of Houston so as to make specification materials. Phase one would have required about 20,000 tons of specification sand. Dubey agreed to pay the cost of this blend material, although the original contract provided that Dubey was to mine, wash and stockpile materials, and Macomb was to pay the cost of raw materials. Dubey also agreed to pay the expense of the consultant, Finis White, an expense which was originally that of Macomb.

Earl Dubey and Sons also agreed to provide Macomb with a promissory note payable to Macomb in the amount of the original contract price of $543,000 or so much thereof as Macomb had advanced, a security agreement giving to Macomb as collateral for the promissory note all of Dubey's equipment in Texas and a personal guarantee executed by Dubey's principal, Wayne Dubey, personally guaranteeing the promissory note of July 17.

In addition to Dubey and Macomb, Cle-Tex, Inc., the owner of the Cle-Tex sand pit, and Sentry Insurance were to be parties to this agreement. Dubey and Macomb executed and delivered all of the agreements on July 17 without requiring Sen-

try or Cle-Tex to execute those documents. Sentry's agent, at the meeting which culminated in the agreement of the 17th, gave approval to the agreements but wanted the home office to execute the documents. They were never signed by Sentry. Cle-Tex also refused to sign the contract.

Pursuant to the terms of the security agreement of July 17, on July 22, 1974, Macomb effectuated the recordation of a UCC financing statement making claim to a security interest in all of Dubey's assets. On July 24, pursuant to those agreements, Macomb paid one of Dubey's creditors, Cle-Tex, in the amount of $10,591.55.

In reliance on the agreements, Dubey began tooling up his operation and ordered the blend materials which were to be mixed with the sand at the Cle-Tex site. On July 29, 1974, Macomb, through its attorney in Houston, announced by telegram that Dubey was in default, that Macomb was taking possession of the production site and that demand was being made for payment by Dubey of the promissory note and personal guarantee of July 17, 1974. Dubey's plant was closed and the relationship between Dubey and Macomb was ended.

On September 13, 1974, Dubey brought this action in the Alpena County Circuit Court against Macomb seeking restitution based upon fraud, misrepresentation, mutual mistake, impossibility of performance and breach by Macomb of its contractual obligations under the agreements between the parties. Macomb filed a motion for change of venue, said motion was granted by the Alpena County Circuit Court judge and venue was moved to Macomb County Circuit Court on December 9, 1974. Sentry then joined Dubey as a party-plaintiff. On March 12, 1975, Macomb filed a counter-

claim against both Dubey and Sentry seeking money damages for breach of contract. The issues were joined for trial by jury which commenced in the Macomb County Circuit Court on March 2, 1976.

The defendant raises four issues on appeal that have been restated and rearranged into three issues for consideration.

The first issue is whether the July 17, 1974, agreement to extend the time of Dubey's performance was binding on Macomb so as to give rise to a cause of action for Macomb's breach where the agreement involved multiple parties, not all of which signed, but where Macomb took action consistent with the agreement in regards to Dubey.

The defendant maintains that the trial court should have granted its motion for a directed verdict because there was no evidence presented by Dubey that defendant Macomb, after learning of the Cle-Tex repudiation of the amended contract, did any act which evidenced an intention to be bound notwithstanding the refusal of Cle-Tex to sign the document.

In *Sexton v American Aggregates,* 60 Mich App 524, 530–531; 231 NW2d 449 (1975), the standard for review of a motion for a directed verdict was set out as follows:

> "In reviewing a claim that a motion for directed verdict was erroneously denied, the Court must view evidence in a light most favorable to plaintiff. If, when doing so, the Court determines that there is 'any evidence which was competent and sufficient to support the jury's determination', the jury's resolution of the case should be affirmed." (Citations omitted.)

A motion for judgment notwithstanding the verdict is reviewed even more strictly, since the facts

are viewed inferentially in favor of a non-moving party. *Jackson v Fox,* 69 Mich App 283, 285; 244 NW2d 448 (1976), *lv den* 399 Mich 863 (1977). With this standard in mind, we review the evidence to see whether the trial judge erred in denying the motion for a directed verdict and for a judgment notwithstanding the verdict.

The July 17, 1974, agreement was to be signed by Dubey, Macomb, Cle-Tex and Sentry Insurance. Although Sentry and Cle-Tex did not sign the agreement, both Dubey and Macomb signed it, along with a security agreement providing for Wayne Dubey's personal guarantee, and a promissory note from Dubey to Macomb.

Where there are multiple parties to a contract, a signatory has the burden of proving that it was the intent of all of the parties that none would be bound unless all signed. *Palman v Reynolds,* 310 Mich 35, 39–40; 16 NW2d 657 (1944). In *Wiegand v Tringali,* 22 Mich App 230, 234; 177 NW2d 435 (1970), this Court indicated that intent to be bound is a question of fact:

> "[T]hose who do sign the writing may have intended to be bound by its terms even though less than all the named persons sign. Their intention governs. The intention of the parties is a fact to be decided upon the evidence, not by invoking our personal, professional, or judicial experience."

In the instant case, the agreement does not explicitly provide that it is not to be binding until all parties sign. *Wiegand, supra,* p 235.

Defendant claims that its actions subsequent to the signing of the July 17, 1974, agreement can be

explained away and are not evidence of an intent to be bound by the agreement. While these facts might be interpreted in the light sought by defendant, this Court's review of the judgment notwithstanding the verdict motion requires that the facts be taken inferentially in plaintiffs' favor and not defendant's. *Jackson v Fox, supra.* While defendant presents a plausible argument that the payment to Cle-Tex was to preserve Macomb's rights under the lease, that Cle-Tex was threatening to forfeit, the payment is consistent with the agreement and must be taken inferentially to support plaintiffs' claim that the payment was made pursuant to the July 17 agreement. The most damaging evidence showing that defendant intended to be bound by the July 17 agreement is the July 29, 1974, telegram in which Macomb claimed the benefit of the note executed pursuant to the agreement. The telegram reads as follows:

> "PMS WAYNE DUBEY, PRESIDENT DLR
> EARL DUBEY & SONS INC. DRAWER O
> CLEVELAND TX 77327
>
> "DEMAND IS HEREBY MADE UPON YOU FOR IMMEDIATE PAYMENT OF THE FULL AMOUNT DUE UNDER THAT CERTAIN PROMISSORY NOTE DATED JULY 17, 1974 BETWEEN EARL DUBEY & SONS, INC. AS MAKER AND MACOMB CONCRETE CORPORATION AS PAYEE. THIS INDEBTEDNESS IS IN THE PRINCIPAL AMOUNT OF $178,591.55 PLUS INTEREST THEREON AT THE RATE OF 12-1/4 PER CENT FROM JULY 17, 1974, TO DATE. THIS INDEBTEDNESS IS PAYABLE AT THE OFFICES OF PAYEE, MACOMB CONCRETE CORPORATION, 33180 KELLY ROAD, FRASER, MICHIGAN, IMMEDIATELY.
>
> "DEMAND IS ALSO HEREBY MADE UPON YOU PERSONALLY FOR IMMEDIATE PAYMENT OF THIS INDEBTEDNESS UNDER THE GUARANTY MADE AND ENTERED INTO BY YOURSELF AS AN INDIVIDUAL ON JULY 17, 1974.
>
> "EARL DUBEY & SONS, INC. HAS NOT PRODUCED CON-

TRACT SPECIFIED QUANTITIES OF MATERIAL UNDER ITS AGREEMENTS WITH MACOMB CONCRETE CORPORATION, AND EARL DUBEY & SONS, INC. IS IN DEFAULT OF ITS OBLIGATIONS THEREUNDER. YOUR ATTENTION IS RESPECTFULLY CALLED TO PARAGRAPH 3 OF THE SAND AND GRAVEL REMOVAL AGREEMENT AND BOND APPROVAL DATED MAY 28, 1974 ENTERED INTO BY EARL DUBEY & SONS, INC., MACOMB CONCRETE CORPORATION AND SENTRY INSURANCE, A MUTUAL COMPANY. UNDER THAT PARAGRAPH, EARL DUBEY & SONS, INC. AGREED THAT IF IT COULD NOT PRODUCE CONTRACT QUANTITIES OF MATERIAL, IT WOULD VOLUNTARILY QUIT THE PREMISES AND SURRENDER POSSESSION OF ALL EQUIPMENT AT OR NEAR THE SITE TO MACOMB CONCRETE CORPORATION. MACOMB CONCRETE CORPORATION HAS ACCORDINGLY TAKEN POSSESSION OF THE PREMISES AND ALL EQUIPMENT AT OR NEAR THE PREMISES PREVIOUSLY OCCUPIED BY EARL DUBEY & SONS, INC. UNDER ITS AGREEMENTS WITH MACOMB. MACOMB CONCRETE CORPORATION WILL OPERATE THE FACILITIES LOCATED THERE IN AN EFFORT TO MITIGATE THE DAMAGES SUSTAINED BY IT DUE TO EARL DUBEY & SONS, INC.'S DEFAULT.

"CHARLES G. KING
BRACEWELL & PATTERSON
1808 FIRST CITY NATIONAL BANK BUILDING
HOUSTON, TEXAS 77002
ATTORNEYS FOR MACOMB CONCRETE CORPORATION."

Additionally, defendant claims that there was no evidence that it took any further action in reliance on the July 17 agreement after learning that Cle-Tex would not sign the agreement. This is not supported by the record. James Hicks, an executive vice-president of Macomb, testified as follows:

"Q. [Plaintiffs' attorney] Now, when did you learn that Cle-Tex had refused to go through with signing the documents that were prepared on July 17th?

"A. Oh, my guess is it was within a day or two after that date."

Therefore, Macomb knew on either July 18 or 19 that Cle-Tex was not going to sign the agreement. However, the security agreement was filed on July 22, 1974. Also, the telegram demanding payment under the July 17 note was dated July 29, 1974. Thus, defendant did take further action after it had knowledge that Cle-Tex would not sign the agreement.

Given the evidence that defendant proceeded under the advantageous portions of the July 17 agreement, this Court holds that there was sufficient evidence for the jury to make a finding of intent to be bound even though the parties other than Dubey and Macomb did not sign the agreement. Thus, there was no error in denying the motion for directed verdict. Additionally, when these facts are viewed inferentially in plaintiffs' favor, no error can be predicated on the denial of the motion for judgment notwithstanding the verdict.

The next issue is whether the July 17 agreement was unenforceable as illusory so as to preclude a finding of defendant's breach inasmuch as the agreement in part gave defendant the option at its sole discretion to make advance payments to plaintiff, but where the agreement also extended the time of plaintiff's performance and was supported by consideration for the extension of time.

Defendant maintains that even assuming, *arguendo,* that defendant evidenced an intention to be bound by the July 17 agreement, the agreement imposed no legal duties on it, as it was completely discretionary with the defendant whether or not to

make advance payments to plaintiff. Therefore, the promise was illusory and the contract lacked mutuality of obligation.

The July 17 agreement provided the following in regard to the agreements of Macomb:

"Contemporaneously herewith, Macomb has agreed to advance to Dubey certain amounts pursuant to a promissory note and security agreement of even date herewith. In addition *Macomb agrees to the extension of time of performance of the Removal Agreement as set forth in this Agreement."* (Emphasis added.)

The promissory note provided in part as follows:

"Payee shall have the option at its discretion, but shall be under no obligation whatsoever, to make any advancement either on its own motion or pursuant to a written request by Maker (supported by such documentation as payee may request) that such an advancement be made to satisfy, in whole or part, a debt necessarily incurred in connection with Maker's production of specification materials relating to Houston Intercontinental Airport Contract No. 101."

This provision regarding advancements of money is unenforceable since it is dependent on "the will of the promisor", *Carlson v Johnson,* 275 Mich 35, 37; 265 NW 517 (1936). However, this is not the sole promise made by Macomb in the July 17 agreement and it cannot be said that the entire agreement is unenforceable. In *Alderton v Williams,* 139 Mich 296, 298–299; 102 NW 753 (1905), the Michigan Supreme Court indicated that a portion of a contract that is unenforceable will not vitiate an entire contract where there are promises that are enforceable. The Court in *Alderton* stated:

"Plaintiff insists that the contract relied upon by defendants is void for indefiniteness and want of mutuality. It is true that in certain particulars the contract is indefinite. * * * We are referred to no authority, and we believe there is no authority, which holds that indefiniteness in details of this character makes an entire contract void."

While *Alderton* is not completely parallel to the instant case, it is reasonable that if portions of a contract are unenforceable by its terms, it will not affect the enforceability of other portions of the contract that are valid.

Although the advance payment portion of the agreement is unenforceable, under paragraph 2.3 of the July 17 agreement, the time for Dubey's performance was extended to September 15, 1974. The extension of time for performance was an enforceable agreement in exchange for Dubey's promises to pay additional sums and personally guarantee the note securing the advancements. This time extension was one of the principal considerations for Dubey not only executing the agreement of July 17, but also for the execution of the promissory note payable to Macomb Concrete in the amount of $543,000 and Dubey's personal guarantee of that note and security agreement by which Dubey gave Macomb a lien on all its equipment in Texas. This consideration was adequate to make the contract legally binding on both sides.

The final issue is whether the jury was properly allowed to award reliance damages to Dubey for defendant's breach of the agreements between the parties.

The jury awarded Dubey $313,661.56 which represented the difference between the expenditures of Dubey which totaled $542,261,56, minus the prior advances made by Macomb which totaled

$178,000 and two improperly included items in Dubey's damage exhibit which totaled $50,600. Thus, Dubey received the amount it spent on this project minus the advance payments by Macomb.

The defendant claims that the foregoing measure of damages is improper, the proper measure being the contract price less the cost of completion. In other words, the nonbreacher is entitled to its profit. Furthermore, defendant maintains that plaintiff could not make a profit on this contract because the cost of completion would have exceeded the contract price; therefore, defendant, by preventing Dubey's performance, kept Dubey from incurring a loss on the contract. Thus, defendant is only liable for nominal damages.

Expenses as an alternative remedy for breach of a contract are discussed in 17 CJ, Damages, § 172, pp 855–856:

"(5) Prevention of Performance. Where, without fault on his part, one party to a contract who is willing to perform it is, by the other party, prevented from doing so, the primary measure of damages is the amount of his loss, or, as it has been otherwise expressed, the value of his contract which may consist of two distinct items, the one being the party's reasonable outlay or expenditure toward performance, and the other the anticipated profits which would have been derived from performance. Plaintiff is entitled to recover the amount which he has upon the faith of the contract fairly and in good faith laid out and expended, and the loss upon material on hand at the time defendant refused to permit him to perform his agreement, together with a fair allowance for his own time and services. Profits may be too remote and speculative to be capable of the clear and direct proof required by law, and in such a case plaintiff is confined to his loss of actual outlay and expense. Failure to prove profits, however, will not prevent a recovery for outlay and expense." (Footnotes omitted.)

See also, 17 ALR2d 1327, § 9. This approach was adopted by the Michigan Supreme Court in *Tross v. H E G Clarke Co,* 274 Mich 263, 265–266; 264 NW 365 (1936), wherein the Court stated:

> "Generally speaking, the measure of damages would be loss of profits to plaintiff from the prevention of performance. But where the profits are wholly speculative and unprovable, the one who prevents performance may not go scot-free.
>
> " 'Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures.' *United States v Behan,* 110 US 338, 344 (4 Sup Ct 81.)
>
> "Where profits are speculative, the measure of damages is the actual expenditures and value of services reasonably spent in a *bona fide* attempt to perform the contract or reasonably expended upon the faith of the contract. *United States v Behan, supra;* 17 CJ p 855; *Feldman v Wear-U-Well Shoe Co.,* 191 Mich 73 [157 NW 395 (1916)]."

Therefore, plaintiff could properly seek reliance damages based on the reasonable expenses incurred attempting to perform the contract.

Defendant claims that Dubey would have lost money if it had completed the contract. We point out that the executive vice-president of Macomb, James Hicks, testified that Dubey would have been paid additional sums beyond the $543,000 contract price had Dubey completed the contract.

Defendant's argument that the expenses for which Dubey recovered were attributable prior to the July 17 amended agreement is generally correct. However, this does not change our decision because the agreements of January 31, May 28

and July 17 should be viewed as a whole. In fact, the July 17 agreement provides:

"*Provisions of Other Agreements.* All provisions of the Removal Agreement,[1] the Amendment,[2] and the Equipment Lease in effect immediately prior to the execution hereof shall remain in effect unless specifically amended herein. The Removal Agreement, as amended, and the Equipment Lease shall be deemed to be amended by this Agreement to the extent specifically set forth herein. In addition, Macomb and Cle-Tex, by their execution hereof, do not waive any claim, demand, action or cause of action against Dubey or Sentry arising from, out of or in any manner connected with such agreements."

So viewed, the contractual relationship between the parties is indivisible and the reliance damages cannot be apportioned between the original and the subsequent agreement for extension of time.

Affirmed. Costs to defendant.

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[1] The January 31, 1974, agreement.

[2] The May 28, 1974, agreement.

SMITH v MARTINDALE

1. WORKMEN'S COMPENSATION—EXCLUSIVE REMEDY—FELLOW EMPLOYEES—RESPONDEAT SUPERIOR.

Workmen's compensation is the exclusive remedy for an injured employee from his employer; however, where an employee was injured by the actions of another worker at a construction site and the other worker was employed by someone other than the injured employee's employer, then the injured employee might recover further by suing the other worker's employer under the *respondeat superior* doctrine.

2. MASTER AND SERVANT—ECONOMIC REALITY TEST—ACTUAL EMPLOYER—CONTROL OF WORKER—PAYMENT OF WAGES—HIRING AND FIRING.

The economic reality test has been adopted by Michigan courts to discern an employment situation; among the relevant factors which demonstrate an employment relationship are: (1) control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the worker's duties as an integral part of the employer's business towards the accomplishment of a common goal.

3. MASTER AND SERVANT—CRANE OPERATOR—EQUIPMENT LEASING COMPANY—ACTUAL EMPLOYER—ECONOMIC REALITY TEST.

A crane operator should have been considered to be an employee of a firm in the business of renting out cranes and crane operators as an entity to construction companies and not an employee of the construction company using this service where the facts of the case indicate under the economic reality test that the leasing firm had control of the operator's duties, that the leasing firm paid the operator's wages and that the leasing firm had the right to hire and fire and discipline the operator, even though the fourth factor of the economic reality test indicated a possible employment situation between the crane

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REFERENCES FOR POINTS IN HEADNOTES

[1] 53 Am Jur 2d, Master and Servant § 415.

[2–4] 81 Am Jur 2d, Workmen's Compensation §§ 169, 170.

[4] 73 Am Jur 2d, Summary Judgment § 13.

operator and the construction company; the economic reality test views its four elements as a whole, assigning primacy to no single one.

4. JUDGMENT—SUMMARY JUDGMENT—MASTER AND SERVANT—CRANE OPERATOR—NO FACTUAL DISPUTE—COURT RULES.

A motion for summary judgment was the proper means to determine whether a defendant crane operator was an employee of a leasing company which leased cranes and operators as units or an employee of the construction company which was leasing the crane with an operator from the leasing company where the record and the agreed statement of facts showed that there was no dispute as to any of the underlying facts (GCR 1963, 117.2[3]).

Appeal from Genesee, Harry B. McAra, J. Submitted January 3, 1978, at Lansing. (Docket No. 77-1541.) Decided March 7, 1978. Leave to appeal applied for.

Complaint by Michael Smith and Pamela Smith against Don Martindale and R. L. White Erectors, Inc., for damages for personal injuries suffered by Michael Smith. Summary judgment for defendants. Plaintiffs appeal. Affirmed in part, reversed in part, and remanded.

H. William Martin, for plaintiffs.

Neal & Lengauer (by *Paul Lazar),* for defendants.

Before: V. J. BRENNAN, P. J., and D. E. HOLBROOK and R. B. MARTIN,* JJ.

D. E. HOLBROOK, J. Plaintiffs appeal from an April 19, 1977, order granting the summary judgment motion of R. L. White Erectors, Inc. Plaintiffs' amended complaint claimed damages from an injury to Michael Smith caused by Don Martindale's negligence in operating a crane on a con-

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

struction project. Michael Smith's employer, Freedland Steel, was the general contractor for the project and had rented the use of a crane and operator (Don Martindale) from White. Freedland voluntarily paid workmen's compensation benefits to plaintiff and thereafter plaintiffs commenced a third-party action against Martindale and R. L. White Erectors. Plaintiffs sought to hold R. L. White Erectors vicariously liable because of the employer-employee relationship between the corporation and Martindale. White moved for summary judgment on the grounds that, as a matter of law, at the time of the accident, Don Martindale was the employee of Freedland and hence plaintiffs' remedy was through Freedland's worker's compensation: The trial court granted the summary judgment motion in an opinion dated April 14, 1977.

Michael Smith was a construction worker employed by Freedland Steel Company. General Motors contracted with Freedland Steel for construction work at the A. C. Spark Plug Plant in Flint, Michigan. On January 24, 1975, Michael Smith was working at the construction site when he was hit on the head with a steel "bracing angle" which fell from a steel trestle. The trestle was being positioned by a crane which was operated by Don Martindale and owned by R. L. White Erectors, Inc. Freedland Steel fabricated the trestle and the "bracing angle". Michael Smith received a skull fracture and a scalp laceration.

R. L. White Erectors, Inc., is in the business of leasing cranes and persons to operate them. Don Martindale had worked for R. L. White three years as a crane operator. R. L. White paid Martindale's wages, along with deducting his social security and income taxes from his check. Additionally, R. L. White paid Martindale's worker's compensation

insurance. On January 23, 1975, Freedland rented the services of a crane and operator from White. White instructed Don Martindale and an "oiler", Rick White, to report to the A. C. construction site on January 24, 1975. Don Martindale and Rick White transported the crane to the site. On their second day on the job, January 25, Don Martindale and Rick White returned to the site without further instructions from White.

Under the rental contract, Freedland paid White a set rate for the crane and an hourly rate set at the union wage for Don Martindale and Rick White.

According to plaintiffs, Don Martindale and Rick White had some discretion in operating the crane in that Martindale could refuse to operate the crane in any way he felt would harm it. However, in the actual use of the crane for placement of the trestle, Freedland's employees by a recognized set of hand signals, directed the crane operator as to where the trestle should go.

R. L. White Erectors, Inc., chose Don Martindale as the operator of the crane. Freedland Steel Company had no power to fire him, but could have him removed from the job if it felt it was necessary to do so. Although officers of R. L. White Erectors, Inc., visited the construction site on certain occasions, R. L. White apparently exercised no control or supervision over the construction project.

After reviewing the above facts, the trial court determined that Don Martindale was actually the "loan servant" or employee of Freedland and granted White's motion for summary judgment.

The first issue raised on appeal is whether an employee-crane operator of a company in the business of renting cranes and crane operators be-

comes the "loaned servant" of the company renting the crane and operator.

The determination of who employed Don Martindale is significant in that it controls plaintiffs' ability to recover. Plaintiffs have worker's compensation rights with respect to Michael Smith's employer, Freedland Steel. The worker's compensation benefits are plaintiffs' exclusive remedy against Freedland. Plaintiffs might recover further if Don Martindale was White's employee, and if Don Martindale was negligent, by suing White under the *respondeat superior* doctrine. However, if Don Martindale was a Freedland employee, the *respondeat superior* doctrine is of no value to plaintiffs because of the exclusive nature of the worker's compensation remedy. Also, if Don Martindale and Michael Smith are coemployees for Freedland, then plaintiffs are barred from recovering from Don Martindale by reason of the worker's compensation act.

Both plaintiffs and defendants agree that the economic reality test is applicable to the case at bar. However, plaintiffs claim that the test indicates that Martindale is R. L. White's employee whereas defendants maintain that Martindale is Freedland's employee.

The economic reality test has been adopted by the Michigan courts to discern an employment situation. *Goodchild v Erickson,* 375 Mich 289, 293; 134 NW2d 191 (1965), *Cronk v Chevrolet Local 659,* 32 Mich App 394, 398; 189 NW2d 16 (1971), *lv den,* 385 Mich 784 (1971), *McKissic v Bodine,* 42 Mich App 203, 205–208; 201 NW2d 333 (1972), *lv den,* 388 Mich 780 (1972). Under the economic reality test, the Michigan Supreme Court in *Askew v Macomber,* 398 Mich 212, 217–218; 247 NW2d 288 (1976), listed relevant factors to be used to discern an employment situation:

"(1) [C]ontrol of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal."

We review each factor as it relates to the facts in the instant case to determine whether Don Martindale was an employee of R. L. White or Freedland Steel at the time of the accident.

(1) *Control of a worker's duties.*

Prior to the economic reality test, control of the employee was the test used. Today, control is merely part of the test. *Askew, supra.* A case decided under the control test was *White v Bye,* 342 Mich 654; 70 NW2d 780 (1955), a case which was factually very similar to the case at bar. In *White v Bye,* the plaintiff was an employee of the J. A. Utley Company, who was the general contractor for the construction of a plant for General Motors in Flint, Michigan. Utley leased a crane and operator from Bye Excavating for work on the project. Another contractor on the project was the Wilcox Company. Wilcox borrowed from Utley the crane and operator rented from Bye for a very small job. Such borrowing was common in large construction projects. While the crane operator was using the crane, a terminal hook broke loose and struck the plaintiff. At the time the crane operator was being directed by hand signals from Wilcox's employees. Plaintiff brought an action against Bye on the theory that their employee, the crane operator, was negligent in the operation of the crane. Bye argued that the operator was no longer their employee at the time of the accident. The Court ruled in favor of the plaintiff White therein.

Defendants and the lower court distinguished *White v Bye* on the grounds that Wilcox had no

formal relationship with Bye, whereas R. L. White herein had a formal relationship with Freedland. Although the two cases are not totally on all fours, we hold that the Court's reasoning and findings in *White v Bye* are instructive as to the question of control in the instant case. The Court in *White, supra,* at 660–663 stated:

"The facts pertinent to this issue are that: Bye owned the crane and hired the operator and paid his wages; the crane and operator were hired as a unit, with Bye paying the maintenance, insurance, et cetera; Bye was in the business of renting cranes with his own skilled employees to operate them; the operator was the only person who could operate the controls of the crane; Utley or Wilcox could not discharge the operator from Bye's employ though they could apparently force Bye to put another operator in his place; Wilcox gave hand signals and directions for moving the reel of cable to indicate to the operator where the crane was to go; the operator could refuse to do any job which he felt would injure the crane; and it was customary on a building project of this kind for a lessee of a crane to accommodate other contractors by lending them his crane either for a charge or in some cases for nothing. Bye contends that the operator ceased being his servant because Wilcox or Utley 'exercised detailed on-the-spot control of the actual operation' and it was their work that was being done at the time. We are convinced, however, that the directions and signals on the scene were not sufficiently significant, in and of themselves, to establish the master-servant relationship. The noise and the nature of the work made the directions and signals from below necessary. In *Rockwell v Grand Trunk Western Railway Co, supra,* [253 Mich 144; 234 NW 159 (1931)] the defendant maintained an electric crane for the unloading of heavy freight and the plaintiff trucker was unloading a car. In respect to defendant's liability, as master, we stated (p 148):

" 'The plaintiff had no control over the crane or the operator except that by signals he could direct when and in what direction the beams should be hoisted.

Beyond this he was not allowed to interfere with its operation.'

"In the landmark and oft-quoted case of *Standard Oil Co v Anderson* (1909), 212 US 215 (29 S Ct 252, 53 L ed 480), the court considered this problem as applied to the Standard Oil Company whose ship was being loaded by means of its own winch, operated by its own man, though the stevedoring company gave signals and directions and supplied the tackle. The court stated in holding the company liable (pp 222, 226):

" 'Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.

* * *

" 'Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos. The giving of signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters.'

* * *

"In the instant case, Bye furnished the crane, operator and the operator's know-how as an entity. The operator was hired by and remained under Bye's control. Bye was in the business of lifting and transporting of objects for other persons by means of cranes. He furnished these services and not the operator and crane individually. In the *Rockwell Case, supra,* we said (p 148):

" 'In the instant case the defendant furnished the crane to increase its business in the carrying of heavy weight. It selected a man who had been instructed in its use to care for and operate it. * * * While operating it, he was engaged in the furtherance of the defendant's business. He did nothing that the plaintiff was required

to do. He knew the safe way and the unsafe way to operate it. He was selected by the defendant, paid by the defendant, and could be discharged whenever it pleased the defendant.' "

Therefore, we hold that the control of Martindale was by R. L. White and not Freedland.

(2) *Payment of wages.*

Martindale's wages were paid to him by R. L. White. White also deducted social security and income taxes from his check. Martindale did not receive any money from Freedland Steel. Freedland claims that it was required to pay R. L. White for the number of hours worked by Martindale at the construction site and that it was in effect paying Martindale's wages. However, we do not agree. Martindale was paid by a check issued by R. L. White and White was responsible for the withholding taxes. We hold that the most reasonable view of this relationship is that R. L. White paid Martindale's wages.

(3) *Right to hire and fire and discipline.*

Allen Clark, a vice-president of Freedland Steel, was questioned in a deposition in part as follows:

"Q *[Plaintiffs' attorney]* Do you know who directed Don Martindale to report to the A. C. Spark Plug Plant to work that job?

"A Well, I'm assuming his supervisor or someone at the company where he's employed.

"Q Would you or Mike Davis have any authority to fire Don Martindale from the R. L. White Company?

"A Would we have authority?

"Q Yes.

"A Yes.

"Q To fire him from his own company?

"A No. No. I'm sorry. I misunderstood you. No, none whatsoever.

"Q So whether or not he worked is up to his company, not up to you?

"A That's correct."

Thus, Freedland had no right to fire Martindale. As to the disciplining of Martindale, by Freedland, Clark was questioned as follows:

"Q *[Plaintiffs' attorney]* If you didn't like the way Don Martindale or anybody else was running their crane, what procedures would you follow in getting them off the premises?

"A There would be various types of ways. It would be according to the circumstances. You would possibly go to the owner of the equipment you rented or if it was severe enough, why, you just politely asked him to leave the job and if not, you'd take other action accordinly *[sic]."*

Thus, although Martindale could be asked to leave the job, any disciplining was up to White. We do not agree with defendants that the right of removal is equal to the right to fire, hire and discipline. The firing and disciplining of Martindale was up to R. L. White, not Freedland.

(4) *The performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal.*

Martindale's performance of his duties, *i.e.,* operation of the crane, was an integral part of Freedland's business towards accomplishment of a common goal, *i.e.,* construction of a building at the A. C. Spark Plug Plant. Thus, the fourth factor indicates a possible employment situation between Martindale and Freedland. However, as Justice SMITH stated in *Schulte v American Box Board Co,* 358 Mich 21, 33; 99 NW2d 367 (1959):

"Control is a factor, as is payment of wages, hiring

and firing, and the responsibility for the maintenance of discipline, but the test of economic reality views these elements as a whole, assigning primacy to no single one."

Also see, *Askew, supra,* p 220. Considering the four factors, assigning primacy to no single one, we rule that Martindale was the employee of R. L. White Erectors, Inc.

The next issue plaintiffs raise is the question of whether a person is a "borrowed servant" represents a question of fact precluding summary judgment under GCR 1963, 117.2(3).

This case is on appeal from the granting of defendants' summary judgment motion under GCR 1963, 117.2(3). The trial judge held that as a matter of law Don Martindale was Freedland's employee. Plaintiffs claim a question of fact existed as to whose employee Don Martindale was.

This issue was raised in *Renfroe v Higgins Rack Coating & Manufacturing Co, Inc,* 17 Mich App 259, 261–262; 169 NW2d 326 (1969), wherein the Court stated:

"In the case at bar, the record contains numerous interrogatories, depositions, and affidavits, which set out the underlying events and circumstances in great detail. These, as well as the agreed statement of facts submitted for purposes of this appeal, reveal that there is no dispute as to any of the underlying facts. Plaintiff's only contention is that on the basis of the agreed facts, defendant should not be labeled an 'employer' within the meaning of the workmen's compensation law. This is not a question of fact for a jury to decide; it is a question of law which must ultimately be decided by the courts. As such, it is appropriately decided under a motion for summary judgment where full affidavits and depositions disclose no disputed issue of fact."

See also, *Askew, supra,* at 217.

Thus, under the facts and circumstances of the instant case, the motion for summary judgment was a proper means to determine the issue as to whose employee Martindale was. However, the trial judge's decision that Martindale was Freedland's employee was in error.

Affirmed in part and reversed in part. Remanded for trial in accordance with this opinion. No costs, neither party prevailing fully.

PEOPLE v RANKINS

1. SEARCHES AND SEIZURES—SEARCH WARRANTS—HAIR SAMPLES—EVIDENCE—PROBABLE CAUSE—CUSTODY—REMOVAL BY DOCTOR—FORCE—MINOR INTRUSIONS—POTENTIAL FOR ABUSE.

   A search warrant was not required to justify the taking of hair samples from a defendant which were compared with hairs found at the scene of the crime charged and introduced into evidence at trial where there was sufficient evidence at the time the samples were taken to establish probable cause that the defendant committed the crime, the hair samples were removed by a medical doctor in a hospital environment after defendant was already in custody and at a time when he was conscious and alert, and where there was nothing to suggest that the hair samples were obtained by force; the intrusion into or upon the integrity of the defendant's person was very minor, and the potential for abuse of this procedure by police for harassment purposes is not great.

2. SEARCHES AND SEIZURES—SEARCH WARRANTS—OFFICIAL INTRUSIONS—INDIVIDUAL'S PERSON—EXTENUATING CIRCUMSTANCES—REASONABLENESS—MINOR INTRUSIONS.

   Not all official intrusions of an individual's person require a search warrant in order to be reasonable; some official in-custody investigative techniques designed to uncover incriminating evidence from a person's body are such minor intrusions into or upon the "integrity of an individual's person" that they are not, in the absence of a search warrant, unreasonable intrusions.

Appeal from Oakland, William R. Beasley, J. Submitted February 15, 1978, at Lansing. (Docket No. 77-4185.) Decided March 7, 1978.

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 68 Am Jur 2d, Searches and Seizures §§ 29, 105.

Physical examination or exhibition of, or tests upon, suspect or accused, as violating rights guaranteed by Federal constitution—Federal cases. 22 L Ed 2d 909.

Glen L. Rankins was convicted of armed robbery, assault with intent to do great bodily harm less than murder, and first-degree criminal sexual conduct. Defendant appeals. Affirmed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and *Thomas S. Richards,* Assistant Prosecuting Attorney, for the people.

Adrian B. Spinks, for defendant.

Before: DANHOF, C. J., and BRONSON and N. J. LAMBROS,* JJ.

DANHOF, C. J. Defendant, Glen Lamare Rankins, was charged with two counts of armed robbery, MCLA 750.529; MSA 28.797, one count of assault with intent to do great bodily harm less than murder, MCLA 750.84; MSA 28.279, and first-degree criminal sexual conduct, MCLA 750.520b; MSA 28.788(2). He was convicted of all four counts on November 7, 1975. Defendant's motion for a new trial was denied and he appeals as of right.

About one hour after the crime was committed, defendant was apprehended as the result of a high speed auto chase which ended when defendant crashed into a parked car. While the defendant was in custody and at a hospital for treatment of minor injuries, the doctor clipped some hair samples from him. The defendant was conscious at the time but unresponsive to questioning. These samples were compared to hairs found at the scene of the crime and introduced into evidence. The defendant raised a Fourth Amendment objection to

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

this evidence, but this was overruled and he appeals.

Although this exact question has never been decided in this state, this Court did address the issue in *People v Cutler,* 73 Mich App 313; 251 NW2d 303 (1977). In *Cutler,* while the defendant was in custody, the police clipped a few strands of his hair without a warrant or consent. The Court in that case referred to *United States v D'Amico,* 408 F2d 331 (CA 2, 1969), which held that:

"Unquestionably the clipping of the few strands of appellant's hair by a federal agent constituted a 'seizure' that might conceivably be subject to the 'constraints of the Fourth Amendment,' *Schmerber v California,* 384 US 757, 767; 86 S Ct 1826; 16 L Ed 2d 908 (1966); but the fact that the officer failed to obtain a search warrant before cutting off the hairs does not necessarily require that we hold that this 'seizure' was an unconstitutional one." *D'Amico, supra,* at 332–333.

The Court in *D'Amico, supra,* also considered and rejected the lack of "exigencies of the circumstances" argument which defendant raised. Citing *Schmerber v California,* 384 US 757, 86 S Ct 1826, 16 L Ed 2d 908 (1966), the Court rejected this argument:

"This holding does not comprehend that all official intrusions into an individual's person require, in the absence of extenuating circumstances, a search warrant in order to be reasonable. Some official in-custody investigative technique designed to uncover incriminating evidence from a person's body are such minor intrusions into or upon the 'integrity of an individual's person' (384 U.S. at 772; 86 S Ct at 1826 [16 L Ed 2d at 920]), that they are not, in the absence of a search warrant, unreasonable intrusions.

* * *

"Here there was only the slightest intrusion (if indeed there was any intrusion at all): the clipping by the officer of the few strands of hair from appellant's head was so minor an imposition that appellant suffered no true humiliation or affront to his dignity. We hold that a search warrant was not required to justify the officer's act. *D'Amico, supra,* at 333."

Applying this law to the instant case, it is clear that a search warrant was not required to justify the taking of the hair samples from the defendant. In this case, there was sufficient evidence to establish probable cause that the defendant committed the crime. The hair samples were removed by a medical doctor in a hospital environment after defendant was already in custody, and at a time when he was conscious and alert. Also, there is nothing to suggest that the hair samples were obtained by force. The intrusion into or upon the integrity of the defendant's person was very minor and slight. Furthermore, since only one sample is required for analysis, the potential for abuse of this procedure by police for harassment purposes is not great, see *Davis v Mississippi,* 394 US 721; 89 S Ct 1394; 22 L Ed 2d 676 (1969). Under these facts and circumstances, there was no violation of defendant's Fourth Amendment rights.

Although they are not controlling, it should be noted that the same result has been reached in other states, *Commonwealth v Tarver,* — Mass —; 345 NE2d 671 (1975), *State v Sharpe,* 284 NC 157; 200 SE2d 44 (1973), *State v Brierly,* 109 Ariz 310; 509 P2d 203 (1973).

Affirmed.

PEOPLE v DUIS

1. CRIMINAL LAW—ENTRAPMENT—OBJECTIVE TEST—POLICE CONDUCT.

   The objective test of entrapment, which has been adopted in this state, requires the trial judge to determine whether the police conduct was of such a nature that it would induce the commission of a crime by an otherwise unwilling or unready person; the propensity of the particular defendant to commit the crime is irrelevant.

2. CRIMINAL LAW—ENTRAPMENT—POLICE CONDUCT—PUBLIC POLICY.

   The real concern in entrapment cases is whether the actions of the police were so reprehensible under the circumstances that the Court should refuse, as a matter of public policy, to permit a conviction to stand.

3. CRIMINAL LAW—DRUGS AND NARCOTICS—ENTRAPMENT—SCRUTINY OF FACTS—COURT OF APPEALS—POLICE CONDUCT—PUBLIC POLICY.

   To find out if a defendant, charged with delivery of a controlled substance, was entrapped as a matter of law, the Court of Appeals should scrutinize the facts of the particular case and determine whether the government agent pressured the defendant into selling the controlled substance; where the entire course of police conduct was sufficiently provocative to induce a normal law-abiding citizen to commit a crime, the actions are so reprehensible that the Court of Appeals should refuse, as a matter of public policy, to permit the conviction to stand.

Appeal from Berrien, Chester J. Byrns, J. Submitted January 6, 1978, at Grand Rapids. (Docket No. 30817.) Decided March 7, 1978.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 21 Am Jur 2d, Criminal Law §§ 143–145.

25 Am Jur 2d, Drugs, Narcotics, and Poisons § 43.

Entrapment to commit offense with respect to narcotics law. 33 ALR2d 883.

Modern status of the law concerning entrapment to commit narcotics offense—state cases. 62 ALR3d 110.

Donald Duis was convicted of delivery of LSD. Defendant appeals. Reversed.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *John Smietanka,* Prosecuting Attorney, and *Chris W. Dunfield,* Assistant Prosecuting Attorney, for the people.

Drew and Drew, for defendant on appeal.

Before: D. F. WALSH, P. J., and R. M. MAHER and BEASLEY, JJ.

PER CURIAM. A jury convicted defendant of delivery of LSD, MCLA 335.341(1)(b); MSA 18.1070(41)(1)(b). He was sentenced to 2 years probation. Defendant appeals as of right.

Defendant admitted that on July 24, 1975, he delivered LSD to police officer Jan Edwards of the Berrien County Metro Narcotics Unit at Island Park in Niles, Michigan. Pursuant to a motion to dismiss on the grounds of entrapment, a *Turner* hearing was held prior to trial. After listening to testimony, the trial judge ruled that as a matter of law there had been no entrapment. The case then proceeded to trial on the sole issue of entrapment.

Tim Kelly, a police undercover agent, testified that he had arranged for the purchase of the LSD from defendant. He also testified that in 1972 he had been convicted of larceny in a building. Before July 24, 1975, while he was in jail awaiting trial on another felony charge (uttering and publishing), in lieu of posting $5,000 bond, Kelly and the Metro Narcotics Unit reached an agreement whereby Kelly was released from jail on personal recognizance in order to arrange drug arrests for the police. The police told Kelly that if he could help the Metro Narcotics Unit, they would try to get

the pending charges reduced to "no account check" and would see to it that Kelly received probation rather than a prison term.

Kelly and the defendant had, before July 24, 1975, worked together at U. S. Aviex where they frequently lunched together. The two worked side by side on the same job and defendant testified he thought they had become close friends. After defendant quit work to go to college, he and Kelly, except for meeting each other on the street, did not see each other until three weeks before July 24, 1975. At that time they spoke with each other at a mutual friend's house.

On July 24, 1975, Kelly made three visits to the house where defendant was staying and called defendant twice. Kelly did not recall if the subject of mescaline came up during the first or second visit; according to defendant, the subject arose while the two were talking during Kelly's first visit. Kelly inquired about buying some hallucinogens. Defendant replied that there were some around but that he had none for sale. When Kelly asked the defendant if he could get him some, defendant was noncommittal. Kelly returned a few hours later with the same request and defendant said no. After a third visit and two telephone calls, defendant finally agreed to procure the mescaline for Kelly as a favor.

Defendant, after locating a person who had some mescaline (which was, in fact, LSD) picked up several packets of the substance, not knowing how many Kelly wanted, and proceeded to Island Park where he was to meet Kelly.

At Island Park, Kelly introduced Officer Edwards as his cousin who wanted to buy the mescaline. Defendant received $20 from the officer, which he gave to the person from whom he ob-

tained the drugs along with the remaining packets. He made no profit on the transaction.

Before the incident in question, defendant never sold Kelly any drugs, though he was aware that Kelly used drugs. July 24 was also the first time defendant had ever arranged the purchase of drugs for anyone, *i.e.,* acted as a dealer.

At the close of the prosecution's case, the defense moved for a directed verdict of acquittal on the grounds of entrapment. The court denied the motion on the same basis that the motion to dismiss at the conclusion of the *Turner* hearing was denied.

In *People v Turner,* 390 Mich 7; 210 NW2d 336 (1973), the Michigan Supreme Court adopted an objective test of entrapment, relying on the dissenting opinion of Justice Stewart in *United States v Russell,* 411 US 423; 93 S Ct 1637; 36 L Ed 2d 366 (1973), which states:

> "But when the agents' involvement in criminal activities goes beyond the mere offering of such an opportunity, and when their conduct is of a kind that could induce or instigate the commission of a crime by one not ready and willing to commit it, then—regardless of the character or propensities of the particular person induced—I think entrapment has occurred. For in that situation, the Government has engaged in the impermissible manufacturing of crime, and the federal courts should bar the prosecution in order to preserve the institutional integrity of the system of federal criminal justice." 411 US at 445.

In *Turner* our Supreme Court stated that the real concern in entrapment cases is "whether the actions of the police were so reprehensible under the circumstances, that the Court should refuse, as a matter of public policy, to permit a conviction to stand". *Id.* at 22.

Through an examination of the facts of each case, the court must determine whether the police conduct was of such a nature that it would induce the commission of a crime by an otherwise unwilling or unready person. *People v Fraker,* 63 Mich App 29; 233 NW2d 878 (1975). The character or propensities of a particular defendant are totally irrelevant to the entrapment determination. *People v Cushman,* 65 Mich App 161; 237 NW2d 228 (1975).

To find out if defendant was, as a matter of law, entrapped, we scrutinize the facts of this particular case. The police agent who was instrumental in the sale was a convicted felon who arranged the drug arrest as part of a deal with police by which he would receive probation, not a prison term, and would be charged with an offense less serious than that with which he was originally charged. This factor is properly taken into consideration in our focus on police conduct. In *People v Asher,* 67 Mich App 174; 240 NW2d 749 (1976), the Court, in concluding that there had been entrapment, had due regard for the criminal status of the police agent.

Here we find the circumstances more reprehensible than those in *Asher.* There the police had focused their attention on a suspected narcotics dealer. The police agent was contacted while in jail because he was a friend of defendant. In the instant case, however, the police had not focused on a particular subject. The police approached Kelly because he was in a vulnerable position and because they assumed he knew and could contact drug dealers. The police did not investigate defendant to ascertain if he was a drug dealer. By failing to adequately supervise Kelly's activity, the police allowed him to select any victim he wished. The

employment of Kelly, a convicted felon, awaiting trial on yet another felony, to induce defendant to sell drugs offends decent standards of law enforcement. It is precisely the overreaching police conduct condemned in *Turner.*

In further scrutinizing the facts, we concentrate on whether the government agent pressured defendant into selling controlled substances. *People v Turner, supra, People v Henley,* 54 Mich App 463; 221 NW2d 218 (1974). Kelly visited defendant three times on the day of the sale and telephoned him twice. Kelly admitted he continued to "bug" defendant, who was not willing to accede to Kelly's entreaties, until defendant agreed to sell the mescaline. The police pressure is inexcusable. It is the kind of conduct which would reasonably be expected to induce an unwilling and unready individual to commit crime. Such police methods cannot be countenanced.

It is true that the friendship between Kelly and defendant was created independent of any police involvement. But the friendship was later cultivated and kept alive solely for the purpose of inducing defendant to sell drugs. Kelly actively exploited and abused the friendship for an obvious reason: the police promised him leniency and freedom if he arranged drug arrests. Police involvement was the very reason Kelly entrapped his friend.

Moreover, only by playing on defendant's sympathy was Kelly able to entice defendant to sell drugs. "Do it for me as a favor, brother", was Kelly's plea to defendant. While not as flagrant an action as that in *Turner,* Kelly did lie to persuade defendant to sell the drugs.

The entire course of police conduct "was sufficiently provocative to induce the normal law abid-

ing citizen to commit a crime". *People v Fraker, supra,* at 33. The actions of the police were so reprehensible that this Court must refuse, as a matter of public policy, to permit the conviction to stand. *People v Turner, supra.* Because we find defendant was entrapped as a matter of law, his conviction is reversed.

BIBERSTINE v WOODWORTH

OPINION OF THE COURT

1. LIMITATION OF ACTIONS—MALPRACTICE—STATE LICENSED PERSON—LAST TREATMENT—DISCOVERY OF MALPRACTICE.

An action based on malpractice by a state licensed person must be brought within two years of the time when such person discontinues treating or otherwise serving the plaintiff, or within two years of the time when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the asserted malpractice, whichever is later (MCLA 600.5805[3], 600.5838; MSA 27A.5805[3], 27A.5838).

2. LIMITATION OF ACTIONS—MALPRACTICE—BANKRUPTCY—ATTORNEY AND CLIENT—FAILURE TO SCHEDULE DEBT—ACCRUAL OF CAUSE OF ACTION.

A cause of action by a client against his attorney for malpractice arising from inaction or delay accrues for the purpose of the statute of limitations at the time when it can be said that the attorney has had a reasonable time to act but has failed to do so; therefore, in a malpractice action by a client against his attorney based on the attorney's failure to schedule a certain debt in a bankruptcy proceeding, the alleged malpractice occurred when the attorney failed to schedule the debt within a reasonable time after having been requested to do so by his client.

3. ATTORNEY AND CLIENT—ATTORNEY MALPRACTICE—BANKRUPTCY—FAILURE TO SCHEDULE DEBT—ACCRUAL OF ACTION—JURY QUESTION.

The issues of whether an attorney's failure to schedule a certain

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REFERENCES FOR POINTS IN HEADNOTES

[1–4] 7 Am Jur 2d, Attorneys at Law §§ 184–187.

What statute of limitations governs damage action against attorney for negligence in performance of professional services. 49 ALR2d 1216.

When statute of limitations begins to run upon action against attorney for malpractice. 18 ALR3d 978.

[3] 7 Am Jur 2d, Attorneys at Law § 189.

debt in his client's bankruptcy action constituted malpractice and the date upon which the alleged malpractice occurred are both questions of fact to be resolved by the trier of fact.

CONCURRENCE BY R. B. BURNS, J.

4. LIMITATION OF ACTIONS—ATTORNEY AND CLIENT—MALPRACTICE—BANKRUPTCY—FAILURE TO SCHEDULE DEBT—ACCRUAL OF CAUSE OF ACTION.

The statute of limitations for a malpractice suit based on an attorney's failure in his client's bankruptcy proceeding to schedule a certain debt as requested by the client should start to run at the time the client was discharged in bankruptcy, because until then the attorney could have petitioned the bankruptcy court to amend the bankruptcy petition and plaintiff would not have had a claim for malpractice.

Appeal from Huron, Paul R. Mahinske, J. Submitted October 19, 1977, at Detroit. (Docket No. 31073.) Decided March 7, 1978. Leave to appeal applied for.

Complaint by Crane M. Biberstine against James F. Woodworth for damages for malpractice. Accelerated judgment for defendant. Plaintiff appeals. Reversed and remanded.

Keller & Katkowsky, P. C., for plaintiff.

Woodworth & Woodworth, for defendant.

Before: T. M. BURNS, P. J., and R. B. BURNS and W. R. BROWN,* JJ.

PER CURIAM. This case involves a claim of attorney malpractice. The circuit court granted accelerated judgment, GCR 1963, 116.1(5), after it found that the applicable statute of limitations had run. Plaintiff appeals, we reverse.

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

Plaintiff retained defendant to file a personal bankruptcy in 1970. The original petition was filed in the bankruptcy court on March 17, 1971, and amended on April 19, 1971. Neither petition scheduled a debt owed by plaintiff to the Michigan Motor Vehicle Accident Claims Fund. Plaintiff attempted several times to have defendant schedule this debt, including filing a request for investigation with the State Bar Grievance Board on November 22, 1971. Plaintiff received his discharge of bankruptcy on September 25, 1972, which did not include the debt to the Michigan Motor Vehicle Accident Claims Fund. This suit was filed December 26, 1973.

Both parties agree that the applicable statute of limitations is two years, MCLA 600.5805(3); MSA 27A.5805(3), and that the accrual of the claim is governed by MCLA 600.5838; MSA 27A.5838 before its amendment by 1975 PA 142. In dealing with the statutes, the Supreme Court in *Dyke v Richard,* 390 Mich 739, 747; 213 NW2d 185 (1973), held:

> "an action based on malpractice by a state licensed person must be brought within two years of the time when such person discontinues treating or otherwise serving the plaintiff, or within two years of the time when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the asserted malpractice, whichever is later."

Applying this standard, the circuit court held the last date of service to be April 19, 1971 (when the bankruptcy petition was amended) and the date of plaintiff's knowledge of the asserted malpractice to be November 22, 1971 (the date of filing the request for investigation with the State Bar).

We deem it necessary to discuss only the second

question;[1] when did plaintiff discover, or in the exercise of reasonable diligence should he have discovered, the asserted malpractice?

In reaching the conclusion that plaintiff was aware of the possible malpractice more than two years before the complaint was filed, the circuit court relied on a portion of the request for investigation in which plaintiff stated, "I'm making payments to the state that an attorney from the state told me the bankruptcy would eliminate, or I should be able, if my attorney couldn't figure it out to take action against the attorney for malpractice."

To decide the issue it is necessary to determine what the *asserted* malpractice consisted of. Plaintiff claims it was failure to amend the petition in bankruptcy to include the debt before discharge on September 25, 1972. This would be within the applicable period of limitations. Without deciding that failure to schedule the debt was malpractice, the amendment would have required leave of the bankruptcy court under General Order 11 in effect at that time, we hold that whether plaintiff could have discovered the asserted malpractice before the two year limitations period is a question of fact to be decided by the trier of fact.

The asserted malpractice is not an action which occurred on a specific date, but rather, an omission to take an action before a certain date. In Anno: *When Statute of Limitations Begins to Run Upon Action Against Attorney for Malpractice,* 18 ALR3d 978, pp 1002–1003, two possible rules for handling this type of situation are analyzed. Under the first, the statute of limitations begins to run when the asserted malpractice results in in-

[1] For recent cases dealing with the question of last date of service, *see Basic Food Industries, Inc v Travis, Warren, Nayer and Burgoyne,* 60 Mich App 492; 231 NW2d 466 (1975), *Berry v Zisman,* 70 Mich App 376; 245 NW2d 758 (1976).

jury. Here, that would be, as plaintiff argues, the date of his discharge in bankruptcy. Adoption of this rule would bring an amount of certainty and ease of application to the law.

We think the other choice presents a better balancing of the interests of all involved, however. We hold that where the negligence of the attorney consists of delay or inaction, a client's cause of action accrues for the purpose of the statute of limitations at the time when it can be said that the attorney has had a reasonable time to act but has failed to do so.

In other words, we conclude that the malpractice, if it was malpractice, occurred when defendant failed to schedule the debt within a reasonable time after having been requested to do so by his client.[2] Whether this was malpractice and the date upon which it occurred are both questions of fact to be resolved by the trier of fact. See, *Tumey v Detroit,* 316 Mich 400; 25 NW2d 571 (1947), GCR 1963, 116.3. The trial court erred in ruling that plaintiff's claim was barred by the statute of limitations on the basis of the present record.

Reversed and remanded for proceedings not inconsistent with this opinion. Costs to plaintiff.

R. B. BURNS, J. *(concurring in result).* I concur in the results reached by my brothers, but write separately because in my opinion the statute of limitations should start to run at the time the plaintiff was discharged in bankruptcy. Until then the defendant could have petitioned the bankruptcy court to amend the petition and plaintiff would not have had a claim for malpractice.

[2] In his request for investigation, plaintiff also stated, "I want Mr. Woodworth to either file the amendments and do the job for me—or return the $335 I have paid him and let me obtain other counsel." This seems to indicate that plaintiff was still willing to have defendant act for him if he did so within a reasonable time.

DETROIT AUTOMOBILE INTER-INSURANCE EXCHANGE v REYNOLDS

OPINION OF THE COURT

1. INSURANCE—AUTOMOBILES—UNINSURED MOTORISTS—EXCLUSIONS—NONOWNED AUTOMOBILES.

Uninsured motorist insurance covers all members of a named insured's household; an exclusionary clause which limits the coverage, by requiring that if a protected individual is injured while occupying an automobile it must be the vehicle listed in the policy declaration or a "nonowned" vehicle as defined in the policy, is valid and does not violate public policy.

DISSENT BY D. E. HOLBROOK, J.

2. INSURANCE—AUTOMOBILES—UNINSURED MOTORISTS—EXCLUSIONS.

An automobile insurer's offer of uninsured motorist coverage must apply to whoever is insured under the liability coverage *of the policy; therefore, a clause in an insurance policy is invalid where it excludes uninsured motorist coverage to the daughter of a named insured, who with her husband is living in the named insured's household, and who is injured while a passenger in an uninsured automobile owned and driven by her husband.*

Appeal from Wayne, Neal Fitzgerald, J. Submitted December 12, 1977, at Detroit. (Docket No. 77-541.) Decided March 7, 1978. Leave to appeal applied for.

Complaint by the Detroit Automobile Inter-Insurance Exchange against Robert Reynolds and

REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 7 Am Jur 2d, Automobiles and Highway Traffic §§ 301, 302.
New Topic Service, No-fault Insurance § 20.
7 Am Jur 2d, Automobile Insurance §§ 135–138.
Rights and liabilities under "uninsured motorists" coverage. 79 ALR2d 1252.

Jacqueline Reynolds for a declaratory judgment that Jacqueline Reynolds was not entitled to uninsured motorist coverage under a policy of insurance issued by plaintiff to Jacqueline Reynolds' father. Summary judgment for plaintiff. Defendant Jacqueline Reynolds appeals. Affirmed.

Selby, Dickinson, Pike, Mourad & Brandt (by *Michael B. Haber),* for plaintiff.

Weizenthal, Mindell & Panzer, for defendants.

Before: N. J. KAUFMAN, P. J., and BRONSON and D. E. HOLBROOK, JJ.

PER CURIAM. Defendant, Jacqueline Reynolds, was injured in an automobile accident while riding as a passenger in her husband's uninsured automobile. The other car involved was also uninsured. Defendant made a claim for uninsured motorist benefits under her father's automobile insurance policy because the defendant and her husband resided with her father. The plaintiff filed an action for a declaratory judgment asking that the court find that defendant was not entitled to uninsured motorist coverage under the terms of the contract. The plaintiff then made a motion for summary judgment which was granted. Defendant appeals.

The exclusion clause in the insurance contract between the plaintiff and defendant's father excludes uninsured motorist coverage unless the insured party was occupying a nonowned automobile. A nonowned automobile is defined as follows:

" 'non-owned automobile' means any automobile or trailer * * * not owned by, furnished or available for the frequent or regular use of the named insured,

relative or other resident of the same household of such named insured * * * ."

It is undisputed that the automobile defendant was occupying at the time of the accident was owned by her husband. Thus, although the "exclusions clause" would not limit liability when the protected individual was injured while a pedestrian or a passenger of a car belonging to a nonrelative or a member of another household, under these facts defendant is excluded from benefits under the terms of the contract. *Burch v Wargo,* 378 Mich 200; 144 NW2d 342 (1966). The distinguishing feature is the fact that her father's automobile insurance contract contains a provision which specifically excludes liability if the vehicle in which she was riding is not a "non-owned" automobile.

Uninsured motorist insurance coverage protects against bodily injury caused by someone who has no insurance. Thus, uninsured motorist insurance covers the individual and follows wherever the individual goes. When purchased, it covers all members of a named insured's household. As such, one member of a household which had numerous automobiles could purchase uninsured motorist coverage in an insurance contract on one of the automobiles and provide protection for all the other members of the household under all circumstances. To limit this risk, the insurers have inserted an "exclusions clause" in each contract. This limits liability by requiring that if the protected individual is injured while occupying an automobile, it must be the vehicle listed in the declaration of the policy or a nonowned vehicle as defined in the contract.

Finally, we note that this section of the exclusion clause does not violate public policy. *Rice v*

Detroit Automobile Inter-Insurance Exchange, 66 Mich App 600; 239 NW2d 675 (1976), *lv den,* 396 Mich 858 (1976), *Priestly v Secretary of State,* 67 Mich App 96; 240 NW2d 282 (1976), *lv den* 396 Mich 859 (1976). Therefore, we affirm.

Affirmed. Costs to appellee.

D. E. HOLBROOK, J. *(dissenting).* The majority opinion upholds plaintiff's argument that defendant is not entitled to coverage under her father's insurance contract for injuries sustained while she was occupying an uninsured automobile titled to her husband. This writer respectfully disagrees.

The Michigan Supreme Court in *Pappas v Central National Insurance Group of Omaha,* 400 Mich 475; 255 NW2d 629 (1977), and this Court in the cases of *Hickman v Community Service Insurance Co,* 78 Mich App 1; 259 NW2d 367 (1977), *Bradley v Mid-Century Insurance Co,* 78 Mich App 67; 259 NW2d 378 (1977), and *Ellis v State Farm Insurance Co,* 78 Mich App 189; 259 NW2d 421 (1977), held that MCLA 500.3010; MSA 24.13010[1] requires that the offer of coverage apply to whomever is insured under the liability coverage of the policy. In the instant case, the policy provided insured status on Jacqueline Reynolds by virtue of her being a resident relative of Adam Zeller. Any self-insured policy limitation which would deny uninsured motorist coverage to her while a resident relative of Adam Zeller is invalid.

This writer is in complete agreement with Judge DANHOF when he wrote in *Hickman, supra,* at pp 6–7:

"We are not unmindful of the fact that *Nunley v Turner,* 57 Mich App 473; 226 NW2d 528 (1975), *Rice v*

[1] MCLA 500.3010; MSA 24.13010 was repealed by 1972 PA 345, effective October 1, 1973.

Detroit Automobile Inter-Insurance Exchange, 66 Mich App 600; 239 NW2d 675 (1976), and *Priestly v Secretary of State,* 67 Mich App 96; 240 NW2d 282 (1976), all appear to reach results contrary to the decision in the instant case. We read those cases as allowing the insurer and the insured to narrowly define the class of persons protected by the uninsured motorist coverage, but we read *Pappas, supra,* as rejecting such narrow definitions. We further read *Nunley, Rice,* and *Priestly* as attempting to circumscribe the factual situation in which the insured party, injured by an uninsured motorist, may recover under a policy providing the statutorily required coverage. *Pappas, supra,* allows no such circumscription:

" 'The legislative policy expressed in the statute is not affected by circumstances peculiar to the situation of a particular plaintiff.' 400 Mich at 481.

"In the instant case, and its two companion cases, *Ellis v State Farm Insurance,* 78 Mich App 189; 259 NW2d 421 (1977), and *Bradley v Mid-Century Insurance Co,* 78 Mich App 67; 259 NW2d 378 (1977), the plaintiff is an 'insured' under the liability section definition of the insurance policy in question. Once having been afforded this status, and so long as it exists, MCLA 500.3010; MSA 24.13010 requires that an offer of uninsured motorist coverage must be extended for protection from injuries caused by uninsured motorists wherever the 'insured' happens to be and whatever the 'insured' happens to be doing at the time of the injury."

Also see, *Bradley, supra,* at pp 71–72, and *Ellis, supra,* at pp 193–194.

This writer would hold that the judgment of the trial court be reversed and that a judgment be entered that Jacqueline Reynolds is covered under the insurance policy of her father for uninsured motorist benefits.

NORTON SHORES v CARR

1. NUISANCE—USE OF PROPERTY—ZONING—CONFORMING USES—NONCONFORMING USES—STRUCTURES AND PLOTS—WORDS AND PHRASES.

   The term "nonconforming use" in zoning cases comprehends the physical characteristics, dimensions, or location of a structure as well as the functional use thereof or of the premises on which it is located, and is used as a generic term that includes nonconforming use of conforming structures and plots, nonconforming use of nonconforming structures and plots, and conforming use of nonconforming structures and plots.

2. ZONING—NONCONFORMING USE—EXPANSION—ORDINANCES.

   Generally, a nonconforming use may not be expanded; one of the goals of zoning is the eventual elimination of nonconforming uses so that growth and development sought by ordinances can be achieved.

3. ZONING—NONCONFORMING USES—CONTINUATION.

   The continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance; therefore, a nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted.

REFERENCES FOR POINTS IN HEADNOTES

[1] 82 Am Jur 2d, Zoning and Planning §§ 3, 178 *et seq.*
[2] 82 Am Jur 2d, Zoning and Planning §§ 179, 180, 196–199.
[3] 82 Am Jur 2d, Zoning and Planning § 188 *et seq.*
[4] 5 Am Jur 2d, Appeal and Error §§ 703, 772.
[5] 82 Am Jur 2d, Zoning and Planning §§ 184, 215, 216.
[6] 82 Am Jur 2d, Zoning and Planning §§ 3, 186.
[7] 82 Am Jur 2d, Zoning and Planning § 3.
[8] 58 Am Jur 2d, Nuisances §§ 11–13.
[9] 82 Am Jur 2d, Zoning and Planning §§ 3, 191–207.
[10] 58 Am Jur 2d, Nuisance §§ 136–139, 173, 174.
[11] 5 Am Jur 2d, Appeal and Error §§ 703, 772.
[12] 58 Am Jur 2d, Nuisance § 150 *et seq.*
[13] 58 Am Jur 2d, Nuisance § 151.
[14] 82 Am Jur 2d, Zoning and Planning § 178 *et seq.*

4. EQUITY—APPEAL AND ERROR—DE NOVO REVIEW—TRIAL COURT FINDINGS—AGREEMENT—DIFFERENT RESULT.

The Court of Appeals reviews equity cases *de novo;* however, the findings of the trial judge will not be disturbed on appeal unless the appellate court can conclude that it would have arrived at a different result had it been in the position of the trial court.

5. ZONING—NONCONFORMING PRIOR USE—EVIDENCE—INTENT—ABANDONMENT.

The necessary elements of abandonment of a nonconforming use are the intent to abandon and some act or omission on the part of the owner or holder which clearly manifests his or her voluntary decision to abandon.

6. NUISANCE—ZONING—NONCONFORMING PRIOR USE—VESTED RIGHTS—TRIAL COURT FINDINGS.

The existence of a vested right to a prior nonconforming use does not preclude a court from finding that the nonconforming use constitutes a nuisance.

7. NUISANCE—PRIVATE NUISANCE—PUBLIC NUISANCE—DEFINITIONS.

Nuisances may be private or public or both: a private nuisance is a civil wrong based on a disturbance of defendants' neighbors' rights in their land; a public nuisance results from an interference with the rights of the community at large.

8. NUISANCE—NUISANCE IN FACT—NUISANCE PER SE—CIRCUMSTANCES—LOCATION AND SURROUNDINGS.

A nuisance in fact and a nuisance at law, or per se, are distinguishable; a nuisance in fact is that which becomes a nuisance by reason of circumstances and surroundings and a nuisance per se is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.

9. NUISANCE—NONCONFORMING USE—CHANGES IN USE—EXTENSION OF NONCONFORMING USE.

Changing the nature and size of a nonconforming use constitutes an extension of a prior nonconforming use and is therefore a nuisance.

10. NUISANCE—NUISANCE IN FACT—TRIAL COURT FINDINGS—EVIDENCE—CLEAR ERROR RULE.

A finding of a nuisance in fact is not clearly erroneous where there is sufficient credible evidence to support the trial court's conclusion.

11. APPEAL AND ERROR—LIMITED REVIEW—COURT DECIDED ISSUES.
The Court of Appeals is limited on review to issues decided by the trial court.

12. NUISANCE—EQUITY—ABATEMENT OF NUISANCE—JUDICIAL POLICY.
An equity court has the power to enjoin a nuisance; however, it is the policy of the courts to tailor the remedy to the problem and where possible to abate a nuisance without completely destroying the business in which the nuisance originates.

13. EQUITY—NUISANCE—ABATEMENT—CONTINUING BUSINESS—OBJECTIONABLE FEATURES—INFRINGEMENT ON RIGHTS.
Equity will not abate a lawful continuing business as a nuisance when it is possible to eliminate objectionable features which infringe upon the ordinary rights of others.

14. MUNICIPAL CORPORATIONS—REGULATORY ORDINANCES—ZONING ORDINANCES—NONCONFORMING USE—PRIOR NONCONFORMING USE—EXPANSION OF USE.
A regulatory ordinance, unlike a zoning ordinance, is not encumbered by a nonconforming use provision and while a preexisting nonconforming use may exist despite a zoning ordinance, a regulatory ordinance envisions no similar exceptions; therefore, neither an original nonconforming use, nor an expansion of it, excuses the enforcement of a regulatory ordinance.

Appeal from Muskegon, Charles A. Larnard, Jr., J. Submitted January 4, 1978, at Grand Rapids. (Docket No. 77-611.) Decided March 7, 1978. Leave to appeal applied for.

Complaint by Norton Shores, a municipal corporation, and others against Cornelius Carr and Rose I. Carr seeking abatement of a public and private nuisance and an injunction requiring the defendants to conform to certain ordinances. Judgment for plaintiffs. Defendants appeal. Affirmed.

Parmenter, Forsythe & Rude (by *Steven G. Schember),* for plaintiff.

Bunker & Rogoski, for defendant.

Before: D. F. WALSH, P. J., and R. M. MAHER and BEASLEY, JJ.

PER CURIAM. Defendants appeal the judgment of the trial court holding defendants' landscaping business, which constitutes a nonconforming use, to be a nuisance. The court ordered it enclosed by a fence. Defendants' junkyard business, which is also a nonconforming use, was restricted to a certain portion of the defendants' property. Finally, the trial court found that defendants' used car business—another nonconforming use—had been abandoned.

On July 24, 1972, plaintiffs filed a complaint charging defendants with violation of a city junkyard ordinance, a zoning ordinance, and an abandoned-vehicle ordinance, and with maintaining a public and private nuisance. Defendants own a parcel of land in Norton Shores which they purchased in 1945. Defendants deal in junk, that is, they buy and sell scrap iron, rags, batteries, used equipment and machinery. They also carry on a landscaping business for which they store top soil (black dirt), shrubbery, and other nursery items.

In 1949, Norton Shores Township, predecessor of the City of Norton Shores, adopted a junkyard resolution. At that time defendants had already acquired a vested right to continue operation of the junkyard in the same manner in which it had been conducted before adoption of the resolution.

On January 1, 1955, the township of Norton Shores adopted its first zoning ordinance which provided for the continuance of nonconforming uses and buildings. In 1962, the township amended the zoning ordinance, as a result of which the west 200 feet of defendants' lot was zoned commercial. It was stipulated that during the time immediately

before the adoption of the Norton Shores zoning ordinance, defendants operated heavy machinery in conducting their business.

Defendants charge that the trial court erred in failing to conclude that defendants have a vested right to continue the use of their real estate in the manner in which it was used before the adoption of the Norton Shores zoning ordinance. The restrictions imposed by the court, defendants argue, are repugnant to their vested right.

Contrary to defendants' contention, the trial court did hold that defendants' nonconforming uses could be continued as they were practiced before adoption of the Norton Shores zoning ordinance in 1955. That was not an issue at trial. All agreed defendants had a valid nonconforming use. The issue was whether defendants had unlawfully expanded their use beyond the scope that existed at the time the zoning ordinance was adopted. The judgment restricted use of the eastern 200 feet of defendants' property solely to the landscaping business; this line of demarcation was established in accordance with trial testimony which disclosed that in 1955 defendant had no other business operations except landscaping on the eastern 200 feet of their property.

" 'A "nonconforming use" comprehends the physical characteristics, dimensions, or location of a structure as well as the functional use thereof or of the premises on which it is located, and is used as a generic term that includes nonconforming use of conforming structures and plots, nonconforming use of nonconforming structures and plots, and conforming use of nonconforming structures and plots.' (Footnotes omitted.) 82 Am Jur 2d, Zoning and Planning, § 178, p. 685." *Long Island Court Homeowners Association v Methner,* 74 Mich App 383, 387; 254 NW2d 57 (1977).

Expansion of a nonconforming use is severely restricted. One of the goals of zoning is the eventual elimination of nonconforming uses, so that growth and development sought by ordinances can be achieved. Generally speaking, therefore, nonconforming uses may not expand. *Fredal v Forster,* 9 Mich App 215; 156 NW2d 606 (1967), *Hillsdale v Hillsdale Iron & Metal Co, Inc,* 358 Mich 377; 100 NW2d 467 (1960). The policy of the law is against the extension or enlargement of nonconforming uses, and zoning regulations should be strictly construed with respect to expansion.

" '[I]t is the law of Michigan that the continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance.' " *Dearden v Detroit,* 70 Mich App 163, 169; 245 NW2d 700 (1976), *Township of White Lake v Lustig,* 10 Mich App 665, 674; 160 NW2d 353 (1968).

The nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted. *Township of Commerce v Rayberg,* 5 Mich App 554; 147 NW2d 453 (1967).

In 1955, the trial court opined, the eastern 200 feet of defendants' property was not being used for a junkyard as it was 20 years later. In accordance with Michigan law on the expansion of nonconforming uses, the trial judge restricted defendants' use of the eastern 200 feet and held it could only be used for defendants' landscape business which had been in operation when the zoning ordinance was adopted. While this Court reviews equity cases *de novo,* it will not disturb the findings of the trial court unless it would have arrived at a different result had it been in the position of the trial court.

Biske v City of Troy, 381 Mich 611; 166 NW2d 453 (1969).

We cannot say we would have reached a conclusion different from that of the trial court. Defendants had a valid nonconforming use in 1955, but they had no right to expand that nonconforming use beyond its 1955 scope. The trial court acted properly in restricting the use of the eastern 200 feet of defendants' land.

Also at issue are the trial court's other rulings: (1) that defendants had abandoned their rights to deal in used cars; (2) that defendants had created a nuisance by causing black dirt dust to emanate from their property; and (3) that plaintiffs were entitled to injunctive relief from the alleged dissemination of black dirt.

Turning first to defendants' abandonment of their used car sales: the necessary elements of abandonment of a nonconforming use are intent and some act or omission on the part of the owner or holder which clearly manifests his or her voluntary decision to abandon. *Rudnik v Mayers,* 387 Mich 379; 196 NW2d 770 (1972). The trial court's ruling as to abandonment was not without grounds. An examination of defendants' tax returns for several years showed "no indication of used car sales operation." Nor did any witnesses at trial testify to any used car sales. On these bases the court found the used car operation had been abandoned. We cannot say that had we been sitting as the trial court we would have reached a different result. The finding was not clearly erroneous.

The trial court also held that defendants' soil farm operations on their property caused black dirt dust to blow onto the property of abutting owners, thus creating a nuisance. Defendants

claim this finding is repugnant to their vested right to continue their nonconforming use. But the existence of a vested right to a prior nonconforming use does not preclude a court from finding that the nonconforming use constitutes a nuisance. *Dusdal v City of Warren,* 387 Mich 354; 196 NW2d 778 (1972).

Nuisances may be private or public. *Awad v McColgan,* 357 Mich 386; 98 NW2d 571 (1959). The nuisance at issue here is both: a civil wrong based on a disturbance of defendants' neighbors' rights in their land and an interference with the rights of the community at large. *Williams v Primary School District #3, Green Township,* 3 Mich App 468; 142 NW2d 894 (1966). A nuisance in fact must be distinguished from a nuisance at law, also called a nuisance per se. A nuisance in fact is that which becomes a nuisance by reason of circumstances and surroundings. A nuisance per se is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. *Buddy v Department of Natural Resources,* 59 Mich App 598; 229 NW2d 865 (1975), *Marshall v Consumers Power Co,* 65 Mich App 237; 237 NW2d 266 (1975).

Changing the nature and size of a nonconforming use constitutes an extension of a prior nonconforming use and is therefore a nuisance. *Township of White Lake v Lustig, supra.* In the instant case, the trial judge concluded that defendants' nonconforming use had been expanded. Such expansion is a nuisance per se. *Township of White Lake v Lustig, supra.*

The trial testimony also supports a finding of nuisance in fact. Plaintiffs presented credible evidence sufficient to prompt a court to conclude that the black dirt dust emanating from defendants'

property and being carried to neighbors properties was a nuisance in fact. Again, we are not able to say nor have defendants persuaded us that the trial court was clearly erroneous.

Defendants also contend that plaintiffs were estopped from seeking injunctive relief and that the trial court therefore erred in granting it. Reliance is placed on *Mackenzie v Frank M Pauli Co,* 207 Mich 456; 174 NW 161 (1919). Defendants' reliance is misplaced. The Court in *Mackenzie,* in fact, found that a nuisance existed but limited the scope of the injunction to the offensive features of defendants' business. The Court held that expansion of defendants' business, regardless of whether it was in the area before the plaintiffs were, constituted a nuisance. The plaintiffs in *Mackenzie* were not estopped from seeking injunctive relief, as defendants here contend. *Mackenzie,* if anything, supports the plaintiffs' position.

Defendants present a final charge of error. They claim the trial court was unwarranted in requiring defendants to build a fence around their property and in obliging them to acquire a junkyard license. Defendants argue that the judgment precludes them from using their land to the same extent as others owning land and thereby denies them equal protection.

The issue of equal protection was not raised in the pleadings nor at trial. Pursuant to GCR 1963, 801, these issues cannot be heard on appeal. The Court of Appeals is limited on review to issues decided by the trial court. *Hernandez v Consumers Power Co,* 51 Mich App 288; 214 NW2d 846 (1974), *Behlen Manufacturing Co v Andries-Butler, Inc,* 52 Mich App 317; 217 NW2d 125 (1974).

Defendants' argument that the trial court had no power to require them to build a fence is

without merit. An equity court has the power to enjoin a nuisance. *Township of White Lake v Lustig, supra.* It is the policy of our courts, however, to tailor the remedy to the problem, to abate the nuisance without completely destroying the business in which the nuisance originates. *Hillsdale v Hillsdale Iron & Metal Company, Inc, supra, Mackenzie v Frank M Pauli Co, supra.* Equity will not abate a lawful continuing business as a nuisance when it is possible to eliminate objectionable features which infringe upon the ordinary rights of others. *Kurrle v Walker,* 56 Mich App 406; 224 NW2d 99 (1974). The remedy fashioned by the trial court was tailored to fit the particular nuisance at issue. The fence will both screen the junkyard from view and help prevent the blowing of black dirt and dust.

The contention that the court had no power to require defendants to obtain a junkyard license is also without merit. Defendants claim that because they operated the junkyard as a nonconforming use before the licensing ordinance was passed they cannot be required to obtain a license. The defendants thereby equate a regulatory ordinance with a zoning ordinance.

While a preexisting nonconforming use may exist despite a zoning ordinance, a regulatory ordinance envisions no similar exceptions. A use, albeit nonconforming, is still subject to regulatory ordinances. *Casco Township v Brame Trucking Co, Inc,* 34 Mich App 466; 191 NW2d 506 (1971). Neither the defendants' original nonconforming use, nor their expansion of it, excuses them from the licensing ordinance. A regulatory ordinance is not encumbered by a nonconforming use provision.

In fashioning the remedy in this case, the court was mindful of the interests of both sides: the

nuisance is abated and yet the defendants are not completely foreclosed from operating their businesses. The remedy as fashioned suitably meets the needs of each party without destroying either side's rights.

The judgment of the trial court is affirmed.

WILKERSON v SEDER

1. STATUTES—CRIMINAL STATUTES—CIVIL REMEDY—LEGISLATIVE INTENT—PRIVATE DUTY—PUBLIC DUTY.

   Legislative intent to provide a common-law civil remedy based on a criminal statute may be inferred from the statute where the statute creates a private duty for the benefit of particular individuals or a class rather than a duty to the public.

2. USURY—CRIMINAL LAW—PUBLIC OBLIGATION—STATUTES—CIVIL ACTIONS.

   The criminal usury act creates a public obligation not to engage in usurious loan transactions and provides for remedies where the statute is violated; therefore, no civil cause of action may be based on the criminal usury act (MCLA 438.31c, 438.32, 438.41, 438.42; MSA 19.15[1][c], 19.15[2], 19.15[51], 19.15[52]).

3. USURY—JUDGMENT—SUMMARY JUDGMENT—ISSUE OF FACT—COURT RULES.

   Summary judgment was properly granted to a defendant who allegedly drafted a usurious promissory note where the note and mortgage which it represents did not on their face disclose a usurious interest rate and where none of the pleadings, affidavits or depositions contained facts raising an issue as to the defendant's knowledge of the interest rate (GCR 1963, 117.2[3]).

Appeal from Clare, Robert H. Campbell, J. Submitted January 9, 1978, at Lansing. (Docket No. 77-1413.) Decided March 7, 1978. Leave to appeal denied, 402 Mich 950b.

Complaint by Joseph Wilkerson and Vesta Wilkerson against James Seder and John J. Hermann

REFERENCES FOR POINTS IN HEADNOTES

[1] 73 Am Jur 2d, Statutes § 300.

[2] 45 Am Jur 2d, Interest and Usury § 307.

[3] 61 Am Jur 2d, Pleadings § 230.

to set aside a foreclosure of a mortgage, to clear title to real estate, and for damages for violation of the usury law. Summary judgment in favor of defendant Hermann. Plaintiffs appeal. Affirmed.

Donald W. Grant and *Richard P. King,* for plaintiffs.

John J. Hermann, for defendants.

Before: BRONSON, P. J., and R. B. BURNS and R. E. A. BOYLE,* JJ.

PER CURIAM. This appeal involves a complaint against an attorney (Hermann) seeking damages based on his alleged preparation of a promissory note specifying a usurious rate of interest.[1] The trial court granted summary judgment for Hermann on the basis that the complaint failed to state a cause of action, see GCR 1963, 117.2(1), and that plaintiffs had failed to raise an issue of fact as to his knowledge of a usurious interest rate, see GCR 1963, 117.2(3).

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

[1] The complaint alleged that a one-year note for $24,000 was executed in consideration for a $15,000 loan.

MCLA 438.41; MSA 19.15(51) provides:

"A person is guilty of criminal usury when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearance of any money or other property, at a rate exceeding 25% at simple interest per annum or the equivalent rate for a longer or shorter period. Any person guilty of criminal usury may be imprisoned for a term not to exceed 5 years or fined not more than $10,000.00, or both."

MCLA 438.42; MSA 19.15(52) provides:

"A person is guilty of possession of usurious loan records when, with knowledge of the contents thereof, he possesses any writing, paper, instrument or article used to record criminally usurious transactions prohibited by this act. Any person guilty of possession of usurious loan records may be imprisoned for a term not to exceed 1 year or fined not more than $1,000.00, or both."

The trial court correctly held that plaintiffs failed to state a cause of action.

Plaintiffs contend that a private civil action may be maintained on the basis of the criminal usury statute, MCLA 438.41, 438.42; MSA 19.15(51), 19.15(52). The existence of a civil cause of action based on a criminal statute is based on the presumed intention of the Legislature. See 1 CJS, Actions, § 12, p 996. Intent to provide a common-law civil remedy may be inferred from a penal statute creating a private duty for the benefit of particular individuals or a class, as opposed to a duty to the public, *Taylor v Lake Shore & Michigan Southern R Co*, 45 Mich 74 (1881). Also relevant is the absence of a statutory remedy. See *B F Farnell Co v Monahan*, 377 Mich 552, 555–556; 141 NW2d 58 (1966), *cf. National Bank of Detroit v Eames & Brown, Inc*, 396 Mich 611; 242 NW2d 412 (1976).

We find that the criminal usury act does not create a private duty toward certain individuals, but a public obligation not to engage in usurious loan transactions. Furthermore, the statute itself provides for remedies, including a defense to an action for interest, fees and costs, MCLA 438.32; MSA 19.15(2) and injunctive relief, MCLA 438.31c; MSA 19.15(1)(c). Thus, we hold that no civil cause of action may be based upon the criminal usury statute. Summary judgment under GCR 1963, 117.2(1) was proper.

We also find that plaintiff failed to raise a genuine issue as to Hermann's knowledge of the alleged usurious interest rate. The promissory note and mortgage do not on their face disclose a usurious interest rate. Furthermore, in none of the pleadings, affidavits or depositions filed are there facts raising an issue as to Hermann's knowledge

of the interest rate. See *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973). Summary judgment under GCR 1963, 117.2(3) was also proper.

Affirmed. Costs to appellees.

GIFFELS ASSOCIATES, INC. v DEPARTMENT OF TREASURY

TAXATION—CORPORATIONS—FRANCHISE FEES—DEFICIENCIES—COMPUTATION OF FEE—ACCEPTANCE OF ANNUAL REPORTS—PROTEST—STATUTES.

Computation of franchise fees and acceptance of a corporation's annual report exhausts the Treasury Department's authority under the franchise fee act; therefore, payment of any deficiency assessed after the computation of the fee and acceptance of the annual report, based on unauthorized field audits, is not required of a taxpayer under the act and refund of amounts paid under protest is proper (MCLA 450.310; MSA 21.210[1], since repealed).

Appeal from Corporation Tax Appeal Board. Submitted January 11, 1978, at Lansing. (Docket No. 77-1514.) Decided March 7, 1978.

Petition by Giffels Associates, Inc., to the Corporation Tax Appeal Board for refund of a franchise fee deficiency paid under protest. Refund granted. Defendant, Department of Treasury, appeals by leave granted. Affirmed.

Boyd E. Chapin, for plaintiff.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Richard R. Roesch* and *Charles E. Liken,* Assistants Attorney General, for the Department of Treasury.

Before: BRONSON, P. J., and R. B. BURNS and R. E. A. BOYLE,* JJ.

REFERENCE FOR POINTS IN HEADNOTE

71 Am Jur 2d, State and Local Taxation § 270.

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

PER CURIAM. Plaintiff, Giffels Associates, Inc., filed annual reports and paid franchise fees for the years 1968 to 1971. The reports were accepted by defendant. In 1973, defendant conducted a field audit of plaintiff's books and assessed a franchise fee deficiency of $49,585.29, including interest, for the years 1968–1971, which was paid under protest. Two years later, in *Clark Equipment Co v Department of Treasury, Revenue Division,* 394 Mich 396; 230 NW2d 548 (1975), the Supreme Court held that the Franchise Fee Division of the Department of Treasury was without authority to conduct field audits and recompute franchise fees after it had once computed the tax and accepted and filed the annual reports. See, also, *Borden, Inc v Department of Treasury,* 391 Mich 495; 218 NW2d 667 (1974). Plaintiff then sought a refund, which was refused. On appeal, the Corporation Tax Appeal Board, in a 2–1 decision, ordered the refund. Defendant appeals by leave granted.

The question presented is whether plaintiff is entitled to a refund of franchise fees paid because the department was without authority to conduct a field audit and recompute the franchise fee due.

The statute under which plaintiff sought a refund provided:

"Any corporation subject to the provisions of this act which has paid to the department of treasury an amount in excess of that which it considers to have been legally due from it for any year, within 3 years from the date of such alleged overpayment and not after, may file with the department a written petition to have refunded to it the amount claimed to have been overpaid. If on the petition and the information and proof filed in support thereof, the department determines that the payment of the fee, tax or charge, or any part thereof, was not required of the petitioner by the provisions of this act, it shall cause a refund thereof

to be made or, at the option of the corporation, shall credit any such excessive payment to the account of the corporation for application to any franchise fee liability such corporation may incur thereafter. If the department is of the opinion that the payment made by the petitioner was proper it shall deny the request for refund." MCLA 450.310; MSA 21.210(1).[1]

Resolution of this case depends on whether payment of the additional tax was "not required * * * by the provisions of this act" or whether it was "proper".

In *Clark* and *Borden, supra,* the Supreme Court held that under the franchise fee act, computation of the fee and acceptance of the annual report exhausted the Treasury Department's authority. Therefore payment of any deficiency assessed after that time based on unauthorized field audits was "not required of the petitioner by the provisions of this act". MCLA 450.310; MSA 21.210(1). Refund of amounts paid under protest was proper.

We note also that this accords with the result reached by this Court in another case involving identical facts. See *St Clair-Macomb Consumers Cooperative, Inc v Department of Treasury,* 78 Mich App 287; 259 NW2d 462 (1977).

Affirmed. Costs to appellee.

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[1] MCLA 450.304–450.310; MSA 21.205–21.210(1) were repealed by 1975 PA 230, although those sections remain in effect in proceedings involving fees paid before the repeal. *See, also,* 1975 PA 13, amending MCLA 450.310; MSA 21.210(1).

PEACOCK TOWNSHIP v PANETTA

1. ZONING—INTERPRETATION OF ORDINANCES—RESTRICTIONS—PROPERTY OWNERS.

The language of a zoning ordinance must be interpreted, for purposes of determining the extent of a restriction upon the use of property, in favor of the property owner where doubt exists as to the intention of the legislative body.

2. ZONING—ORDINANCES—CONSTRUCTION OF ORDINANCES—CAMPGROUND—USES PERMITTED—TOWNSHIPS.

A township zoning ordinance should be construed to allow the operation of a primitive campground upon land zoned agricultural where the zoning ordinance permits all uses in an agricultural district that are permitted in a commercial-residential district and where the ordinance allows any recognized "mercantile business" in the commercial-residential districts but fails to define the term "mercantile business", thus leaving it unclear as to what types of uses the drafters of the ordinance intended to permit.

3. ZONING—ORDINANCES—CONSTRUCTION OF ORDINANCES—CONDITIONS OF THE AREA.

It is permissible to inquire into the conditions of the area where a zoning ordinance is intended to operate when construing a zoning ordinance.

4. ZONING—TOWNSHIPS—IMPLICATIONS—PERMISSIBLE USES—CAMPGROUNDS—EXPRESS PROHIBITIONS.

An implication arises that a campground is a permissible use of property in sections of a township where they are not expressly prohibited where the township's zoning ordinance expressly prohibits the construction of campgrounds in certain sections of the township.

REFERENCES FOR POINTS IN HEADNOTES

[1–3] 82 Am Jur 2d,Zoning and Planning §§ 66–68.
[4] 82 Am Jur 2d, Zoning and Planning §§ 121, 122.
[5] 82 Am Jur 2d, Zoning and Planning §§ 25, 27.
[6] 82 Am Jur 2d, Zoning and Planning § 45.
[7] 82 Am Jur 2d, Zoning and Planning § 186.

5. ZONING—ORDINANCES—VALIDITY—PRESUMPTIONS—BURDEN OF PROOF.

A zoning ordinance is presumed valid and the burden is on a party attacking an ordinance to establish its invalidity.

6. ZONING—ORDINANCES—TOWNSHIPS—GOVERNMENTAL INTERESTS—FIRE HAZARDS—SAFETY CONCERNS.

A township's interim zoning ordinance prohibiting the establishment, alteration or extension of campgrounds within the township for a period of one year advances a reasonable and rational governmental interest where the ordinance was passed in order to allow the township time to evaluate the fire hazards and safety concerns incidental to the large number of campers present in the township during motorcycle rallies.

7. ZONING—PRIOR NONCONFORMING USES—REASONABLENESS—VESTED RIGHTS.

A prior nonconforming use is a vested right to continue the lawful use of real estate in the manner it was used prior to the adoption of a zoning ordinance; though the ordinance be reasonable, it cannot operate to oust the property owner of his vested right; to establish a nonconforming use it is essential to show nonconformance in a reasonably substantial manner.

Appeal from Lake, Charles A. Wickens, J. Submitted February 7, 1978, at Grand Rapids. (Docket No. 77-2010.) Decided March 7, 1978.

Complaint by the Township of Peacock against Louis R. Panetta, Marilyn Panetta and Robert A. Haas for an injunction prohibiting defendants from using their property as a primitive campground. Injunction granted. Defendants appeal. Reversed.

Krolczyk & Danielson, for plaintiff.

VanKula, Woodruff & Wernette, for defendants.

Before: J. H. GILLIS, P. J., and R. B. BURNS and ALLEN, JJ.

PER CURIAM. Defendants appeal as of right from

an injunction entered by the Lake County Circuit Court prohibiting defendants from using their property as a primitive campground.[1]

The record reveals the following facts. Plaintiff, Peacock Township, adopted a comprehensive zoning ordinance that went into effect on September 22, 1970. The ordinance established four types of zoning districts: Residential A, Residential B, Commercial-Residential, and Agricultural.

Defendants own a 10-acre parcel of land, of which part is zoned commercial-residential and the remainder is zoned agricultural. Defendants operated a primitive campground on that part of their property that was zoned agricultural. The campground was used primarily by motorcyclists who attended off-the-road rallies at nearby locations. However, other people camped on the property on a regular basis.

On June 17, 1975, plaintiff passed an interim campground and mobile home ordinance. The ordinance provided that no campgrounds could be established, altered or extended for a period of one year.

Defendants continued to allow people to camp upon their property since the ordinance did not prohibit the continued use of an established campground.

Finally, on May 27, 1976, plaintiff amended its comprehensive zoning ordinance to permit campgrounds only in certain sections of the township. Defendants' property did not lie within one of these designated sections. Accordingly, when defendants announced their intention to continue to allow motorcyclists to camp on their property, plaintiff instituted proceedings which resulted in the issuance of an injunction which prevented

[1] A primitive campground is one which provides only fresh water and lavatory facilities.

defendants from using their property as a primitive campground.

Defendants first contend that the original comprehensive zoning ordinance enacted in 1970 does not prohibit the operation of a primitive campground on their property.

Peacock Township Zoning Ordinance, art VIII, § 1 provides as follows:

"(a) All uses permissible in the Residential 'A' and 'B' Districts are permissible in the Commercial-Residential District.

"(b) In addition, any generally recognized mercantile business, including, *but not by way of limitation,* banks, professional offices, dressmaking and millinery shops, grocery and meat markets, drug stores, sales and showrooms, parking lots, restaurants, rental business, studios, gas stations, hotels, motels and room rentals are permitted." (Emphasis supplied.)

Peacock Township Zoning Ordinance, art IX, § 1, defines the uses permitted in an agricultural district. This district permits all uses which are permitted in a commercial-residential district. This district also permits uses which are normally associated with farming and agriculture along with light industry.

As the ordinance states, any recognized "mercantile business" is allowed in the commercial-residential districts. The ordinance fails to define the term "mercantile business", hence, it is unclear as to what types of uses the drafters of the ordinance intended to permit.

"In interpreting the language of the ordinance to determine the extent of the restriction upon use of the property, the language must be interpreted, where doubt exists as to the intention of the legislative body,

in favor of the property owner." 8 McQuillin, Municipal Corporations (3d ed), 1974 Cum Supp, § 25.71, p 50.

Hence, the ordinance in question should be construed to allow defendant to use their property for a primitive campground.

Other factors support this conclusion. When construing a zoning ordinance it is permissible to inquire into the conditions of the area where the ordinance is intended to operate.[2] Peacock Township is sparsely populated. It has about 198 registered voters. More than 60 percent of the township is public land on which persons may camp. In view of these facts, it is reasonable to believe that campgrounds are a use intended to be included in the commercial-residential district. The situation might be otherwise if the ordinance was intended to operate in a metropolitan area.

It should also be noted that art X of the ordinance expressly prohibits the construction of campgrounds in certain sections of the township. However, defendants' property is not within one of the prohibited areas. Hence, an implication arises that a campground is a permissible use of property in sections of the township where they are not expressly prohibited.

Therefore, we conclude that defendants' operation of a campground on their property was a permissible use under the 1970 Peacock Township Zoning Ordinance.

Defendants next contend that the interim zoning ordinance enacted by plaintiff was unconstitutional in that it was not reasonably related to any tenable township interests.

A zoning ordinance is presumed valid. *Kirk v*

[2] *See, People v Detroit Citizens' R Co,* 116 Mich 132, 137–138; 74 NW 520 (1898).

Tyrone Twp, 398 Mich 429; 247 NW2d 848 (1976). The burden is on the party attacking the ordinance to establish its invalidity.

Defendants failed to establish that the ordinance did not promote the health, safety or general welfare of the residents of Peacock Township.

Our review of the record indicates that the ordinance was passed in order to allow plaintiff time to evaluate the fire hazards and safety concerns incidental to the large number of campers present in the township during the motorcycle rallies. Such an ordinance advances a reasonable and rational governmental interest.

Also, since the ordinance only prohibited the expansion of current campgrounds and the establishment of new campgrounds, it had no effect on defendants' continued operation of their campground at its present capacity.

Defendants finally claim that the comprehensive zoning ordinance passed by plaintiff in 1976 cannot prohibit defendants from using their property as a primitive campground since they have already established such a use prior to the effective date of the ordinance.

"A prior nonconforming use is a vested right to continue the lawful use of real estate in the manner it was used prior to the adoption of a zoning ordinance. Though the ordinance be reasonable, it cannot operate to oust the property owner of his vested right." *Dusdal v City of Warren,* 387 Mich 354, 359–360; 196 NW2d 778 (1972).

"[T]o establish a nonconforming use it is essential to show nonconformance in a reasonably substantial manner." *Township of Fruitport v Baxter,* 6 Mich App 283, 285; 148 NW2d 888 (1967).

Prior to the effective date of the 1976 ordinance,

defendants had twice used their property as a campsite for hundreds of people attending motorcycle rallies. They also had weekend campers on a regular basis. The record reveals that four persons camped on the property on a year-round basis.

On the basis of this record, it is the opinion of this Court that defendants established the use of their property as a primitive campground prior to the effective date of the 1976 ordinance which prohibited such a use of defendants' property. Accordingly, defendants should be allowed to use their property as a primitive campground in accordance with their past practices as a prior nonconforming use. The injunction is dissolved.

The other issues raised on appeal do not merit discussion by this Court.

Reversed. No costs, a public question being involved.

AUMAN v FEDERAL INSURANCE COMPANY

1. INSURANCE—DUTY—GOOD FAITH—NEGOTIATING SETTLEMENTS—DAMAGES.

An insurance company has a duty to act in good faith with respect to the interest of the insured when negotiating settlements, and if it fails so to act, the insured may bring an action for the damages he suffers as a result.

2. JUDGMENT—SUMMARY JUDGMENT—FAILURE TO STATE CLAIM—APPEAL AND ERROR—COURT RULES.

Summary judgment was improperly granted to a defendant on the ground that the plaintiff had failed to state a claim upon which relief could be granted where the plaintiff's complaint properly stated a valid cause of action (GCR 1963, 117.2[1]).

3. JUDGMENT—SUMMARY JUDGMENT—ISSUES OF MATERIAL FACT—BENEFIT OF DOUBT—GENUINE ISSUES OF MATERIAL FACT—COURT RULES.

Summary judgment was improperly granted to a defendant on the ground that there was no genuine issue as to any material fact where it is clear, interpreting the pleadings and affidavits to give the benefit of reasonable doubt to the plaintiff, that there existed a genuine issue of material fact (GCR 1963, 117.2[3]).

Appeal from Crawford, William A. Porter, J. Submitted November 1, 1977, at Lansing. (Docket No. 31417.) Decided February 27, 1978. Leave to appeal applied for.

Complaint by Donald R. Auman against the Federal Insurance Company for damages for breach of defendant's duty to defend the plaintiff from claims arising out of the operation of a motor

REFERENCES FOR POINTS IN HEADNOTES

[1] 44 Am Jur 2d, Insurance §§ 1530, 1531, 1533.

[2] 73 Am Jur 2d, Summary Judgment §§ 22, 23.

[3] 73 Am Jur 2d, Summary Judgment § 32.

vehicle insured under a policy issued by defendant. Summary judgment for defendant. Plaintiff appeals. Reversed and remanded.

Dreyer & Braeuninger, for plaintiff.

Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen (by *D. J. Watters* and *Christine D. Oldani),* for defendant.

Before: J. H. GILLIS, P. J., and BASHARA and H. L. HEADING,* JJ.

PER CURIAM. Plaintiff appeals from the trial court's order granting summary judgment to defendant.

Plaintiff in his complaint alleged that he was damaged by defendant's breach of its duty to defend plaintiff in good faith from claims arising out of operation of a motor vehicle insured under a policy issued by defendant. Plaintiff was operating an insured motor vehicle when it was involved in an accident. Defendant negotiated a settlement for $100,000, the amount of the policy limits, with third parties who suffered damages as a result of that accident. In exchange for the settlement, the claimants signed an agreement not to sue defendant and its policyholder, but preserved their rights against plaintiff, which rights they are seeking to enforce in an action for damages in excess of $500,000.

In moving for summary judgment, defendant called the attention of the trial court to the provision in the insurance policy excusing defendant from defending claims filed after the policy limits have been exhausted. The trial court held that

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

defendant, having paid the amount of the policy limits in the settlement, had fulfilled its contractual obligation. Accordingly, he granted summary judgment to defendant.

An insurance company in negotiating settlements has a duty to act in good faith with respect to the interest of the insured, and if it fails so to act, the insured may bring an action for the damages he suffers as a result, *City of Wakefield v Globe Indemnity Co,* 246 Mich 645; 225 NW 643 (1929), *Citizens Mutual Insurance v Nationwide Insurance,* 29 Mich App 91; 185 NW2d 99 (1970). Because plaintiff's complaint properly stated a valid cause of action, summary judgment was improper under GCR 1963, 117.2(1).

The trial court's action in granting summary judgment to defendant is also not proper under GCR 1963, 117.2(3). The affidavit filed in support of defendant's motion for summary judgment does not assert that defendant acted in good faith in negotiating the settlement, a matter put in issue by plaintiff in his complaint. It is clear, interpreting the pleadings and affidavits to give the benefit of reasonable doubt to plaintiff, that there exists a genuine issue of material fact, *Rizzo v Kretschmer,* 389 Mich 363; 207 NW2d 316 (1973). There must therefore be a trial.

Reversed and remanded for trial on the merits. Costs to plaintiff.

PEOPLE v EDMOND

1. BAIL—PRETRIAL RELEASE—STANDARD OF REVIEW—ABUSE OF DISCRETION—COURT RULES.

   The standard of review of a pretrial release or bail decision is abuse of judicial discretion; a trial judge's exercise of discretion in such matters is guided by nine enumerated factors set out in the pretrial release court rule (GCR 1963, 790.5, 790.7[b], [d]).

2. BAIL—PRETRIAL RELEASE—TRANSCRIPT—MOTION FOR REVIEW—COURT REPORTERS—PRIORITY—COURT RULES.

   A party seeking review of a bail decision under the pretrial release court rule must file with the Court of Appeals a certified copy of the transcript of the pretrial release hearing at the same time the motion for review is filed; therefore, although not addressed in the rule, it is obvious that court reporters must give immediate priority to the preparation of bail decision transcripts (GCR 1963, 790).

3. BAIL—AMOUNT OF BAIL—DISCRETION OF TRIAL COURT—APPEAL AND ERROR—COURT RULES.

   Remand to circuit court for reconsideration of the amount of bail is necessary where there is an absence in the record of particularized consideration of the amount of money bail with specific reference to the nine factors enumerated in the pretrial release court rule and where because of the absence of reasons stated on the record for the decision to require the amount of bail established in the case, the Court of Appeals is unable to review the trial court's exercise of discretion in setting the amount of bail (GCR 1963, 790).

4. BAIL—PRETRIAL RELEASE—AMOUNT OF BAIL—CONSTITUTIONAL LAW—EXCESSIVE BAIL—ASSURING DEFENDANT'S PRESENCE—COURT RULES.

   A magistrate or arraigning judge in determining which form of

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REFERENCES FOR POINTS IN HEADNOTES

[1, 2] 8 Am Jur 2d, Bail and Recognizance §§ 48, 53, 54.
[3, 4] 8 Am Jur 2d, Bail and Recognizance §§ 58, 68.
[5] 8 Am Jur 2d, Bail and Recognizance §§ 71–73.
[6] 8 Am Jur 2d, Bail and Recognizance § 12 *et seq.*

release to use under the pretrial release rule and the amount of bail to be required should keep in mind that pretrial release of an accused is a matter of constitutional right and is the state's favored policy under the pretrial release rule; money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required (GCR 1963, 790).

5. BAIL—DANGEROUSNESS OF ACCUSED—PRETRIAL—RELEASE DECISION —OBSTRUCTION OF JUSTICE—INTIMIDATION OF WITNESSES—STATUTES.

An accused's dangerousness to the community in general may not be considered in a pretrial release decision; however, if the accused has made threats against witnesses in the prosecution for which he is being held or otherwise indicates an intention to obstruct the prosecution, that factor may be considered in a pretrial release decision either under the Bail Reform Act of 1966 or as a matter of the court's inherent right to protect the integrity of the judicial process; but the pretrial release decision may not take into consideration allegations that the accused intimidated witnesses or attempted to obstruct justice on a previous occasion, not related to the prosecution for which he is being held, where the accused was never prosecuted for the alleged intimidation or obstruction of justice (18 USC 3146).

6. BAIL—APPEAL AND ERROR—APPEAL AS OF RIGHT.

There is no appeal as of right to review an order on a bail decision (GCR 1963, 790).

Appeal from Ingham, Michael G. Harrison, J. Submitted January 10, 1978, at Lansing. (Docket No. 78-35.) Decided March 14, 1978.

Percy A. Edmond was indicted on one count of conspiracy to deliver heroin and 13 counts of delivery of heroin or possession with intent to deliver heroin. At arraignment on the indictment bail was set at $625,000 and later reduced to $205,000. Defendant appeals. Appeal dismissed and the matter remanded.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Peter D. Houk,*

Prosecuting Attorney, and *John E. Steele,* Assistant Prosecuting Attorney, for the people.

H. Eugene Bennett, for defendant.

Before: DANHOF, C. J., and BRONSON and BEASLEY, JJ.

PER CURIAM. Defendant has filed a claim of appeal from, and a motion to review, a bail decision, pursuant to GCR 1963, 790.7(b). The prosecuting attorney has filed a motion to dismiss the claim of appeal and, in answer to the motion, contends that the amount of the money bail should be increased because of evidence presented at the pretrial release hearing (but not considered by the trial court in his bail decision) that on a prior occasion defendant solicited the testifying witness to kill a possible witness against defendant's brother in judicial proceedings apparently not related to the present indictment. No prosecution arose from that alleged solicitation.

Defendant is presently incarcerated in county jail under indictment by an Ingham County Citizens Grand Jury which charges him with one count of conspiracy to deliver heroin and with 13 counts of delivery of heroin or possession with intent to deliver heroin. At arraignment on the indictment, the circuit court set bail in the amount of $625,000 surety bond: $300,000 on the conspiracy count and $25,000 for each additional count contained in the indictment. At a later hearing for pretrial release under GCR 1963, 790, the circuit court considered the nine factors enumerated in subsection 5 of the rule and determined that defendant could be released only on money bail. However, he agreed to reduce the amount of the bail and require surety bond in the

amount of $205,000: $75,000 on the conspiracy count and $10,000 on each of the other counts.

The pretrial release rule, which became effective December 20, 1977, provides for review of a circuit court bail decision in this Court by motion. GCR 1963, 790.7(b). The standard of review under subsection 7(d) of the rule is abuse of judicial discretion. Under subsection 5 of the rule, a bail judge's exercise of discretion is guided by nine enumerated factors. In light of the standard of review set out in the rule and the several factors which must be considered by the bail judge, this Court is unable to perform its role on review of a bail decision without a transcript of the pretrial release hearing. Accordingly, a party seeking review of a bail decision pursuant to GCR 1963, 790.7(b) must file with this Court a certified copy of the transcript of the pretrial release hearing at the same time the motion for review is filed. Although not addressed in the rule, it is obvious that court reporters must give immediate priority to the preparation of bail decision transcripts.

In the present case, defendant contends that the circuit court abused its discretion under the rule by requiring excessive bail. Defendant does not contend that the trial court abused its discretion by requiring money bail, rather than releasing defendant on his own recognizance or on conditional release. Our own review of the record and the nine factors enumerated in subrule 790.5 satisfies us that the trial court did not abuse its discretion in requiring money bail.

On the other hand, we are not able to determine whether the trial court exercised proper judicial discretion in fixing the amount of the bail. It appears that the trial court considered the enumerated factors with reference to the type of

release to allow and stated the reasons for its decision on the record. However, the trial judge did not give particularized consideration to those factors with specific reference to the amount of the money bail to be required. We read rule 790 as requiring the bail court to consider the nine factors with reference both to the type of release to be employed and the amount of money bail, if that type of release is determined to be necessary to assure defendant's appearance. Subrule 790.5 provides, in pertinent part:

> "In deciding which release to use and what *terms* and conditions to impose, the court shall consider available information on [the nine enumerated factors].
>
> * * *
>
> "Unless the defendant is released on his own recognizance, the court must state *the reason for its decision on the record."* (Emphasis added.)

In the absence of particularized consideration of the amount of money bail with specific reference to the nine factors enumerated in the rule and in the absence of reasons stated on the record for the decision to require a $205,000 bail in this case, we are unable to review the trial court's exercise of discretion in this regard. We remand the cause to the circuit court for reconsideration of the amount of bail.

In determining which form of release to use under the pretrial release rule and the amount of money bail to be required, the magistrate or arraigning judge should keep in mind that pretrial release of an accused is a matter of constitutional right and the state's favored policy under rule 790. Money bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his

presence is required. *Stack v Boyle,* 342 US 1; 72 S Ct 1; 96 L Ed 3 (1951).

New rule 790 is silent on the question whether a judge may specifically consider the fact that the accused might be dangerous to society because of threats against witnesses or attempts to obstruct the prosecution. Since rule 790 is modeled on the Bail Reform Act of 1966, 18 USC 3146, and the ABA Standards Relating to Pretrial Release (Approved draft, 1968), we look to those sources for guidance. The Bail Reform Act is similarly silent on the point and Congress apparently deliberately intended to avoid the question of pretrial detention in the act. *United States v Wind,* 527 F2d 672, 674 (CA 6, 1975). However, Federal cases under the former Federal rule and the Bail Reform Act establish some useful principles. An accused's dangerousness to the community in general may not be considered in a pretrial release decision. See, for example, *United States v Bigelow,* 544 F2d 904 (CA 6, 1976), *United States v Leathers,* 134 US App DC 38; 412 F2d 169 (1969). However, if the accused has made threats against witnesses in the prosecution for which he is being held or otherwise indicates an intention to obstruct the prosecution and, in that sense, is a danger to the community, that factor may be considered in a pretrial release decision either under the Bail Reform Act of 1966 or as a matter of the court's inherent right to protect the integrity of the judicial process. See, for example, *United States v Wind, supra, United States v Gilbert,* 138 US App DC 59; 425 F2d 490 (1969). However, the pretrial release decision may not take into consideration allegations that the accused intimidated witnesses or attempted to obstruct justice on a previous occasion, not related to the prosecution for which he is being held, where

the accused was never prosecuted for the alleged intimidation or obstruction of justice. To do so would in effect be to deny bail on untried charges which ordinarily cannot be done.

Under the Standards Relating to Pretrial Release, threats to witnesses are not to be considered in the decision to release. However, they may be considered in imposing conditions on release. See ABA Standards, *supra,* Commentary, p 59, and Standard 5.5, p 65. Under GCR 1963, 790.5, similar conditions can be imposed. Under those guidelines, the circuit court in this case, in deciding what form of release to allow, properly declined to consider evidence that defendant allegedly solicited the testifying witness to kill a witness against defendant's brother in an unrelated transaction.

Finally, we conclude that a bail decision is not appealable as of right to this Court by claim of appeal. Rule 790.7(b) specifically provides that a bail decision is reviewable by motion. An appeal as of right was never available, nor is it now under GCR 1963, 790, to review an order on a bail decision. Such an order is an interlocutory order and has always been appealable on its own by application for leave. The prosecutor's motion to dismiss defendant's claim of appeal is granted.

This cause is remanded to the circuit court for reconsideration of the amount of money bail in light of the nine factors enumerated in subrule 790.5 and for a statement on the record of the court's reasons for his decision on the amount of bail. The court may make the determination from the present record or may conduct such further evidentiary hearing as he deems necessary. Proceedings on remand shall be conducted within seven days.

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ACTION

1. Restrictions upon voluntary dismissals require that a forum with jurisdiction over a controversy be permitted to proceed to a final resolution and that resolution may derive from a full adversary proceeding on the merits, stipulation by the parties to a determination, or summary resolution where a party is entitled to prevail as a matter of law, but whatever mode is employed, the purpose, which is a final resolution of the controversy, is the same (GCR 1963, 504.1), *Adams v A & P*, 91.

2. The forum must be permitted to render an ultimate resolution, once an adjudicatory proceeding has properly commenced. *Adams v A & P*, 91.

3. A plaintiff can maintain a civil damage action for redress of his statutorily created right to be free from discrimination in private employment, and this remedy may be pursued in addition to the remedial machinery provided by statute. *Avant v National Bank of Detroit*, 543.

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ADMINISTRATIVE LAW

1. *Failure of a plaintiff to exhaust his administrative remedies deprives a circuit court of subject matter jurisdiction. Strachan v Mutual Aid Club*, 165.

2. *A final decision or order of the Civil Rights Commission is subject to direct review by the courts; the filing of a motion or application for reconsideration or rehearing is not required prior to seeking a consideration of the matter by a circuit court (MCLA 24.301; MSA 3.560[201], 1970–1971 AACS, R37.7[a], 1967 AACS, R37.18[a]). Strachan v Mutual Aid Club*, 165.

3. An order by the Director of the Michigan Department of Social Services constituted a continuance of an administrative action brought by the department to determine whether the defendants had received Medicaid payments for services not covered by the program where it withheld a final determination on the amount of overpayment pending the development of a reliable method for calculating that amount after which the defendants would have the right to challenge the department's new statistical method; such an order cannot be considered a final order for purposes of res judicata since it specifically reserved resolution of the amount due pending a redetermination. *Dept of Social Services v Arden*, 210.

ADMINISTRATIVE LAW—Cont'd

4. A general rule regarding the grant of a continuance by an administrative agency is the same as that applicable to judicial proceedings; its decision will not be disturbed absent an abuse of discretion. *Dept of Social Services v Arden,* 210.

5. The purpose of the provisions of the Administrative Procedures Act regarding subpoenas is to grant parties in administrative proceedings access to the subpoena power necessary to permit them to procure and present all favorable relevant evidence; this legislative intention does not require the restriction of the general subpoena authority of the Michigan Department of Social Services granted under a provision of The Social Welfare Act (MCLA 24.273, 24.280, 400.8; MSA 3.560[173], 3.560[180], 16.408). *Dept of Social Services v Arden,* 210.

6. The general investigative subpoena power of an administrative agency is not restricted because of a concurrent adjudicatory proceeding concerning the same subject matter. *Dept of Social Services v Arden,* 210.

7. The exclusivity rule expounded by teh United States Supreme Court which provides that employees under the Railway Labor Act are bound to pursue administrative remedies under the act to the exclusion of judicial avenues of relief does not apply where an employee is asserting rights outside of a collective bargaining agreement (45 USC 151 *et seq.). Trombetta v Detroit, T & I R Co,* 489.

8. The judicial yardstick for assessing the validity of an administrative decision is whether the decision is supported by competent, material and substantial evidence on the whole record; on an appeal of an administrative decision, a court should not superimpose its judgment on that of the administrative agency and review questions of fact and weigh evidence or determine whether the probabilities preponderate one way or another, but should simply determine whether the evidence justifies the findings of the agency. *Smith v Mayor of Ecorse,* 601.

9. An administrative hearing concerning the suspension of a police officer pursuant to the veteran's preference act may be conducted by the mayor pro tem of a city although the city charter does not specifically state that the mayor pro tem should conduct such hearings where such a conclusion is implied in the city charter and is correct both in terms of legal sense and common sense; to hold otherwise would mean that the hearing could not be held until a new mayor was elected (MCLA 35.402; MSA 4.1222). *Smith v Mayor of Ecorse,* 601.

See

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APPEAL AND ERROR

1. The Workmen's Compensation Appeal Board erred in failing to appreciate the significance of sickness and accident benefit information submitted to an employer by an employee 6 days after the employee had been informed by his own doctor of his occupationally-related emphysematous condition where such information provided the employer with notice of the fact of disability, as distinguished from notice of the cause of disability; this notice of the fact of disability was timely under the workmen's compensation statute which provides that an employee must inform the employer of his disability within 120 days after he learns of his disability and of its work-related nature (MCLA 418.441; MSA 17.237[441]). *Hilton v Gen Motors,* 21.

2. The standard of review on appeals from orders for child support provides that the lower court's decision is to be presumed correct and that the appellant bears the burden of showing the decision to be clearly erroneous; however, because of the history of appellate review in equity, the appellant may establish clear error more readily in an equity case than in cases historically heard at law. *Moncada v Moncada,* 26.

3. Clear error by a lower court in finding that a petitioner's act in leaving the site of his employment rendered him responsible, at least in part, for the loss of his employment was not shown on the evidence admitted at trial where the evidence regarding the loss of his job was ambiguous and the record was silent on the questions of whether petitioner ever returned to the work site, under what circumstances he was informed that he had lost his job, and whether he made any effort to regain it. *Moncada v Moncada,* 26.

APPEAL AND ERROR—Cont'd

4. A conclusion reached in an earlier appeal to the Michigan Supreme Court becomes the law of the case and is not subject to review on appeal from a subsequent trial; courts will not review former decisions made by the same court in the same cause and based on the same facts. *Pierce v Riley,* 39.

5. The Court of Appeals reviews equity cases *de novo* but will not disturb the trial court's findings unless convinced that a different result would have been reached had the Court occupied the trial court's position. *Pierce v Riley,* 39.

6. A claim may not be reviewed for the first time on appeal where it was not the subject of a ruling by the court below. *Horton v Kalamazoo,* 78.

7. The Court of Appeals, in evaluating the possible prejudice resulting from a defense counsel's protracted inquiry on cross-examination into the plaintiffs' national origins, looks to whether the questions were relevant to the issues and, if not, whether they were calculated to arouse prejudice; the Court will look to see if defense counsel indulged in unnecessary overkill instead of pursuing a limited, focused inquiry into areas relevant to the issues. *George v Travelers Indemnity Co,* 106.

8. Failure to object specifically and for proper reasons to the admission of evidence precludes appellate review unless there is manifest injustice; failure to request a curative instruction forecloses appellate review unless the remarks of counsel are so prejudicial as to be irreparable by a cautionary instruction. *George v Travelers Indemnity Co,* 106.

9. A plaintiff who has failed to appeal from a final order of the Civil Rights Commission is precluded from further litigation of the issues determined by that order. *Strachan v Mutual Aid Club,* 165.

10. The appropriate remedy on an appeal from a conviction of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct in the third degree where the trial court wrongfully barred the admission of reputation evidence is a remand to the trial court to allow the defendant an opportunity to present evidence on the questions of the complainant's reputation for chastity, and that the defendant knew of this reputation, rather than order what may be a useless new trial. *People v Walker,* 202.

11. A trial court's finding of fact will not be set aside unless it is clearly erroneous (GCR 1963, 517.1). *Merritt v Detroit Memorial Hosp,* 279.

12. The function of an appellate court is restricted to the test of questions which, in the court below, have been raised and saved for review, and a claim not so raised should not be considered

APPEAL AND ERROR—Cont'd

by an appellate court, even if the claim may be of some merit and even if it is a constitutional question. *Oakland County v Detroit,* 308.

13. A surety seeking remittance of a forfeited recognizance bond may appeal to the Court of Appeals if he fails to obtain the requested relief in Recorder's Court. *Wayne Prosecutor v Judges,* 317.

14. An order of a circuit court in a child custody dispute shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue (MCLA 722.28; MSA 25.312[8]). *Radway v Radway,* 328.

15. Numerous rulings in favor of one party to a legal action do not necessarily indicate a prejudice on the part of the court. *Elsasser v American Motors Corp,* 379.

16. Review by the Court of Appeals of a trial court's denial of a motion for a new trial is to determine whether the denial was an abuse of discretion. *Alvarado v Scutt,* 421.

17. There is no ground to reverse a jury verdict even where the verdict must, upon redeliberation, be substantially reassessed after discovery of a defect where the trial court does not seriously compromise the jury's free exercise of judgment on the factual merits. *Alvarado v Scutt,* 421.

18. Plaintiffs fail to preserve claims of error to the jury instructions given by a trial court where they did not make timely objections to the instructions, but the Court of Appeals will reverse to prevent manifest injustice where the instructions given by the trial court on the controlling issue of the case were erroneous. *Raatikka v Jones,* 428.

19. A trial court order granting a defendant's motion to suppress evidence will be affirmed by the Court of Appeals unless the trial court was clearly erroneous in granting the motion. *People v Robertson,* 446.

20. A defendant's motion for a directed verdict of acquittal is properly denied if, viewing the evidence presented by the prosecution in the light most favorable to the prosecution, there is some evidence on which the jury could base a verdict of guilty. *People v Milton,* 515.

21. Generally, a claim may not be reviewed for the first time on appeal where it was not the subject of a ruling of the court below. Turner v Ford Motor Co, 521.

22. A determination of whether a trial court abused its discretion in admitting the preliminary examination testimony of a witness at a later trial requires a qualitative review of the record. *People v Wittebort,* 529.

APPEAL AND ERROR—Cont'd

23. The neglect or omission of a party's attorney does not constitute adequate grounds for setting aside a default judgment; the neglect of an attorney is generally regarded as attributable to his client. *First Bank of Cadillac v Benson,* 550.

24. Findings of fact by a trial court cannot be set aside unless they are clearly erroneous; this is especially true where the testimony at trial was in sharp conflict and the judge had the advantage of seeing and hearing the witnesses (GCR 1963, 517.1). *Sturgis Savings v Italian Vil,* 577.

25. A finding that a plaintiff property owner had not met his burden of showing that the waiver of a mechanic's lien was clear and unequivocal as to liens for work to be done in the future will not be upset by the Court of Appeals where, after reviewing all the evidence, the appellate court cannot say that the finding of the trial court was clearly erroneous. *Sturgis Savings v Italian Vil,* 577.

26. A trial court's judgment must be affirmed if supported by findings not against the clear weight of the evidence; a claim of error based upon findings by the court which are not crucial to the decision will not lead to reversal, even if such findings were without evidentiary support. *Sturgis Savings v Italian Vil,* 577.

27. A party cannot gain reversal on appeal by claiming that the trial court erred in refusing to rule on the prevailing party's alternative theory of recovery where the resolution of the case on one ground gives that party all the relief he seeks. *Sturgis Savings v Italian Vil,* 577.

28. Findings of fact by a trial court are given great weight and are not set aside unless clearly erroneous. *Distco Laminating v Union Tool,* 612.

29. Generally, matters not ruled upon by the trial court will not be acted upon for the first time on appeal. *Distco Laminating v Union Tool,* 612.

30. The Court of Appeals must view evidence in a light most favorable to the plaintiff when reviewing a denial of a directed verdict and if, in doing so, the Court determines that there is any evidence which was competent and sufficient to support the jury's determination, the jury's resolution of the case should be affirmed; a motion for judgment notwithstanding the verdict is reviewed even more strictly, since the facts are viewed inferentially in favor of the non-moving party. *Dubey v Macomb Concrete Corp,* 662.

31. The denial of a defendant's motion for judgment notwithstanding the verdict is not error where the facts, viewed inferentially, are in the plaintiff's favor. *Dubey v Macomb Concrete Corp,* 552.

APPEAL AND ERROR—Cont'd

32. The Court of Appeals is limited on review to issues decided by the trial court. *Norton Shores v Carr,* 715.

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ARBITRATION AND AWARD

1. There is a strong public policy in favor of arbitration of disputes, and any dispute under a contract which contains an arbitration clause may be arbitrated unless it has been expressly exempted by the terms of the contract (MCLA 600.5001[2]; MSA 27A.5001[2]). *DAIIE v Kurak,* 217.

See
INSURANCE 8, 9

ARMED ROBBERY—See
CRIMINAL LAW 59
HOMICIDE 6

ARREST

1. Probable cause to arrest without a warrant is not necessary for an investigatory stop; what is necessary is a reasonable belief that criminal activity may be afoot. *People v Johnson,* 70.

2. Any peace officer may, without a warrant, arrest a person when a felony has been committed and he has reasonable cause to believe such person committed it (MCLA 764.15[c]; MSA 28.874[c]). *People v Johnson,* 70.

3. The reasonable or probable cause required to support an arrest without a warrant stems from some fact, circumstance, or information which creates an honest belief in the mind of a reasonable, prudent man that the person arrested has committed a felony; actual facts creating an actual belief can alone give rise to probable cause. *People v Johnseon,* 70.

4. A suspicion of criminal activity is an insufficient basis on which to justify an arrest without a warrant. *People v Johnson,* 70.

5. Information obtained after an arrest without a warrant can have no bearing on the determination of probable cause to make the arrest; therefore, a defendant's statements and articles discovered after a search of his person are not articulable facts giving the police probable cause to make the arrest. *People v Johnson,* 70.

6. It is impermissible to allow law enforcement officials to forcibly intrude upon the privacy of a person's home to obtain the factual bases required for probable cause to make an arrest without a warrant. *People v Johnson,* 70.

7. A police officer may not, without a warrant, arrest a person for a felony unless a felony has been committed and the officer has reasonable cause to believe that the person arrested has committed it (MCLA 764.15[c]; MSA 28.874[c]). *People v Tebedo,* 535.

8. A police officer may stop a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest where the officer has observed unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot. *People v Tebedo,* 535.

9. An investigative stop of a person by police must be justified at its inception and must be reasonably related in scope to the circumstances which justified the interference in the first place. *People v Tebedo,* 535.

10. The fact that a suspect flees at the approach of the police does not by itself justify an arrest; the police must positively relate the flight to the commission of a crime. *People v Tebedo,* 535.

ARREST—Cont'd

11. Police officers who stop a person for investigation of possible criminal activity may not use subsequent actions of the accused to supply the reasonable suspicion which is essential to justify the initial intrusion; therefore, an inculpatory statement made by a defendant after his arrest is not admissible in evidence where the police did not have reasonable cause to arrest the defendant. *People v Tebedo,* 535.

12. Police officers had a sufficient basis to stop a person to inquire of him what he was doing where the person was discovered at 5 a.m. standing behind a row of apartment buildings shortly after a suspicious person had been reported in the area and where the person fled as the police car approached; without more, however, the police were not justified in arresting the person because there was no indication of criminal activity, and a statement made by the person after his arrest cannot be used to inculpate him in a robbery which occurred three days earlier. People v Tebedo, 535.

See .

SEARCHES AND SEIZURES 8

ARREST WITHOUT WARRANT—See

ARREST 7

ARSON

1. The elements of arson may be established by circumstantial evidence; Michigan courts have affirmed arson convictions based on circumstantial evidence of motive, such as insurance coupled with business difficulties, plus opportunity, such as access to the building where there is independent evidence of the incendiary origins of the fire. *George v Travelers Indemnity Co,* 106.

See

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ATTORNEY AND CLIENT

1. The statute which provides for reasonable attorney's fees in mechanic's lien cases is remedial and should not be narrowly construed; the awarding of attorney fees is within the discretion of a trial judge and his discretion will be upheld in the absence of an abuse in determining the amount of reasonable attorney fees (MCLA 570.12; MSA 26.292). *Sturgis Savings v Italian Vil,* 577.

2. The issues of whether an attorney's failure to schedule a certain debt in his client's bankruptcy action constituted malpractice and the date upon which the alleged malpractice occurred are both questions of fact to be resolved by the trier of fact. *Biberstine v Woodworth,* 705.

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BAIL

1. Any person against whom the default of a recognizance bond may have been entered by a Recorder's Court has a right to apply to that court within 20 days after the judgment for vacation of the judgment for good and sufficient cause shown,

BAIL—Cont'd

and the court in its discretion may vacate such judgment on such terms as it may deem just; a surety against whom a judgment of forfeiture of a recognizance bond has been entered may address a petition for relief in the Recorder's Court issuing the judgment after the 20 day period and seek the discretion of the court. *Wayne Prosecutor v Judges,* 317.

2. A surety seeking remittance of a bond ordered forfeited by the Recorder's Court must seek relief initially from the Recorder's Court judge who ordered the forfeiture of the bond because this judge is responsible for the progress and ultimate disposition of the cases and proceedings on his docket of assigned cases (RCR 16.4). *Wayne Prosecutor v Judges,* 317.

3. An application for the remission of penalties, including the remittance of forfeited recognizance bonds, may not be heard until reasonable notice has been given to the prosecuting attorney and until he has an opportunity to examine the matter and to prepare to resist such application; orders for the remittance of forfeited recognizance bonds which are based on petitions filed without proper notice to the prosecutor's office are void (GCR 1963, 108.4, 110.2, 772.4). *Wayne Prosecutor v Judges,* 317.

4. The standard of review of a pretrial release or bail decision is abuse of judicial discretion; a trial judge's exercise of discretion in such matters is guided by nine enumerated factors set out in the pretrial release court rule (GCR 1963, 790.5, 790.7[b], [d]). *People v Edmond,* 743.

5. A party seeking review of a bail decision under the pretrial release court rule must file with the Court of Appeals a certified copy of the transcript of the pretrial release hearing at the same time the motion for review is filed; therefore, although not addressed in the rule, it is obvious that court reporters must give immediate priority to the preparation of bail decision transcripts (GCR 1963, 790). *People v Edmond,* 743.

6. Remand to circuit court for reconsideration of the amount of bail is necessary where there is an absence in the record of particularized consideration of the amount of money bail with specific reference to the nine factors enumerated in the pretrial release court rule and where because of the absence of reasons stated on the record for the decision to require the amount of bail established in the case, the Court of Appeals is unable to review the trial court's exercise of discretion in setting the amount of bail (GCR 1963, 790). *People v Edmond,* 743.

7. A magistrate or arraigning judge in determining which form of release to use under the pretrial release rule and the amount of bail to be required should keep in mind that pretrial release of an accused is a matter of constitutional right and is the state's favored policy under the pretrial release rule; money

BAIL—Cont'd
bail is excessive if it is in an amount greater than reasonably necessary to adequately assure that the accused will appear when his presence is required (GCR 1963, 790). *People v Edmond,* 743.

8. An accused's dangerousness to the community in general may not be considered in a pretrial release decision; however, if the accused has made threats against witnesses in the prosecution for which he is being held or otherwise indicates an intention to obstruct the prosecution, that factor may be considered in a pretrial release decision either under the Bail Reform Act of 1966 or as a matter of the court's inherent right to protect the integrity of the judicial process; but the pretrial release decision may not take into consideration allegations that the accused intimidated witnesses or attempted to obstruct justice on a previous occasion, not related to the prosecution for which he is being held, where the accused was never prosecuted for the alleged intimidation or obstruction of justice (18 USC 3146). *People v Edmond,* 743.

9. There is no appeal as of right to review an order on a bail decision (GCR 1963, 790). *People v Edmond,* 743.

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BILLS AND NOTES

1. Acceleration of the balance of the payments on a note may be commenced by filing a complaint for claim and delivery based on the accelerated balance. *Oakland Bank v Anderson,* 432.

2. The acceptance of a late installment payment on a note containing an acceleration clause serves to reduce a defendant's indebtedness, but it does not cure all existing defaults; where an acceleration action has already been brought through a complaint for claim and delivery acceptance of a single late payment does not constitute a waiver of the acceleration of the balance of the note. *Oakland Bank v Anderson,* 432.

3. Accepting late payments on an installment note containing an acceleration clause, where the payments were not timely made but the account was current at the time a complaint for claim and delivery was filed, prevents subsequent acceleration after acceptance of the late payments. *Oakland Bank v Anderson,* 432.

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CIVIL RIGHTS

1. *The right to obtain and retain employment without discrimination on the basis of age is a civil right which is enforceable concurrently before the Civil Rights Commission and in the circuit court. Strachan v Mutual Aid Club,* 165.

2. A plaintiff may avail himself of a judicial remedy to recover compensation for damage suffered by reason of discrimination in private employment even though a complaint, alleging essentially the same facts, filed by the plaintiff with the Michigan Department of Civil Rights is pending when the suit is begun. *Avant v National Bank of Detroit,* 543.

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CONSTITUTIONAL LAW

1. The courts are especially deferential toward legislative determinations of public purpose since a determination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government that should be made by the elected representatives of the people. *Horton v Kalamazoo,* 78.

CONSTITUTIONAL LAW—Cont'd

2. Due process of law requires that notice of a proceeding must be given to an opposing party sufficiently in advance of the scheduled proceeding to afford the opposing party a reasonable opportunity to prepare and answer. *Lawrence v Dept of Corrections,* 234.

3. A plaintiff was denied due process where the defendant moved for summary judgment and did not timely serve the plaintiff with a notice of the hearing on the motion, where because the plaintiff, a prison inmate, was incarcerated the court had already denied him the opportunity to argue on a previous motion in person so that the only way the plaintiff could appear was by way of written material sent through the mail, and where the record indicates that the plaintiff did not actually receive notice of the scheduled hearing on the motion until after the hearing was held and the motion granted. *Lawrence v Dept of Corrections,* 234.

4. A state is free as a matter of its own law to impose greater restrictions on police activity than those which the United States Supreme Court holds to be necessary under Federal constitutional standards. *People v Garcia,* 260.

5. Any discharge of a jury, after it has been impaneled and sworn, without sufficient cause operates as an acquittal in that it effectually bars another trial for the same offense; such discharge must have been made without the consent, express or implied, of the respondent in order to operate as an acquittal and bar another trial. *People v Hoffman,* 288.

6. A defendant's silence could not operate as his consent to, or acquiescence in, a trial court's dismissal of an impaneled and sworn jury where the record shows that defendant neither agreed nor dissented to the jury's dismissal; the courts have, nonetheless, found consent if it was expressed by defendant's counsel. *People v Hoffman,* 288.

7. Case precedent requires an express manifestation of consent to a mistrial either from the defendant or from his attorney to effectively eliminate the bar of double jeopardy where a mistrial is sought after a jury is impaneled and sworn; the absence of the defendant's personal consent to a mistrial where the record shows a consent by counsel does not necessarily bespeak the absence of his primary control over the proceedings. *People v Hoffman,* 288.

8. The fealty of the Court of Appeals is to the United States Supreme Court in matters of Federal constitutional interpretation. *People v Hoffman,* 288.

9. The guarantee against double jeopardy is a fundamental right which can be waived only by the defendant himself. People v Hoffman, 288.

CONSTITUTIONAL LAW—Cont'd

10. A defendant must do something positively in order to indicate that he is exercising primary control over the course to be followed and consents to a mistrial where such consent operates as a waiver of the protection against double jeopardy; primary control must reside in the defendant himself or personally; the record must disclose a personal manifestation by defendant that he consents to a waiver; it is not necessary that the record contain a statement by the defendant but it must be demonstrated that counsel has at least spoken with his client about the constitutional protection and after such discussion defendant has made the decision to consent. People v Hoffman, 288.

11. The Equal Protection Clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws but allows the exercise of discretion in that regard, avoiding what is done only when it is without any reasonable basis and is therefore purely arbitrary (US Const, Am XIV). *Oakland County v Detroit,* 308.

12. A classification having some reasonable basis does not offend against the Equal Protection Clause merely because it is not made with mathematical nicety or because in practice it results in some inequality (US Const, Am XIV). *Oakland County v Detroit,* 308.

13. Any state of facts which reasonably can be conceived that would sustain a classification must be assumed to have existed at the time such a law was enacted, where such classification is called into question. *Oakland County v Detroit,* 308.

14. One who assails a classification carries the burden of showing that the classification does not rest upon any reasonable basis, but is essentially arbitrary. *Oakland County v Detroit,* 308.

15. The statute providing for a not guilty by reason of insanity verdict is not violative of the constitutional principle of equal protection under law under the substantive-relation-to-the-object test (MCLA 768.29a; MSA 28.1052[1]). *People v Marvin White,* 335.

16. Michigan criminal procedure, under the appropriate circumstances, permits the introduction of prior recorded sworn testimony taken in accordance with generally accepted rules of evidence; however, the right to cross-examine and confront witnesses is secured by the constitution, and where a defendant has been effectively denied these rights at a preliminary examination, testimony taken at the examination may not be introduced at trial (US Const, Am VI, XIV, MCLA 768.26; MSA 28.1049). *People v Wittebort,* 529.

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CONTRACTS

1. The Motor Vehicle Sales Finance Act prohibits the inclusion of an acceleration clause for the reason that the lender deems itself insecure in any installment sales contract; an attempt to accelerate payment because of creditor insecurity, which was written into an agreement, is invalid and the seizure of an automobile for that reason is unlawful (MCLA 492.114[b]; MSA 23.628[14][b]). *Oakland Bank v Anderson,* 432.

2. Contracts of employment for indefinite periods of time are terminable at the will of either party; an exception is made to this general rule if the act of an employer in discharging an employee violates the public policy of this state. *Trombetta v Detroit, T & I R Co,* 489.

CONTRACTS—Cont'd

3. Generally, damages for mental anguish are not permitted in breach of contract actions; however, an exception to this rule has been created where the contract at issue is highly personalized and noncommercial and where a breach of duty will inevitably and necessarily result in mental anguish, pain and suffering. *Green v Sudakin,* 545.

4. Ambiguous terms, especially in a printed form contract, are to be strictly construed against the preparer of the contract; a trial court does not err in allowing parol evidence, where there is ambiguity in a contract, to show the intent of the parties. *Sturgis Savings v Italian Vil,* 577.

5. An indemnity agreement entered into between a plaintiff race car driver and a defendant race promoter which unequivocally exempts the promoter from liability for damages sustained by the plaintiff because of the promoter's own negligence is not offensive to public policy where the general public as a whole is minimally affected by the agreement, private interests are primarily at stake, and the public interest would not be served by striking down the provision. *Tope v Waterford Racing Corp,* 591.

6. A professional race car driver who entered into an indemnification agreement with a race promoter should be held to a higher standard of conduct and knowledge than an amateur driver as regards the respective bargaining positions of the parties, particularly where the driver had previously participated in a race run over the same course, which consisted of city highways, and was aware of the increased hazards of racing on such a course. *Tope v Waterford Racing Corp,* 591.

7. A contract signatory who claims that the contract is void because all of the intended parties did not sign has the burden of proving that it was the intent of all the parties that none should be bound unless all signed; intention governs, and whether the signers of a contract intended to be bound by its terms even though less than all the named persons sign is a question of fact to be decided upon the evidence. *Dubey v Macomb Concrete Corp,*662.

8. A promise to advance money which is dependent on the will of the promisor is unenforceable. *Dubey v Macomb Concrete Corp,* 662.

9. Unenforceable promises in a contract will not vitiate the entire contract where there are promises that are enforceable; if portions of a contract are unenforceable by the terms of the agreement, it will not affect the enforceability of other portions of the contract that are valid. *Dubey v Macomb Concrete Corp,* 662.

CONTRACTS—Cont'd

10. Adequate consideration in exchange for an enforceable promise in a contract having both enforceable and unenforceable provisions makes the enforceable portion of the contract binding on both sides. *Dubey v Macomb Concrete Corp,* 662.

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CONVERSION

1. The remedy for the unlawful seizure and sale of an automobile in violation of the Motor Vehicles Sales Finance Act is damages for conversion; a defendant is entitled to recover the value of the automobile at the time of conversion, less any amount due the lender at the time of sale, plus any incidental damages arising from the conversion. *Oakland Bank v Anderson,* 432.

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COSTS

1. The power of a court to tax costs is wholly statutory. *People Cousino,* 416.

COSTS—Cont'd

2. Except as otherwise provided by statute, the Supreme Court may by rule regulate the taxation of costs (MCLA 600.2401; MSA 27A.2401). *People v Cousino,* 416.

3. A circuit court's assessment of costs against an unsuccessful appellant from the district court in a criminal case who is exercising his constitutional right to appeal is reversible error and the award of such costs should be vacated where the assessment of the costs impermissibly threatens the defendant's right to appeal by attempting to chill the exercise of a constitutional right (Const 1963, art 1, § 20, GCR 1963, 111.6). *People v Cousino,* 416.

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COURTS

1. Superintending control is the proper remedy for challenging the generalized practices of a court. *Wayne Prosecutor v Judges,* 317.

2. One Recorder's Court judge may reassign a matter to another Recorder's Court judge provided the order of reassignment is signed by both judges; without such signed orders it is entirely improper for one Recorder's Court judge to entertain a petition to reinstate a recognizance bond which was ordered forfeited by another judge of co-equal power (RCR 16.11). *Wayne Prosecutor v Judges,* 317.

3. A Recorder's Court judge may not review or revise any order, judgment, sentence or act of any other Recorder's Court judge involving the personal discretion, judgment or opinion of such other judge (MCLA 726.2; MSA 27.3552). *Wayne Prosecutor v Judges,* 317.

4. The consequences of a plaintiff's injury, namely her medical and surgical treatment in Michigan, the suffering in Michigan and her husband's loss of consortium in Michigan are not sufficient to give a Michigan court limited personal jurisdiction over a Canadian resident in an action for damages for injuries sustained in a boating accident in Canadian waters under the statute regarding limited jurisdiction over individuals (MCLA 600.705[2]; MSA 27A.705[2]). *Clavenna v Holsey,* 472.

5. A state's exercise of long-arm jurisdiction over a non-resident is limited by the Due Process clause of the United States Constitution; due process requires that a defendant have certain minimal contacts with the forum state before jurisdiction may be acquired (US Const, Am XIV). *Clavenna v Holsey,* 472.

6. The statute regarding limited jurisdiction over an individual that speaks of causing consequences to occur within the state applies to situations in which an act or conduct of the defendant outside of Michigan leads to an event in Michigan which gives rise to a tort claim; in the context of personal injury cases that event occurs when the injury results (MCLA 600.705[2]; MSA 27A.705[2]. *Clavenna v Holsey,* 472.

7. *Circuit court has primary jurisdiction to try title questions, but a recorder's court has jurisdiction to order the return of funds seized under a search warrant which it has issued and from which no arrests ensued where no government agency claims any interest in the funds and no other individual asserts a contrary right to possession. People v 3474 Fairview,* 479.

COURTS—Cont'd

8. There is no requirement that notice be given to the parties where their case has been reinstated from the court's no-progress docket. *Thomas v Thomas,* 499.

9. Michigan Court Rules provide that in computing time, the day of the act, event or default after which the designated period of time begins to run is not included while the last day of the period is to be included; two additional days are allowed when service by mail is addressed for delivery outside the county of mailing (GCR 1963, 108.6, 108.7[1]). *First Bank of Cadillac v Benson,* 550.

10. The general rule with regard to the computation of legal notice is that the day of performance of the required act is included and the day from which the notice begins to run is excluded; when an act is to be done a certain number of days before a day stated, then that day is excluded in the computation; but where the act is to be done a certain number of days before another act, then the day on which that act is to be done is included. *First Bank of Cadillac v Benson,* 550.

11. An appellant's failure to obtain counsel for more than a month after his first attorney withdrew from his case does not reasonably excuse his failure to comply with a production order by the lower court entered prior to his attorney's withdrawal where all proceedings in the case were suspended for thirty days to provide the appellant the opportunity to secure counsel. *First Bank of Cadillac v Benson,* 550.

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CRIMINAL LAW

1. A defendant may be convicted and sentenced only once for a single act of criminal sexual conduct. *People v Secreto,* 1.

2. It is reversible error to refuse to give requested instructions on necessarily included lesser offenses. *People v Secreto,* 1.

3. A proper remedy, where a defendant has been convicted of first-degree criminal sexual conduct and the trial court erred by not giving the defendant's requested instructions on the necessarily included offenses of second and fourth-degree criminal sexual conduct but did give a requested instruction on third-degree criminal sexual conduct, is to remand the cause for entry of judgment of conviction of second-degree criminal sexual conduct and resentencing; a conviction for second-degree criminal sexual conduct is warranted because the jury was given the choice between first and third-degree criminal sexual conduct, which under the theory presented, that injury was caused to the victim and force or coercion was used to accomplish sexual penetration, differ in that first degree includes the causation of personal injury as a statutory element while third degree does not and the jury necessarily found that an injury resulted from the act; however, if the prosecutor is of the opinion that justice would be better served by a new trial, the trial court should, upon notification by the prosecutor prior to resentencing, vacate the judgment of conviction and grant a new trial on the original charge. *People v Secreto,* 1.

4. Third-degree and fourth-degree criminal sexual conduct are not lesser included offenses to the greater offense of first-degree criminal sexual conduct where the first-degree criminal sexual conduct charge is based on the theory of sexual penetration occurring under circumstances involving the commission of any other felony (MCLA 750.520b[1][c]; MSA 28.788[2][1][c]). *People v Secreto.* 1.

5. A judge who sits without a jury in criminal cases is obliged to articulate for the record the reasons for his decision in findings of fact, but a judge's failure to find the facts does not require remand where it is manifest that he was aware of the factual issue, that he resolved it, and that it would not facilitate appellate review to require further explication. *People v Jackson,* 18.

6. A trial court should construe with great liberality the request of a defendant to withdraw his plea of guilty prior to sentencing where the defendant advises the court that he is not guilty; refusal of a trial court to allow a defendant to withdraw his guilty plea was an abuse of discretion where the defendant explained that he pled guilty only because of the influence of his counsel, that he did not commit the crime, and that he wanted the police to investigate the crime and discover the perpetrator. *People v McClain,* 84.

CRIMINAL LAW—Cont'd

7. A verdict of guilty of cruelty to children was not against the great weight of the evidence where the defendant and the child's mother both testified that the defendant had spanked his own two children with a belt, medical and photographic evidence showed that the spanking in this instance was more like a beating, and the defendant testified that he had spanked the child the same as he did his own children, but for a longer period of time. *People v Leonard,* 86.

8. Photographs showing the extent of a beating of a child in a trial for cruelty to children were properly admitted into evidence where the photographs were not gruesome and where they were of probative value because the extent of a "spanking" administered by the defendant was strongly contested. *People v Leonard,* 86.

9. A statute which provides for the posting of bond in exchange for a suspended sentence for a person convicted of cruelty to children and which creates classifications based upon permanent versus temporary custodianship of a child is rational, reasonable, and is constitutional (MCLA 750.136; MSA 28.331). *People v Leonard,* 86.

10. It is error for a trial court to refuse to hold a *Walker* hearing to determine the admissability of statements made by a defendant where the defendant moves for such a hearing before trial; however, a trial court's refusal to hold a hearing which was requested on the day before trial was not reversible error where testimony of police witnesses regarding the defendant's statements was merely cumulative of the defendant's testimony, the police testimony was brief, did not refer to defendant's statements as confessions, the witnesses were cautioned not to mention statements by a former codefendant, and the defendant's testimony elaborated upon the statements testified to by the witnesses. *People v Leonard,* 86.

11. A defendant's plea of guilty should be vacated and the case remanded for trial where the defendant claims that her plea was not freely, understandingly, and voluntarily made and where it is clear from the record that at the time of the plea and sentencing the defendant was experiencing considerable emotional pressure because of her pregnancy and her attempts to obtain an obortion. *People v Torrence,* 162.

12. *Reversal of a conviction based on a defendant's plea of guilty is not warranted where the record discloses no error in the plea-taking, the defendant does not assert her innocence and the defendant has not moved the lower court for withdrawal of her guilty plea, and the defendant's claim that her plea was involuntarily made is not supported by the record. People v Torrence,* 162.

13. The application of discovery rules is expressly excluded in criminal cases by court rule (GCR 1963, 785.1[2]). *People v Jesse Smith,* 190.

CRIMINAL LAW—Cont'd

14. Discovery will be ordered in a criminal case, when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression; the burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party. *People v Jesse Smith,* 190.

15. Generally, a trial court's denial of criminal discovery is not reversible error if the defendant is afforded full opportunity of cross-examination. *People v Jesse Smith,* 190.

16. A jury's verdict of guilty of first-degree murder should not be disturbed where there was sufficient evidence on the homicide and also evidence to allow a reasonable man to infer premeditation beyond a reasonable doubt. *People v Jesse Smith,* 190.

17. The criminal sexual conduct statute by its own terms excludes evidence of past sexual experiences in prosecutions for criminal sexual conduct and assault with intent to commit criminal sexual conduct; the statute and the exclusion rules do not apply to a charge of breaking and entering an occupied dwelling with an intent to commit a felony, even though the felony attempted is criminal sexual conduct in the third degree (MCLA 750.520b, 750.520g; MSA 28.788[2], 28.788[7]). *People v Walker,* 202.

18. Evidence of the complainant's reputation for chastity is admissible as bearing on a defendant's state of mind at the time of a breaking and entering where the prosecution is solely for breaking and entering with intent to commit criminal sexual conduct in the third degree. *People v Walker,* 202.

19. Cross-examination of the complaining witness in a trial for criminal sexual conduct as to specific acts of intercourse with third persons is not relevant to show bias on the part of the complainant in bringing the charge. *People v Walker,* 202.

20. A prior conviction of assault with intent to take indecent liberties was not so closely related to a charge of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct as to require its exclusion for impeachment purposes from a trial on the latter charge. *People v Walker,* 202.

21. Verdicts on two charges tried together will not be held inconsistent if they can be explained on any rational basis. *People v Walker,* 202.

22. Remarks of a prosecutor, even if otherwise improper, are not reversibly erroneous where the remarks are induced by and made in response to matters previously discussed by defense counsel. *People v Malchi White,* 226.

CRIMINAL LAW—Cont'd

23. A closing argument by a defense attorney wherein he mentioned the defendant's failure to testify did not amount to ineffective assistance of counsel where it appeared that defense counsel used his argument as part of valid trial strategy based on a concern that jurors are often distressed by a defendant's failure to testify. *People v Malchi White,* 226.

24. A minimum sentence which exceeds two-thirds of the maximum is an improper sentence only where the indeterminate sentence act applies (MCLA 769.8; MSA 28.1080). *People v Malchi White,* 226.

25. The indeterminate sentence act has mandatory application only to those persons convicted for the first time; therefore, the rule which requires a minimum sentence not to exceed two-thirds of the maximum sentence where an indeterminate sentence is given does not apply in the sentencing of a defendant with prior felony convictions (MCLA 769.8; MSA 28.1080). *People v Malchi White,* 226.

26. A police officer after stopping a defendant for a minor traffic violation for which a custodial arrest is made and after a pat-down search for weapons is made has a duty to inform the defendant of the defendant's rights under the interim bail statute and, upon arrival at the station house, to accept bail proffered by the defendant or one acting on his behalf if no magistrate is readily available for an arraignment (MCLA 780.581; MSA 28.872[1]). *People v Garcia,* 260.

27. The questions of whether a defendant was given timely notice of the charges he was to face at a probation revocation hearing and whether he was adequately informed of his rights to contest rather than admit the charges were adequately raised on appeal where defendant states in his brief that "the only information the defendant had was that of a notice of violation and that he had a right to an attorney; he was also asked if he had any answer to the charge to which he replied 'No' " and where defendant alleges that the probation revocation was "without any of the procedure safeguards necesasry for due process". *People v Radney,* 303.

28. Written notice to a defendant of charged probation violations is statutorily required; such notice must be served sufficiently in advance of scheduled court proceedings so that the defendant has a reasonable opportunity to prepare (MCLA 771.4; MSA 28.1134.) *People v Radney,* 303.

29. A defendnat charged with violation of the terms of his probation was not served with timely notice of the violation where the probation revocation hearing was held forthwith after the defendant received a written notice of violation. *People v Radney,* 303.

CRIMINAL LAW—Cont'd

30. It is necesary that a defendant charged with probation violation be informed of his right to a hearing and that he has an alternative to admitting the violations before he may validly waive a hearing on the charges and admit a violation of his probation; that requirement was not met where neither the form language on the notice of violation nor the court's mention of the word "hearing" in its colloquy with the defendant sufficiently apprised the defendant of his right to contest the charges. *People v Radney,* 303.

31. A statement of a defendant charged with probation violation that he has no answer to the charges of probation violation is not a sufficient indication that the defendant wishes to waive his probation revocation hearing. *People v Radney,* 303.

32. As a general rule a defendant who has been convicted of being an habitual offender may not in the appellate review of that conviction have a consideration of the allegation that the prior convictions which are the basis for the habitual offender conviction are constitutionally infirm where the prior convictions have never been appealed in their own right and were first subjected to collateral attack throught the appeal of the habitual offender conviction; however, cases involving the issue of the right to counsel are uniquely distinguished by the retroactivity accorded them and a review is mandated where the collateral attack on appeal involves the claim that the defendant was neither properly informed of nor clearly waived his right to appointed counsel. *People v Pangburn,* 324.

33. A defendant's conviction as a third felony offender should stand, even though the defendant's conviction on one of the earlier charges was constitutionally invalid, where the defendant still had three felony convictions without regard to the invalid conviction; however, the matter should be remanded for resentencing on the assumption that the court may have considered the invalid conviction in its sentence, and on resentencing, consideration of the invalid conviction should be avoided. *People v Pangburn,* 324.

34. The burden is on the prosecution in a criminal case to prove every element of the crime charged. *People v Marvin White,* 335.

35. A defendant in a criminal action is presumed sane but this presumption can be rebutted by offering evidence to the contrary; when this is done, the prosecution has the burden of persuading the trier of fact beyond a reasonable doubt of the defendant's sanity. *People v Marvin White,* 335.

36. The not guilty by reason of insanity verdict is not a special verdict which relieves the prosecution of its burden to prove every element of the crime charged beyond a reasonable doubt; as long as the trier of fact is aware that there is an alternative of returning a general verdict of not guilty, there is no constitu-

CRIMINAL LAW—Cont'd

tional due process problem with returning a special verdict of not guilty by reason of insanity. *People v Marvin White,* 335.

37. A defendant who desires reversal of his conviction or a new trial because of failure to produce a witness must, before filing his brief on appeal, move in the trial court for a new trial and should request an evidentiary hearing at which the prosecutor shall produce the witness or explain why he cannot produce the witness; the witness shall be examined regarding his knowledge of the crime and if a new trial is denied, the judge shall state the reasons. *People v Kaigler,* 340.

38. Rulings on a motion for a new trial are within the discretion of the trial court, and a denial of a new trial was not an abuse of discretion where the defendant claimed that he was entitled to a new trial because a juror had spoken to a spectator regarding the status of the jury's deliberations and the defendant's allegation was without supporting affidavits. *People v Kaigler,* 340.

39. A charge to the jury which instructs them that they must examine the question submitted to them with candor and with a proper regard and deference to the opinions of each other, and that the verdict must be that of each juror, the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, and then urges them to reach a verdict if they can conscientiously do so, the so-called *Allen* charge, is not per se coercive; any claim of coercion must be determined on a case-by-case basis. *People v Robert G Thompson,* 54.

40 The rule that a defendant is entitled to counsel at pretrial identification procedures doe not apply to the pre-custody, pre-questioning, mere suspicion phase of a criminal investigation because it is not feasible to require appointment of counsel in cases of pre-custody photogrpahic showups where there is no detention of the defendant since under such a rule each photograph arguably depicts a suspect and therefore each person whose photograph appears in the photographic display, or perhaps even the "mug book", would require the representation of counsel which would be both impossible and absurd. *People v McNeill,* 368.

41. The mere fact that an investigation has focused on a defendant who is not in custody does not give him the right to counsel at a photographic showup. *People v McNeill,* 368.

42. Identification by photograph may not be used in pre-custody situations where the accused can be readily produced for a corporeal lineup. *People v McNeill,* 368.

43. No abuse of discretion in a trial court's admission of evidence of prior sexual offenses has been shown in a trial for criminal sexual conduct where the acts were clearly similar and could serve as a positive basis for identification of the defendant and where the probative value of such acts as evidence outweighed any prejudicial effects (MCLA 768.27; MSA 28.1050). *People v McNeill,* 368.

CRIMINAL LAW—Cont'd

44. It is the duty of the trial court in a criminal case to present adequately the defendant's theory of the case to the jury; failure to do so is reversible error despite the fact that no request or objection is made (GCR 1963, 516). *People v Gayton,* 390.

45. A defendant was not entitled to a mistrial on the basis of the instructions given by the judge to the jury relating to the defendant's theory of the case where the instrucions, when considered in their entirety, fairly presented the defendant's theory of the case to the jury. *People v Gayton,* 390.

46. The question presented in a criminal trial by a motion for a directed verdict of not guilty is whether there is sufficient evidence from which a jury can reasonably infer all of the elements of the crime charged; when determining whether there was sufficient evidence on each essential element of a charge of murder in the first degree so as to permit submission of that charge to the jury, the prosecutor's evidence must be taken as true, and it must be viewed in a light most favorable to the prosecution so that the prosecution may benefit from every reasonable inference to be drawn therefrom. *People v Gayton,* 390.

47. The denial of a criminal defendant's motion to set aside a guilty verdict returned by a jury because one juror took two volumes of Collier's Encyclopedia into jury deliberations and another juror took in a slip of paper with the definitions of two words written on it was not an abuse of the trial court's discretion where the trial court held hearings on the issue at which the jurors testified and it was determined that the items did not enter into and were not considered in the jury verdict and where the defendant has not shown any prejudice sufficient to set aside the verdict; a showing of mere potential for prejudice from some article improperly in the jury room is insufficient to warrant granting a mistrial. *People v Gayton,* 390.

48. It was error for a trial judge in a criminal trial to allow the clerk of the court to read the defendant's theory of the case to the jury, but such error was harmless and reversal of the defendant's conviction is not required where (1) the trial judge explained to the jury that he was experiencing voice difficulty, and (2) the judge cautioned the jury that the instructions should be accepted as if he had read them; it is not error per se to allow a court clerk to read some or all of the instructions when the judge is experiencing voice problems. *People v Blachura,* 399.

49. A short response by a grand jury foreman, at a defendant's trial for perjury arising from the defendant's testimony before the grand jury, answering a question posed by a prosecutor as to why the grand jury had called the defendant to testify does not violate a literal reading of the statute which cloaks a grand

CRIMINAL LAW-—Cont'd

jury proceeding with secrecy; even if such testimony by the foreman violates the spirit of the statute, the error would be harmless error (MCLA 767.19; MSA 28.959). *People v Blachura,* 399.

50. A trial court may require that a defendant pay costs as a condition of his probation; however, the costs must bear a reasonable relationship to the expenses of prosecution; where the record bears no indication that the costs so levied were reasonably related to the expense of the prosecution, the cause should be remanded for findings with regard to the taxed costs (MCLA 771.3; MSA 28.1133). *People v Blachura,* 399.

51. A defendant's indictment for perjury arising from the defendant's testifying before a citizen's grand jury must stand, even if the defendant's alleged perjury may have resulted from prosecutorial misconduct which may have denied the defendant due process of law; prosecutorial misconduct does not permit a person to lie under oath. *People v Blachura,* 399.

52. It was reversible error for a trial judge in a defendant's trial on charges of perjury to have the clerk of the court read the defendant's theory of the case to the jury because the judge had a cold and wanted to save his voice where the judge read the instructions to the jury, then stopped to save his voice and had the clerk read the defendant's theory, and then the judge continued to address the jury after the clerk had finished the defense theory which may have given the appearance to the jury that the defendant's theory was so unimportant or so without merit that the judge could not waste his voice reading it. People v Blachura, 399.

53. A *sua sponte* instruction that the jury may not draw any adverse inference because of a witness's refusal to testify need not be given, and where a defendant did not request such an instruction the issue of whether the trial court erred by not giving such an instruction is not properly preserved for appeal. *People v Castaneda,* 453.

54. The Recorder's Court of Detroit does not have jurisdiction to determine title to monies seized under a search warrant issued by that court where no arrests were made as a result of the warrant or seizure, no criminal proceedings are pending therefrom, and the monies were not taken from the presence of the person claiming title to them nor from premises registered in his name. *People v 3474 Fairview,* 479.

55. A conviction cannot constitutionally be sustained if there is no evidence on some element of the crime; however, unless there is no evidence at all on a material point, the sufficiency of the evidence is a question that should be left to the jury. *People v Milton,* 515.

56. To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. *People v Milton,* 515.

CRIMINAL LAW—Cont'd

57. The Court of Appeals will reverse a defendant's conviction in order to prevent manifest injustice where the trial court's instructions omitted an essential element of the crime for which the defendant was convicted in spite of the fact that defense counsel did not object to the instructions, and successfully prevented them from being given in proper form. *People v Milton,* 515.

58. The general rule is that evidence tending to show the commission of other criminal offenses by a criminal defendant is inadmissible on the issue of his guilt or innocence of the offense charged because whatever probative value such evidence has is outweighed by the disadvantage of diverting the trier of fact from an objective appraisal of the defendant's guilt or innocence; an exception to this rule is that the acts, conduct and demeanor of the defendant at the time of or shortly before or after the offense is claimed to have been committed may be shown as part of the res gestae; proof of such acts is not rendered inadmissible by the fact that they may tend to show the commission of another crime. *People v Bernard Smith,* 561.

59. The admission of evidence of other criminal offenses which is offered solely in explanation and corroboration of the evidence of the act charged in an information does not constitute a variance of proofs from the information; therefore, it was not error for a trial judge, at defendants' trial for armed robbery, to allow the prosecution to introduce into evidence two items that were seized from the defendants' residence when they were arrested which had been stolen from the victim's home but were not listed on the information. *People v Bernard Smith,* 561.

60. Instructions given to the jury regarding reasonable doubt are proper where the instructions given are consistent with past instructions approved by the Court of Appeals. *People v Bernard Smith,* 561.

61. The crimes of unlawful driving away of an automobile and attempted unlawful driving away of an automobile are felonies; therefore, use of a defendant's prior convictions for committing those offenses does not violate the rule which prohibits the use of prior misdemeanor convictions for impeachment purposes (MCLA 750.92, 750.413; MSA 28.287, 28.645). *People v Bernard Smith,* 561.

62. The prohibition on the use of *all* misdemeanor convictions for impeachment purposes remains the rule of law in Michigan, absent the adoption of Michigan's proposed rules of evidence, or reconsideration of the issue by the Supreme Court. *People v Bernard Smith,* 561.

63. A trial judge's decision to allow a defendant to be impeached by evidence of a prior misdemeanor conviction cannot be considered to be harmless error, even though the defendant had prior felony convictions which would have been used as im-

CRIMINAL LAW—Cont'd
peachment evidence had the defendant taken the stand, where the defendant, faced with the probability of impeachment by his complete criminal record, chose not to testify in his own behalf; where the issue involved is as crucial to the judicial process as a defendant's right to testify in his own behalf, any doubt as to the motivating factors behind a decision to forego that right must be resolved in the defendant's favor. *People v Bernard Smith,* 561.

64. Attempted larceny from a building is a high misdemeanor punishable by two years in prison and under the Michigan Rules of Evidence, effective March 1, 1978, such an offense clearly would be admissible for impeachment purposes. People v Bernard Smith, 561.

65. A trial judge's failure to grant a defense motion to suppress a defendant's misdemeanor conviction for impeachment purposes was harmless error where the defendant would have been impeached by evidence of his prior felony convictions. People v Bernard Smith, 561.

66. A defendant may be deemed to have waived his right not to be placed in double jeopardy where a review of the trial record reveals evidence which supports the prosecutor's claim that defendant waived his double jeopardy rights at a previous trial and where this evidence coupled with sworn affidavits signed by defendant's original counsel and the trial judge leads to the conclusion that defendant waived his double jeopardy rights. *People v Galdoni,* 606.

67. A defendant's waiver of his double jeopardy rights must be placed on the record at the time he is first placed in jeopardy, when it is most germane to the proceedings; at that time there should be an affirmative showing on the record that the defendant himself consented to such waiver. People v Galdoni, 606.

68. It is improper to manufacture a record from after-the-fact affidavits and from the transcript of a defendant's second trial in order to show that the defendant waived his protection against double jeopardy during his first trial where no record of such waiver appears on the record of the first trial; the proper record to which the court must look for such waiver is the record of the first proceeding where it is most appropriate. People v Galdoni, 606.

69. Affidavits by a defendant's former attorney and the judge at his first trial are an invalid basis on which to base a finding that a waiver of the defendant's right against double jeopardy was on the record and are insufficient to support a finding of waiver at all where the affidavits allege an in-chambers waiver and do not state that defendant was present, and where the affidavits do not disclose that defendant retained primary control over the course to be followed or disclose a personal manifestation by defendant that he consented to a waiver of the protection against double jeopardy. People v Galdoni, 606.

CRIMINAL LAW—Cont'd

70. The objective test of entrapment, which has been adopted in this state, requires the trial judge to determine whether the police conduct was of such a nature that it would induce the commission of a crime by an otherwise unwilling or unready person; the propensity of the particular defendant to commit the crime is irrelevant. *People v Duis,* 698.

71. The real concern in entrapment cases is whether the actions of the police were so reprehensible under the circumstances that the Court should refuse, as a matter of public policy, to permit a conviction to stand. *People v Duis,* 698.

72. To find out if a defendant, charged with delivery of a controlled substance, was entrapped as a matter of law, the Court of Appeals should scrutinize the facts of the particular case and determine whether the government agent pressured the defendant into selling the controlled substance; where the entire course of police conduct was sufficiently provocative to induce a normal law-abiding citizen to commit a crime, the actions are so reprehensible that the Court of Appeals should refuse, as a matter of public policy, to permit the conviction to stand. *People v Duis,* 698.

See
APPEAL AND ERROR 10, 19
ARREST 1–6
CONSTITUTIONAL LAW 4, 16
GRAND JURY 1
HOMICIDE 6
SEARCHES AND SEIZURES 13, 14
USURY 1
WITNESSES 1–3, 5–12, 14–18, 20–24, 26, 28–30

CRIMINAL SEXUAL CONDUCT—See
APPEAL AND ERROR 10
CRIMINAL LAW 1, 3, 4, 17–19

CRIMINAL STATUTES—See
STATUTES 12

CROSS-EXAMINATION—See
CONSTITUTIONAL LAW 16
CRIMINAL LAW 15, 19
WITNESSES 19–24, 30

CRUELTY TO CHILDREN—See
CRIMINAL LAW 7–9

CUMULATIVE TESTIMONY—See
WITNESSES 2, 3, 6, 8

CURATIVE INSTRUCTIONS—See
APPEAL AND ERROR 8

CURRENT ACCOUNTS—See
BILLS AND NOTES 3

CURTILAGE—See
SEARCHES AND SEIZURES 7

CUSTODIAL ARREST—See
CRIMINAL LAW 26
SEARCHES AND SEIZURES 9

CUSTODIAN—See
CRIMINAL LAW 9

CUSTODY—See
APPEAL AND ERROR 14
CRIMINAL LAW 40, 41
PARENT AND CHILD 1
SEARCHES AND SEIZURES 18

DAMAGES

1. An instruction to a jury in a products liability action involving enhanced injuries that they must apportion damages between defendants is not necessary where the defendants have previously agreed to an apportionment between themselves. *Elsasser v American Motors Corp,* 379.

2. A jury's verdict that a plaintiff was entitled only to minimal damages following an automobile accident was not contrary to the great weight of the evidence where there was evidence to indicate that the injury of which the plaintiff complained was work-related and existed prior to the automobile accident, that the injury may have been psychological rather than physical, and that the plaintiff was on sick leave from her employment at the time of the accident. *Alvarado v Scutt,* 421.

3. A jury verdict of damages should not be set aside as excessive so long as the amount awarded is within the range of the evidence and within the limits of what reasonable minds might deem just compensation for such imponderable items as personal injuries sustained and pain and suffering. *Decker v N & W R Co,* 647.

4. Generally, the measure of damages from the prevention of performance of a contract would be the loss of profits to the plaintiff, but where the profits are wholly speculative and unprovable, the one who prevents performance should not go scotfree because the claimant should at least be made whole for his losses and expenditures; where profits are speculative, the measure of damages is the actual expenditures and value of services reasonably spent in an attempt to perform the contract or in reliance upon it; therefore, a plaintiff may properly seek reliance damages based on the reasonable expenses incurred in attempting to perform the contract. *Dubey v Macomb Concrete Corp,* 662.

DAMAGES—Cont'd
See
ACTION 3
CIVIL RIGHTS 2
CONTRACTS 3
CONVERSION 1
INSURANCE 17
LIBEL AND SLANDER 1
NEGLIGENCE 1, 2
ZONING 3

DAMS—See
TAXATION 5

DEFAMATORY UTTERANCES—See
LIBEL AND SLANDER 1

DEFAULT—See
BAIL 1

DEFAULT JUDGMENT—See
APPEAL AND ERROR 23
DIVORCE 9
JUDGMENT 14–16

DEFECTIVE JUDGMENT—See
JUDGMENT 10

DEFECTIVE PREMISES—See
LANDLORD AND TENANT 1, 3

DEFECTIVE VERDICT—See
APPEAL AND ERROR 17

DEFECTS—See
PRODUCTS LIABILITY 5

DEFECTS IN TITLE—See
MORTGAGES 5

DEFENDANT'S FAILURE TO TESTIFY—See
CRIMINAL LAW 23

DEFENDANTS THEORY OF CASE—See
CRIMINAL LAW 44, 45

DEFENDANT'S TESTIMONY—See
CRIMINAL LAW 20

DEFENSE COUNSEL—See
CRIMINAL LAW 22

DEFENSE OF ACTIONS—See
INSURANCE 1–3

DEFENSES—See
CRIMINAL LAW 35

DEFENSES—Cont'd
HOMICIDE 3
INSURANCE 6, 7
JUDGMENT 16

DEFENSE THEORY—See
CRIMINAL LAW 51

DEFICIENCIES—See
TAXATION 11

DEFINITIONS—See
LIBEL AND SLANDER 3
NUISANCE 3
SALES 1
WORDS AND PHRASES 1

DELAY—See
LIMITATION OF ACTIONS 4

DELIBERATION—See
APPEAL AND ERROR 17
CRIMINAL LAW 56
HOMICIDE 10, 12
TRIAL 3

DELIVERY OF HEROIN—See
DRUGS AND NARCOTICS 1

DENIAL OF MOTIONS—See
APPEAL AND ERROR 16, 20

DE NOVO REVIEW—See
EQUITY 3

DEPARTMENT OF CIVIL RIGHTS—See
CIVIL RIGHTS 2

DEPARTMENT OF SOCIAL SERVICES—See
ADMINISTRATIVE LAW 6

DEPOSITIONS

1. A trial court was without authority to issue an order precluding the presence of plaintiffs from the depositions of any other coplaintiff because the court rule which restricts the presence of persons at a deposition makes a specific exception as to parties from orders limiting attendance at depositions; such an order of the trial court, issued without the authority to issue the order, is void (GCR 1963, 306.2). *Mock v City of Detroit,* 556.

DEPRECIATED RECONSTRUCTION COST—See
TAXATION 5

DERIVATIVE CLAIMS—See
LIMITATION OF ACTIONS 2

DETERMINATION OF RIGHTS—See
WORKMEN'S COMPENSATION 9, 10, 11, 13, 14

DILIGENCE—See
VENDOR AND PURCHASER 1
WITNESSES 15

DIRECTED VERDICT—See
APPEAL AND ERROR 20, 30, 31
CRIMINAL LAW 46
EVIDENCE 1
HOMICIDE 9
INSURANCE 7
MOTIONS 2

DISABILITIES—See
APPEAL AND ERROR 1

DISCHARGE IN BANKRUPTCY—See
LIMITATION OF ACTIONS 5

DISCHARGE OF JURY—See
CONSTITUTIONAL LAW 5, 6

DISCHARGE OF MORTGAGES—See
MORTGAGES 2, 5

DISCOVERY—See
CRIMINAL LAW 13–15

DISCOVERY OF MALPRACTICE—See
LIMITATION OF ACTIONS 3

DISCRETION—See
ADMINISTRATIVE LAW 4
APPEAL AND ERROR 16, 22
ATTORNEY AND CLIENT 1
BAIL 1, 4, 6
COURTS 3
CRIMINAL LAW 6, 14, 15, 20, 38, 43, 47
DIVORCE 5
GARNISHMENT 1
MOTIONS 1
TRIAL 3
WITNESSES 6, 8, 13

DISCRIMINATION—See
ACTION 3
CIVIL RIGHTS 2
TAXATION 3

DISMISSAL AND NONSUIT

1. Dismissal of the plaintiffs' cause of action cannot be ordered for the failure of the plaintiff to obey an order that the trial court did not have the power to issue. *Mock v City of Detroit,* 556.

DISMISSALS—See
ACTION 1
JUDGMENT 4, 5

DISPUTES—See
WORKMEN'S COMPENSATION 8, 9

DIVORCE

1. The father's income is one of the factors to which a court must look when entertaining a petition for modification of child support payments provided for in a judgment of divorce; in some cases a reduction in the father's income would compel a modification; however, the father's duty to pay support is not limited by his income and the court may also look to his unexercised ability to earn. *Moncada v Moncada,* 26.

2. Voluntary reductions in a father's income will not warrant a modification of child support payments provided for in a judgment of divorce where the reduction was made in bad faith or where the father voluntarily worsens his financial position through unconscionable disregard for the welfare of his dependents. *Moncada v Moncada,* 26.

3. A father's voluntary reduction in income is not an adequate reason for a trial court's refusal to modify a child support order where bad faith or a wilful disregard for the interests of the dependent children by the father are absent. *Moncada v Moncada,* 26.

4. A case in which the trial court refused to reduce a defendant's alimony and child support payments must be remanded for clarification where the defendant had apparently been unemployed for a period of time and where there is no record of the defendant's present earnings or of his efforts to secure employment, either at the time of a trial court's earlier order or subsequently. *Radway v Radway,* 328.

5. An award of attorney fees, costs and expenses in an action for divorce or separation rests in the sound discretion of the trial court; however, attorney fees are not awarded as a matter of right but only if necessary to enable a party to carry on or defend the litigation (MCLA 552.13; MSA 25.93). *Radway v Radway,* 328.

6. A party who moves for an award of attorney fees in an action for divorce, separate maintenance, annulment or affirmation of marriage shall allege facts showing that she or he is unable to bear the expense of the action without that aid (GCR 1963, 726.1). *Radway v Radway,* 328.

DIVORCE—Cont'd

7. It is presumed, by statute and by case law, that any child conceived or born to a married couple prior to the commencement of a suit for divorce is legitimate; this presumption may be rebutted only by clear and convincing evidence (MCLA 552.29; MSA 25.107). *Shepherd v Shepherd,* 465.

8. A husband in a divorce action who contests his paternity of a child born to his wife nine months, ten days after the parties separated is entitled to present his best evidence to rebut the presumption of legitimacy; therefore, a trial court erred in denying the husband's request that he, his wife, and the child be required to submit to blood tests, the results of which would be filed with the court. *Shepherd v Shepherd,* 465.

9. A default judgment of divorce should not be set aside on the basis that there is no proof of service in the court file where the defendant was actually served with a copy of the original complaint for divorce. *Thomas v Thomas,* 499.

See

EVIDENCE 7

DOCTORS—See

SEARCHES AND SEIZURES 18

DOUBLE JEOPARDY—See

CONSTITUTIONAL LAW 6, 7, 9, 10
CRIMINAL LAW 66–69
HOMICIDE 6

DOUBLE-TRACK CROSSINGS—See

NEGLIGENCE 4

DRAINS

1. The Drain Code of 1956 does not provide a method for the holders of drain orders to make a demand for reimbursement of such orders from the general fund of a county where the drain fund upon which such orders are drawn is insufficient to pay the orders (MCLA 280.244; MSA 11.1244). *English v Saginaw Cnty Treasurer,* 626.

2. A drain commissioner has a duty to reassess in order to make up any deficiency in a drain fund; an action for a writ of mandamus should be directed against the drain commissioner where a holder of unpaid drain orders seeks a reassessment (MCLA 280.245, 280.280; MSA 11.1245, 11.1280). *English v Saginaw Cnty Treasurer,* 626.

DRUGS AND NARCOTICS

1. A trial court properly instructed a jury on aiding and abetting where the defendant, who was charged with delivery of heroin, maintained that another person was the drug dealer and where from the testimony at trial it would be reasonable for the jury

DRUGS AND NARCOTICS—Cont'd
to believe that the other person was the dealer or supplier and that the defendant had assisted in effecting the sale for which he was charged. *People v Castaneda,* 453.

See
CRIMINAL LAW 72

DUE DILIGENCE—See
WITNESSES 1

DUE PROCESS—See
CONSTITUTIONAL LAW 2, 3
COURTS 5
CRIMINAL LAW 51
MECHANICS' LIENS 10

DUE PROCESS HEARINGS—See
WORKMEN'S COMPENSATION 14

DUST—See
WORKMEN'S COMPENSATION 1

DUTY—See
INSURANCE 17
JURY 2
LANDLORD AND TENANT 1, 3

DUTY OF PURCHASER—See
VENDOR AND PURCHASER 1

DUTY OF TRIAL JUDGE—See
CRIMINAL LAW 44

DUTY TO DEFEND—See
INSURANCE 1–3, 5

DUTY TO PAY—See
INSURANCE 2

DWELLINGS—See
LANDLORD AND TENANT 2

ECONOMIC BURDENS—See
EQUITY 1

ECONOMIC REALTY TEST—See
MASTER AND SERVANT 1, 2

EFFECTIVE ASSISTANCE—See
CRIMINAL LAW 23

ELECTIONS—See
INSURANCE 11

ELEMENTS OF CRIME—See
ARSON 1
CRIMINAL LAW 34, 46, 57
HOMICIDE 9

EMOTIONAL PRESSURES—See
CRIMINAL LAW 11

EMPLOYERS AND EMPLOYEES—See
ACTION 3
ADMINISTRATIVE LAW 7
APPEAL AND ERROR 1
CIVIL RIGHTS 2
JUDGMENT 11, 17
LABOR RELATIONS 1, 2
LIBEL AND SLANDER 4, 5
MASTER AND SERVANT 1, 2
MUNICIPAL CORPORATIONS 5, 7
WORKMEN'S COMPENSATION 1, 2, 7, 8, 10, 11, 13, 19

EMPLOYMENT—See
APPEAL AND ERROR 3
CIVIL RIGHTS 1

EMPLOYMENT CONTRACTS—See
CONTRACTS 2

ENCUMBRANCES—See
MECHANICS' LIENS 6

ENFORCEABLE PROMISES—See
CONTRACTS 9, 10

ENFORCEMENT—See
CONTRACTS 9

ENFORCEMENT OF AWARDS—See
WORKMEN'S COMPENSATION 16

ENGINEERING SERVICES—See
MECHANICS' LIENS 6

ENTIRETY OF INSTRUCTIONS—See
CRIMINAL LAW 45

ENTRAPMENT—See
CRIMINAL LAW 70–72

EQUAL PROTECTION—See
CONSTITUTIONAL LAW 11, 12, 15

EQUAL PROTECTION—Cont'd
CRIMINAL LAW 9
GRAND JURY 2

EQUIPMENT LEASING—See
MASTER AND SERVANT 2

EQUITY

1. The Court of Appeals should not weigh the economic positions of the respective parties and consider the burden placed on each to arrive at an equitable and enlightened solution to an equity case where the economic burden of the defendants was caused by the defendants' decision to proceed with further development of a marina at their own risk while the issue of the reasonableness of the development was still in litigation. *Pierce v Riley,* 39.

2. A trial court's reliance on general equitable principles without articulating any specific factors is insufficient to justify an award of attorney fees. *Radway v Radway,* 328.

3. The Court of Appeals reviews equity cases *de novo;* however, the findings of the trial judge will not be disturbed on appeal unless the appellate court can conclude that it would have arrived at a different result had it been in the position of the trial court. *Norton Shores v Carr,* 715.

4. Equity will not abate a lawful continuing business as a nuisance when it is possible to eliminate objectionable features which infringe upon the ordinary rights of others. *Norton Shores v Carr,* 715.

See
APPEAL AND ERROR 2, 5
NUISANCE 7

ERRONEOUS JUDGMENT—See
JUDGMENT 7

ERRONEOUS RECORDS—See
WITNESSES 18

ETHNIC ALLUSIONS—See
TRIAL 2

EVASIVE ACTIONS—See
SEARCHES AND SEIZURES 12

EVIDENCE

1. A conclusion cannot be inferred from a fact which was itself derived inferentially from circumstantial evidence; however, where two distinct lines of argument, each based on an inference from different direct evidence converge on the same conclusion, it is not necessary to base an inference on an inference for either argument. *George v Travelers Indemnity Co,* 106.

EVIDENCE—Cont'd

2. The general practice where evidence is admissible for one purpose and inadmissible for another is to admit the evidence subject to a limiting instruction on use unless the legitimate use of the evidence is so slight compared to the possibility of jury misuse of the evidence that the trial court feels compelled to exclude the evidence entirely. *People v Walker,* 202.

3. The question in a case involving parol evidence is whether the proffered parol evidence is inconsistent with the written language of the contract; if there is no inconsistency, the parol evidence is admissible. *Oakland County v Detroit,* 308.

4. The erroneous exclusion of evidence does not require reversal unless it has caused a denial of substantial justice. *Oakland County v Detroit,* 308.

5. Clear and convincing evidence is more than a preponderance of evidence; such evidence must be "very convincing", "of such cogency as to render belief necessary" and "beyond all reasonable doubt". *Shepherd v Shepherd,* 465.

6. The results of blood tests disclosing only that an alleged father might have sired the child are irrelevant and inadmissible in determining paternity, but results of properly conducted tests which preclude paternity are conclusive and sufficient to rebut the presumption of legitimacy. *Shepherd v Shepherd,* 465.

7. The resolution of conflicting testimony is best done by a trial judge and although he is not bound to accept as true the testimony of interested witnesses, such testimony does provide a basis for a finding that is not clearly erroneous. *Sturgis Savings v Italian Vil,* 577.

See

ADMINISTRATIVE LAW 8
APPEAL AND ERROR 3, 8, 19, 20, 26, 30, 31
ARREST 11, 12
CONTRACTS 7
CRIMINAL LAW 8–10, 16–19, 35, 43, 46, 55, 58, 59, 61–65
DAMAGES 2, 3
DIVORCE 8
FALSE PRETENSES 3–5
HOMICIDE 9, 10, 14
INSURANCE 7
JURY 1
MECHANICS' LIENS 5, 11
MOTIONS 3
NUISANCE 6
PROPERTY 1
RAPE 1
SEARCHES AND SEIZURES 5, 7, 8, 10, 11, 17, 18
WITNESSES 29

EVIDENCE—Cont'd
WORKMEN'S COMPENSATION 5
ZONING 10

EVIDENTIARY HEARINGS—See
CRIMINAL LAW 37

EXCESSIVE BAIL—See
BAIL 7

EXCESSIVE DAMAGES—See
DAMAGES 3

EXCLUSION OF DISCOVERY—See
CRIMINAL LAW 13

EXCLUSION OF EVIDENCE—See
APPEAL AND ERROR 10
EVIDENCE 2, 4

EXCLUSIONS—See
INSURANCE 12–16

EXCLUSIVITY RULE—See
ADMINISTRATIVE LAW 7

EXHAUSTION OF REMEDIES—See
ADMINISTRATIVE LAW 1, 2
JUDGMENT 8

EXIGENT CIRCUMSTANCES—See
SEARCHES AND SEIZURES 14, 19

EXPANSION—See
ZONING 8

EXPANSION OF USE—See
MUNICIPAL CORPORATIONS 12

EXPENDITURES—See
DAMAGES 4
MUNICIPAL CORPORATIONS 4

EXPENSES—See
PLEADING 2
SALES 5

EXPENSES OF PARENTS—See
NEGLIGENCE 2

EXPENSES OF PROSECUTION—See
CRIMINAL LAW 50

EXPERT WITNESSES—See
WITNESSES 4, 13

EXPLANATION—See
CRIMINAL LAW 59

EXPRESS PROHIBITIONS—See
ZONING 14

EXTENSION OF NONCONFORMING USE—See
NUISANCE 5

EXTRINSIC EVIDENCE—See
PROPERTY 1

EYEWITNESSES—See
WITNESSES 26

FACTS—See
PLEADING 1
ZONING 2

FACTS AND INFERENCES—See
APPEAL AND ERROR 30, 31

FAILURE TO OBEY ORDER—See
DISMISSAL AND NONSUIT 1

FAILURE TO OBJECT—See
APPEAL AND ERROR 8
WITNESSES 11

FAILURE TO PRODUCE WITNESS—See
CRIMINAL LAW 37

FAILURE TO SCHEDULE DEBT—See
ATTORNEY AND CLIENT 2
LIMITATION OF ACTIONS 4, 5

FAILURE TO TESTIFY—See
CRIMINAL LAW 53

FAIR TRIAL—See
CRIMINAL LAW 14

FALSE COMMUNICATIONS—See
LIBEL AND SLANDER 7

FALSE PRETENSES

1. Time is not of the essence of the offense of obtaining money by means of false pretenses and a prosecutor may introduce evidence of events prior to the time of the charged crime specified in an indictment, particularly where the defendant does not allege prejudice and where the evidence of prior events is essential to an understanding of the crime charged. *People v Breckenridge,* 6.

FALSE PRETENSES—Cont'd

2. It is not error to permit the amendment of an information during trial to enlarge the time period during which the crime of obtaining money by false pretenses occurred; the prosecution is not required to set forth in the information the false pretenses by which the offense was accomplished, and proof of the crime is not restricted to the exact transaction as it took place between the complaining witness and the accused. *People v Breckenridge,* 6.

3. Failure to ask for a continuance in a prosecution for obtaining money by false pretenses, where the defendant is entitled to one, leads the Court of Appeals to presume that the defendant was not prejudiced by the failure of the prosecution to indicate at an earlier time that it was going to introduce evidence of events occurring prior to the time specified in the indictment. *People v Breckenridge,* 6.

4. An instruction on "continuous misrepresentation" in a prosecution for obtaining money by false pretenses, which defendant asserts is a non-existent doctrine, is harmless error even if there is no such doctrine where there was considerable evidence of material misrepresentations over an extended period of time and sufficient evidence of defendant's misrepresentations during the time specified in the indictment to render any error harmless. *People v Breckenridge,* 6.

5. A statute permits evidence of events occurring within a 6 month period following the time stated in an information or indictment to be admitted in a trial for obtaining money by false pretenses; there is no limitation in the statute on the admission of events occurring prior to the time stated in the information or indictment and no authority exists which supports the proposition that the statute prohibits the admission of such evidence (MCLA 767.60; MSA 28.1000). *People v Breckenridge,* 6.

6. Failure to establish the element of reliance in a trial for obtaining money by false pretenses is reversible error. *People v Breckenridge,* 6.

FATHER'S INCOME—See
DIVORCE 1

FEDERAL CONSTITUTION—See
CONSTITUTIONAL LAW 8

FEDERAL POWER COMMISSION—See
TAXATION 6, 9

FEDERAL STANDARDS—See
SEARCHES AND SEIZURES 8

FELONIES—See
ARREST 7

FELONIES—Cont'd
STATUTES 10

FELONY CONVICTIONS—See
CRIMINAL LAW 63

FELONY MURDER—See
HOMICIDE 4–8, 13, 14

FINAL JUDGMENT—See
JUDGMENT 2, 9

FINAL ORDERS—See
ADMINISTRATIVE LAW 3
WORKMEN'S COMPENSATION 7

FINDINGS OF FACTS—See
APPEAL AND ERROR 5, 24–26, 28
CRIMINAL LAW 5
SALES 2
WORKMEN'S COMPENSATION 12

FIRE HAZARDS—See
ZONING 16

FIRST-DEGREE MURDER—See
CRIMINAL LAW 16
HOMICIDE 1, 2, 4, 5, 9, 10–12, 14

FLIGHT—See
ARREST 10

FORCIBLE INTRUSION—See
ARREST 6

FORECLOSURE—See
MECHANICS' LIENS 3

FOREFEITURE OF BONDS—See
APPEAL AND ERROR 13
BAIL 1–3
COURTS 2

FOREIGN JURISDICTIONS—See
PLEADING 3

FORESEEABILITY—See
PRODUCTS LIABILITY 4

FORESEEABLE INJURY—See
PRODUCTS LIABILITY 1

FORESEEABLE USES—See
PRODUCTS LIABILITY 2

FORGED INSTRUMENTS—See
MORTGAGES 2

FORM OF VERDICT—See
TRIAL 3

FORUM—See
ACTION 1, 2

FORUM STATE—See
COURTS 5

FOURTH AMENDMENT—See
SEARCHES AND SEIZURES 7

FRANCHISE FEES—See
TAXATION 11

FRAUDS AND IMPOSITIONS—See
STATUTES 2

FUNDAMENTAL RIGHTS—See
CONSTITUTIONAL LAW 9

FURTIVE GESTURES—See
SEARCHES AND SEIZURES 11, 12, 16

GARNISHMENT

1. A trial court in a garnishment action may award a garnishee-defendant reasonable attorney's fees incurred in filing a disclosure and other necessary costs; the award of such fees and costs is discretionary with the trial court and the Court of Appeals is limited in its scope of review to the question of whether the trial court's action amounted to an abuse of discretion (GCR 1963, 526.9). *C. I. T. v Lewis,* 623.

GENERAL PROPERTY TAX ACT—See
TAXATION 1

GENERAL RULE—See
ADMINISTRATIVE LAW 4
STATUTES 6

GENERAL VERDICTS—See
CRIMINAL LAW 36

GOOD FAITH—See
INSURANCE 17
LIBEL AND SLANDER 7

GOVERNMENTAL IMMUNITY—See
TORTS 1

GOVERNMENTAL INTERESTS—See
ZONING 16

GOVERNMENTAL REGULATION—See
TAXATION 8

GOVERNMENT POWERS—See
STATES 1

GRAND JURY

1. A person indicted by a citizen's grand jury is entitled to a preliminary examination; however, the Michigan Supreme Court case which established this rule made it applicable to pending and future cases, therefore, where a defendant was convicted prior to the establishment of the rule, he was not entitled to a preliminary examination and the trial court's failure to conduct a requested preliminary examination was not error. *People v Blachura,* 399.

2. The significant differences between proceedings before a one-man grand jury and a citizens' grand jury are ample justification for granting a witness before a one-man grand jury the right to have counsel present in the room where the inquiry is held and the denial of that right to a witness before a citizens' grand jury. *People v Blachura,* 399.

See
CRIMINAL LAW 49, 51

GREATER OFFENSES—See
HOMICIDE 6

GROSS NEGLIGENCE—See
TORTS 3

GUILTY PLEA—See
CRIMINAL LAW 6, 11, 12

GUNS—See
SEARCHES AND SEIZURES 10

HABITUAL OFFENDERS—See
CRIMINAL LAW 32, 33

HAIR SAMPLES—See
SEARCHES AND SEIZURES 18

HARMLESS ERROR—See
CRIMINAL LAW 5, 65
FALSE PRETENSES 4

HAZARDOUS UNDERTAKINGS—See
STATUTES 2

HEARING—See
ADMINISTRATIVE LAW 9
BAIL 1
LABOR RELATIONS 1, 2

HEROIN—See
DRUGS AND NARCOTICS 1

HIGHWAY CROSSINGS—See
NEGLIGENCE 4

HIRING AND FIRING—See
MASTER AND SERVANT 1

HISTORICAL COST—See
TAXATION 8

HOME—See
ARREST 6

HOMICIDE

1. A determination of the degree of guilt of one accused of homicide is a fact question for the trier of fact under established principles: (1) premeditation can be reasonably inferred from the circumstances surrounding the killing, (2) a defendant may not be found guilty of first-degree murder if he did not have an opportunity to subject the nature of his response to a second look or reflection, *i.e.,* one cannot instantaneously premeditate a murder, (3) a sufficient time lapse to provide an opportunity for a "second look" may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing, and (4) where it is factually clear that there is no evidence of premeditation, the trier of fact may not consider a charge of first-degree murder. *People v Jesse Smith,* 190.

2. Premeditation can be inferred from various kinds of evidence, such as the prior relationships between the parties, whether the murder weapon had been acquired or positioned in preparation for the homicide, the immediate circumstances of the killing, and the defendant's post-homicide conduct. *People v Jesse Smith,* 190.

3. A decedent's reputation for ferocity, brutality and the like, if known by the defendant, may be shown in a prosecution for homicide to support his claim that he acted in self-defense with the reasonable belief that he was in imminent danger of death or great bodily harm. *People v Walker,* 202.

4. The presence or absence of malice in each first-degree murder case remains a question for jury determination, although malice may be inferred from the nature of an underlying felony in a felony-murder case and the circumstances surrounding the commission of the felony; therefore, a defendant's conviction of first-degree murder under a felony-murder theory should be reversed, and the matter remanded, where a trial judge, in his instructions to the jury, removed the essential element of malice from the jury's consideration. *People v Robert G Thompson,* 348.

HOMICIDE—Cont'd

5. A prosecutor may choose on remand after a defendant's conviction for felony murder has been reversed, where the defendant was convicted of both first-degree murder, under a felony-murder theory, and armed robbery, the underlying felony, either to have the defendant's armed robbery conviction and sentence stand or to have it vacated and retry the defendant on armed robbery and first-degree murder charges. *People v Robert G Thompson,* 348.

6. *Punishing a defendant for the greater offense of first-degree felony murder and for the included offense of the underlying felony constitutes a violation of the double jeopardy clauses of the United States Constitution and the Michigan Constitution; therefore, a defendant's conviction for armed robbery should be reversed where the armed robbery was the felony upon which the jury based the defendant's conviction for felony murder (US Const, Am V, Am XIV, Const 1963, art 1, § 15). People v Robert G Thompson,* 348.

7. *Failure of a defendant at his trial on a felony-murder charge to object to a trial judge's failure to instruct the jury on the elements of malice, and, in effect, letting the jury imply malice from the underlying felony to the killing precludes the Court of Appeals from reviewing the issue because there is no manifest injustice; whether the instruction uses the word murder or killing in connection with an underlying felony, an omission to instruct on malice should not be reversible error unless properly preserved for review by objection or by the trial court's refusal to give a properly requested instruction. People v Robert G Thompson,* 348.

8. *The common-law felony-murder rule does not require the giving of an instruction to the jury on malice because malice is imputed from a killing which takes place during the perpetration of or attempt to perpetrate one of the enumerated felonies (MCLA 750.316; MSA 28.548). People v Robert G Thompson,* 348.

9. A motion for a directed verdict of acquittal should be denied in a defendant's trial for first-degree murder if there is any evidence at all on each of the elements of murder in the first degree. *People v Gayton,* 390.

10. Evidence of premeditation and deliberation sufficient to sustain a conviction of first-degree murder may be inferred from the character of the weapon used, the wound inflicted and the circumstances surrounding the killing. *People v Gayton,* 390.

11. A person must act with the purpose of causing death in order to commit first-degree murder; mere conscious indifference to the likelihood of death as a result of an intentional act is not enough to constitute first-degree murder. *People v Milton,* 515.

HOMICIDE—Cont'd

12. The elements of premeditation and deliberation distinguish first-degree murder from second-degree murder; a failure to define these elements for a jury independently of malice is error because it has the effect of abolishing the difference between first-degree and second-degree murder. *People v Milton,* 515.

13. It is essential for conviction under a felony murder theory for the prosecution to prove the underlying felony as well as the murder. *People v Milton,* 515.

14. A first-degree murder conviction must be overturned when the jury is instructed on both premeditated murder and felony murder when the evidence presented at trial is legally insufficient to establish the crime of felony murder. *People v Milton,* 515.

See
CRIMINAL LAW 56

HOUSING LAW—See
LANDLORD AND TENANT 2, 3

HYDROELECTRIC FACILITIES—See
TAXATION 5–7
WITNESSES 4

IDENTIFICATION—See
CRIMINAL LAW 40, 43
WITNESSES 10

ILLEGAL ACTIVITY—See
MUNICIPAL CORPORATIONS 2

ILLEGAL CONTRABAND—See
SEARCHES AND SEIZURES 10

ILLEGAL SEARCHES AND SEIZURES—See
SEARCHES AND SEIZURES 16, 17

IMPEACHMENT—See
CRIMINAL LAW 20, 61–64
WITNESSES 16, 17

IMPLICATIONS—See
ZONING 14

IMPLIED WARRANTY—See
PRODUCTS LIABILITY 1, 2

INACTION—See
LIMITATION OF ACTIONS 4

INADMISSIBLE EVIDENCE—See
SEARCHES AND SEIZURES 5

INCARCERATION—See
CONSTITUTIONAL LAW 3

INCENDIARY ORIGINS—See
ARSON 1
INSURANCE 7

INCLUDED OFFENSES—See
HOMICIDE 6

INCOME—See
DIVORCE 1–3

INCONSISTENT VERDICTS—See
CRIMINAL LAW 21
JURY 2

INDEFINITE TIME PERIODS—See
CONTRACTS 2

INDEMNIFICATION—See
CONTRACTS 5, 6, 9
TORTS 3

INDETERMINATE SENTENCE ACT—See
CRIMINAL LAW 24, 25

INDICTMENT—See
GRAND JURY 1

INDICTMENT AND INFORMATION—See
CRIMINAL LAW 21
FALSE PRETENSES 1–3, 5

INDORSEMENT—See
WITNESSES 7, 8, 15, 27, 30

INDUSTRY STANDARDS—See
PRODUCTS LIABILITY 6

INFANTS—See
CRIMINAL LAW 7–8
NEGLIGENCE 1, 2

INFERENCES—See
CRIMINAL LAW 16, 46, 53
EVIDENCE 1
HOMICIDE 2, 4, 10

INFORMATION—See
CRIMINAL LAW 59
SEARCHES AND SEIZURES 6

INJURIES—See
COURTS 4, 6

INJURIES—Cont'd
PRODUCTS LIABILITY 2, 5
WORKMEN'S COMPENSATION 1–3

INLAND LAKES—See
WATERS AND WATER COURSES 1, 3

IN PARI MATERIA—See
STATUTES 7

INQUIRY—See
MORTGAGES 1, 5
VENDOR AND PURCHASER 1

INSANITY—See
CONSTITUTIONAL LAW 15
CRIMINAL LAW 35, 36

INSTALLMENT PAYMENTS—See
BILLS AND NOTES 3

INSTALLMENT SALES—See
CONTRACTS 1
SALES 1

INSTRUCTIONS TO JURY—See
APPEAL AND ERROR 18
CRIMINAL LAW 2, 3, 39, 45, 48, 52, 53, 57, 60
DAMAGES 1
DRUGS AND NARCOTICS 1
EVIDENCE 2
FALSE PRETENSES 4
HOMICIDE 4, 7, 8
NEGLIGENCE 3, 4
WITNESSES 12

INSURANCE

1. The duty of an insurer to defend an action brought by a third party against the insured depends upon the allegations in the complaint of the third party. *Dochod v Central Mut Ins,* 63.

2. The duty of an insurer to defend an action brought against the insured by a third party is severable from the duty to pay; that an insurer may ultimately be found not liable is a matter separate and apart from its obligation to defend the insured. *Dochod v Central Mut Ins,* 63.

3. An insurer's duty to defend its insured extends to the defense of actions of the nature and kind covered by the policy, and the insurer has a duty to defend, despite theories of liability asserted against the insured which are not covered under the policy, if there are any theories of recovery that fall within the policy. *Dochod v Central Mut Ins,* 63.

INSURANCE—Cont'd

4. Ambiguities in an insurance policy are to be resolved against the insurer and most favorably to the premium-paying insured. *Dochod v Central Mut Ins,* 63.

5. An insurer has a duty to defend its insured in an action brought against the insured by a third party even though the insured admits and it is stipulated that the insured inflicted injury upon the third party intentionally and the policy excludes liability for intentional acts of the insured where the complaint asserts, among several causes of action, negligence, which comes within the coverage of the insurance policy. *Dochod v Central Mut Ins,* 63.

6. The burden is placed on the insurer who raises an arson defense to prove by a preponderance of the evidence that the plaintiff set fire to the building or caused it to be set on fire. *George v Travelers Indemnity Co,* 106.

7. There was enough direct and circumstantial evidence of motive, opportunity and incendiary cause for a jury to find that an arson defense was established by defendant insurers, in an action for damages for the alleged failure of the insurers to honor the terms of policies covering the plaintiff's property and business, where it was undisputed that the fire resulted from arson, the plaintiffs were heavily insured, the plaintiffs had easy access to the building, and there was evidence from which the jury could conclude that the plaintiffs' corporation was heavily in debt as well as evidence suggesting that community hostility against the plaintiffs had made it unprofitable, if not impossible, to carry on business. *George v Travelers Indemnity Co,* 106.

8. An insured who is covered by more than one insurance policy and who recovers an award in arbitration within the limits of one policy may nevertheless demand arbitration under the other policies for the same claim, provided, however, that he may be compensated only once for any damage suffered. *DAIIE v Kurak,* 217.

9. Arbitration under one policy of insurance is not binding as res judicata on subsequent arbitration between a party and a nonparty to the first arbitration; neither a release of one insurer nor an arbitration award against one insurer affects the insured's rights under contract. *DAIIE v Kurak,* 217.

10. The word "premises" has been construed to be synonymus with the word "building"; therefore, a trial court did not err in determining that a fire insurer's election to repair the premises owned by an insured, as set forth in a letter to the insured, did not include an election to repair the contents of the building. *DeSantis v Mich Prop Ins,* 440.

INSURANCE—Cont'd

11. The statutory language of a standard fire insurance policy may be interpreted to allow an insurer to elect, and the parties are free to agree upon, different methods of adjustment of losses to buildings and their contents; therefore, a trial court did not err by finding that an insurer should repair a building which it insured but should pay for the building's contents within the policy limits (MCLA 500.2832; MSA 24.12832). *DeSantis v Mich Prop Ins,* 440.

12. A clause in a motor vehicle liability insurance policy which provides that coverage under the policy does not apply to "bodily injury to any person who is related by blood, marriage, or adoption to an insured against whom claim is made if such person remains in the same household as such insured" is not valid and is unenforceable because it deprives third parties of protection which is required by the no-fault automobile insurance act (MCLA 500.3101, 500.3135; MSA 24.13101, 24.13135). *Allstate Ins Co v DeFrain,* 503.

13. Exclusionary clauses in an automobile liability insurance policy which cause a certified policy to deviate from statutory requirements are barred. *Allstate Ins Co v DeFrain,* 503.

14. Exclusion of liability coverage in an automobile liability insurance policy is allowed where a vehicle is operated by a named person and such exclusion is authorized by the insured; such an exclusion is not allowed where the exclusionary clause is designed to avoid liability when certain persons not involved in the operation of the motor vehicle are injured. (MCLA 257.520[b][2], 500.3009[2]; MSA 9.2220[b][2], 24.13009[2]). *Allstate Ins Co v DeFrain,* 503.

15. Uninsured motorist insurance covers all members of a named insured's household; an exclusionary clause which limits the coverage, by requiring that if a protected individual is injured while occupying an automobile it must be the vehicle listed in the policy declaration or a "nonowned" vehicle as defined in the policy, is valid and does not violate public policy. *DAIIE v Reynolds,* 710.

16. *An automobile insurer's offer of uninsured motorist coverage must apply to whoever is insured under the liability coverage of the policy; therefore, a clause in an insurance policy is invalid where it excludes uninsured motorist coverage to the daughter of a named insured, who with her husband is living in the named insured's household, and who is injured while a passenger in an uninsured automobile owned and driven by her husband. DAIIE v Reynolds,* 710.

17. An insurance company has a duty to act in good faith with respect to the interest of the insured when negotiating settlements, and if it fails so to act, the insured may bring an action for the damages he suffers as a result. *Auman v Federal Ins Co,* 740.

INSURERS—See
INSURANCE 6

INTENT—See
CONTRACTS 4, 7
STATUTES 7, 10
ZONING 10

INTENTIONAL ACTS—See
INSURANCE 5

INTENT OF PARTIES—See
MECHANICS' LIENS 5
STATUTES 1

INTENT TO CLAIM LIEN—See
MECHANICS' LIENS 1

INTERCOURSE—See
CRIMINAL LAW 19

INTEREST—See
SALES 5
USURY 2
WORKMEN'S COMPENSATION 4

INTERESTS OF THE PARTIES—See
LIBEL AND SLANDER 2, 4

INTERIM BAIL STATUTE—See
CRIMINAL LAW 26
SEARCHES AND SEIZURES 8, 9

INTERPRETATION OF ORDINANCES—See
ZONING 11

INTERPRETATIONS—See
CONSTITUTIONAL LAW 8

INTIMIDATION OF WITNESSES—See
BAIL 8

INTRUSIONS—See
ARREST 6
SEARCHES AND SEIZURES 4

INVALID CONVICTIONS—See
CRIMINAL LAW 33

INVESTIGATION OF TITLE—See
VENDOR AND PURCHASER 1

INVESTIGATIVE SUBPOENA POWER—See
ADMINISTRATIVE LAW 6

INVESTIGATORY STOPS—See
ARREST 1, 8, 9, 11, 12
SEARCHES AND SEIZURES 3

INVESTORS—See
STATUTES 2–4

ISSUES—See
APPEAL AND ERROR 6, 21, 32

ISSUES OF FACT—See
JUDGMENT 12, 13, 19
USURY 2

JEOPARDY—See
CRIMINAL LAW 1

JUDGES

1. A party alleging prejudice or bias on the part of a trial judge bears the burden of showing that prejudice or bias. *Elsasser v American Motors Corp,* 379.

See
BAIL 2
COURTS 2, 3
CRIMINAL LAW 48, 52

JUDGMENT

1. Res judicata is a jurisprudential doctrine founded upon the premise that litigation of a controversy must have a termination point; the doctrine becomes applicable when an adjudicatory proceeding on a contested issue has progressed to a final determination and all available courses of appeal have been exhausted or not pursued within the prescribed time limits. *Strachan v Mutual Aid Club,* 165.

2. Res judicata is applicable to administrative proceedings that are adjudicatory in nature and from which an appeal is provided, where the Legislature intends that the tribunal's judgment is to be final absent an appeal. *Strachan v Mutual Aid Club,* 165.

3. Three requirements must be satisfied in order for a former judgment to be a bar to a subsequent action: (1) identity of subject matter, (2) identity of parties or their privies, and (3) a judgment on the merits. Strachan v Mutual Aid Club, 165.

4. An involuntary dismissal which is not for lack of jurisdiction operates as an adjudication on the merits and bars a plaintiff from bringing a second action unless it is specified that the dismissal is without prejudice; the corollary to this rule is that a dismissal for lack of jurisdiction does not operate as an adjudication on the merits (GCR 1963, 504.2). Strachan v Mutual Aid Club, 165.

JUDGMENT—Cont'd

5. *The dismissal of a case on the basis of a plaintiff's failure to exhaust his administrative remedies, and not on the merits of the plaintiff's allegations, was a dismissal for "lack of jurisdiction" within the meaning of a court rule governing the effect of an involuntary dismissal upon a subsequent action between the same parties (GCR 1963, 504.2). Strachan v Mutual Aid Club,* 165.

6. *A judgment made on the grounds that the court lacks jurisdiction, while not on the merits and not conclusive on the merits, is conclusive as to the jurisdictional question presented and the jurisdictional issue may not be relitigated. Strachan v Mutual Aid Club,* 165.

7. *Generally, a decision of a court that it is without jurisdiction to hear a matter acts as a bar to the bringing of another action even if that decision is erroneous; this rule is, however, subject to exceptions under proper circumstances. Strachan v Mutual Aid Club,* 165.

8. *A dismissal by a circuit court on the basis that the plaintiff had not exhausted her administrative remedies where she had also filed a complaint to the Civil Rights Commission which had not yet been adjudicated when the plaintiff filed her complaint in circuit court is not res judicata as to a second complaint filed after the commission dismissed the matter where the jurisdictional question and the circumstances were different at the time of filing the second complaint. Strachan v Mutual Aid Club,* 165.

9. *An otherwise nonfinal judgment is considered to be final only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment; upon entry of a final judgment all prior nonfinal rulings and orders are incorporated into the final judgment and are finalized for purposes of appeal and upon perfection of an appeal by right from a final judgment a party may seek review of any prior ruling in the case affecting the party that would otherwise be only a nonfinal order (GCR 1963, 518.2). Am Fed Savings v Orenstein,* 249.

10. A jury verdict upon which no judgment was rendered may not be attacked by use of a court rule which provides for a post-trial proceeding to remedy defective judgments (GCR 1963, 527). *Alvarado v Scutt,* 421.

11. A trial court erroneously granted defendants' motion for summary judgment based on the ground that the plaintiff had failed to state a claim upon which relief could be granted where the plaintiff had stated a claim upon which relief could be granted when he claimed that defendants discharged him from their employ because he refused to manipulate and adjust pollution control reports to be filed with the state pursuant to

JUDGMENT—Cont'd
statute since such manipulation would clearly violate the law of this state whose public policy does not condone such attempts to violate duly enacted laws (MCLA 323.1 *et seq.;* MSA 3.521 *et seq.,* GCR 1963, 117.2[1]). *Trombetta v Detroit, T & I R Co,* 489.

12. A trial court did not err in granting defendants' motion for summary judgment where the judge found, after considering the entire record and viewing the plaintiff's case in its most favorable light, that the parties had failed to present a genuine issue of material fact (GCR 1963, 117.3). *Trombetta v Detroit, T & I R Co,* 489.

13. It is not mandatory that a plaintiff file counter-affidavits in opposition to a defendant's motion for summary judgment claiming that the plaintiff has failed to present a genuine issue of material fact; however, if affidavits submitted by defendant in support of the motion for summary judgment stand on the record uncontroverted by any opposing affidavits, depositions, or exhibits, then the allegations in the plaintiff's unsworn pleadings should not deprive the defendant of his right to summary judgment (GCR 1963, 117.3). *Trombetta v Detroit, T & I R Co,* 489.

14. Failure to make proof of service does not affect the validity of the service; therefore, proof of service on the record is no longer a prerequisite to the entry of a valid default judgment (GCR 1963, 104[2], 520). *Thomas v Thomas,* 499.

15. Valid entry of a default judgment requires service of process upon the defendant either personally or by publication (GCR 1963, 105, 106). *Thomas v Thomas,* 499.

16. Both good cause and a meritorious defense must be shown before a default judgment will be set aside; good cause is defined as (1) a substantial defect or irregularity in the proceedings upon which the default was based, (2) a reasonable excuse for failure to comply with the requirements which created the default, or (3) some other reason showing that manifest injustice would result from permitting the default to stand. *First Bank of Cadillac v Benson,* 550.

17. A motion for summary judgment was the proper means to determine whether a defendant crane operator was an employee of a leasing company which leased cranes and operators as units or an employee of the construction company which was leasing the crane with an operator from the leasing company where the record and the agreed statement of facts showed that there was no dispute as to any of the underlying facts (GCR 1963, 117.2[3]). *Smith v Martindale,* 682.

18. Summary judgment was improperly granted to a defendant on the ground that the plaintiff had failed to state a claim upon which relief could be granted where the plaintiff's complaint properly stated a valid cause of action (GCR 1963, 117.2[1]). *Auman v Federal Ins Co,* 740.

JUDGMENT—Cont'd

19. Summary judgment was improperly granted to a defendant on the ground that there was no genuine issue as to any material fact where it is clear, interpreting the pleadings and affidavits to give the benefit of reasonable doubt to the plaintiff, that there existed a genuine issue of material fact (GCR 1963, 117.2[3]). *Auman v Federal Ins Co,* 740.

See
APPEAL AND ERROR 26, 30, 31
DIVORCE 9
USURY 2
WORKMEN'S COMPENSATION 16, 18

JUDGMENT NOTWITHSTANDING VERDICT—See
APPEAL AND ERROR 30, 31
MOTIONS 2, 3

JUDICIAL AUTHORITY—See
DISMISSAL AND NONSUIT 1

JUDICIAL POLICY—See
NUISANCE 7

JUDICIAL REMEDIES—See
ADMINISTRATIVE LAW 7
CIVIL RIGHTS 2

JUDICIAL RULINGS—See
APPEAL AND ERROR 15

JURISDICTION—See
ACTION 1, 2
ADMINISTRATIVE LAW 1
CIVIL RIGHTS 1
COURTS 4–7
CRIMINAL LAW 54
JUDGMENT 4–8
TAXATION 10
WORKMEN'S COMPENSATION 6

JURY

1. A jury is not obligated to believe a witness's testimony *in toto,* they may give whatever weight to any particular testimony they desire. *People v Jesse Smith,* 190.

2. Jury verdicts which have a logical explanation will not be found inconsistent; a verdict in favor of an automobile driver who was injured in a collision with a train, which held the railroad to be negligent but found no cause of action as to the train's engineer, was not thereby inconsistent because the railroad's duty of care extended beyond the actions taken by the engineer. *Decker v N & W R Co,* 647.

JURY—Cont'd
See
CONSTITUTIONAL LAW 5–7
CRIMINAL LAW 16
PRODUCTS LIABILITY 4
TRIAL 3

JURY DELIBERATIONS—See
CRIMINAL LAW 47

JURY INSTRUCTIONS—See
APPEAL AND ERROR 18
CRIMINAL LAW 2, 3, 39, 45, 48, 52, 53, 57, 60
DAMAGES 1
DRUGS AND NARCOTICS 1
EVIDENCE 2
FALSE PRETENSES 4
HOMICIDE 4, 7, 8
NEGLIGENCE 3, 4
WITNESSES 12

JURY QUESTIONS—See
APPEAL AND ERROR 30
ATTORNEY AND CLIENT 2

JURY VERDICT—See
APPEAL AND ERROR 17
DAMAGES 2, 3
JUDGMENT 10

JUSTIFIABLE INTRUSION—See
SEARCHES AND SEIZURES 4

JUSTIFICATION—See
SEARCHES AND SEIZURES 16

KNOWLEDGE—See
CONTRACTS 6
USURY 2

LABOR RELATIONS

1. A probationary police officer denied permanent employment is entitled by statute to a hearing at which cause for the denial must be established (MCLA 38.511, 38.514; MSA 5.3361, 5.3364). *Troy v Troy Civil Service,* 585.

2. A probationary employee does not have a right to a hearing on dismissal at the end of his probationary period of employment unless that right is expressly created by statute. *Troy v Troy Civil Service,* 585.

See
ACTION 3
MUNICIPAL CORPORATIONS 8

LACK OF JURISDICTION—See
JUDGMENT 4

LANDLORD AND TENANT

1. The common-law rule regarding the extent of a landlord's duty to repair defective premises provides that the landlord is liable to his tenant only for latent defects of which he knows or has reason to know. *Raatikka v Jones,* 428.

2. The Michigan housing law provides that every dwelling and all parts thereof be kept in good repair by the owner; the Michigan housing law abrogates the common-law rule regarding the landlord's duty to repair in the localities where it applies (MCLA 125.471; MSA 5.2843). *Raatikka v Jones,* 428.

3. A landlord may, under provisions of the Michigan housing law and city ordinances enacted under that law, be under a duty to repair all defects in the premises of which he knew or should have known; this does not impose a duty upon the landlord to inspect the premises on a regular basis to determine if any defects exist, but it does require him to repair any defects brought to his attention by the tenant or by his casual inspection of the premises (MCLA 125.401, 125.471; MSA 5.2771, 5.2843, Durand Ordinances, ch 83, 8.121, 8.172). *Raatikka v Jones,* 428.

LANDOWNERS—See
STATUTES 5
ZONING 1, 2, 17

LAND USE—See
ZONING 4, 5, 7, 12, 14

LAND VALUES—See
TAXATION 8

LATENT DEFECTS—See
LANDLORD AND TENANT 1

LATE PAYMENTS—See
BILLS AND NOTES 2, 3

LAW OF THE CASE—See
APPEAL AND ERROR 4

LEGISLATIVE ACTS—See
STATES 1

LEGISLATIVE BODIES—See
MUNICIPAL CORPORATIONS 3

LEGISLATIVE CLASSIFICATIONS—See
CONSTITUTIONAL LAW 11

LEGISLATIVE DETERMINATIONS—See
CONSTITUTIONAL LAW 1

LEGISLATIVE INTENT—See
ADMINISTRATIVE LAW 6
STATUTES 11, 12
ZONING 11

LEGITIMACY—See
DIVORCE 7, 8

LESSER INCLUDED OFFENSES—See
CRIMINAL LAW 2–4

LEX LOCI DELICTI—See
TORTS 2

LIABILITY—See
TORTS 3
WORKMEN'S COMPENSATION 10, 15

LIABILITY INSURANCE—See
INSURANCE 12–14

LIBEL AND SLANDER

1. Generally, a qualified privilege is recognized where the public interest in activities which presuppose frank communication on certain matters between persons standing in particular relationships to each other outweighs the damage to individuals of good faith but defamatory utterances relevant to the interests of those involved. *Merritt v Detroit Memorial Hosp,* 279.

2. A qualified privilege extends to all communications made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty, and the privilege embraces cases where the duty is not a legal one, but where it is of a moral or social character of imperfect obligation. *Merritt v Detroit Memorial Hosp,* 279.

3. The term privilege relates to a situation or occasion in which the importance of the criticism published justifies a modification or indeed a withdrawal of the protection normally afforded to our citizens' reputations. *Merritt v Detroit Memorial Hosp,* 279.

4. An employer has a qualified privilege to defame an employee by publishing statements to other employees whose duties interest them in the subject of the publication. *Merritt v Detroit Memorial Hosp,* 279.

5. Employees responsible for hiring and firing are entitled to hear accusations of employee misconduct which warrant dismissal and preclude rehiring; therefore, employees who are supervisors, personnel department representatives or company officials are those employees to whom an employer-defendant's qualified privilege extends. *Merritt v Detroit Memorial Hosp,* 279.

LIBEL AND SLANDER—Cont'd

6. A communication regarding a person is absolutely privileged if the person consents to it. *Merritt v Detroit Memorial Hosp,* 279.

7. Absolutely privileged communications and qualifiedly privileged communications made in good faith do not lose their status even if the content of the communication is proved false. *Merritt v Detroit Memorial Hosp,* 279.

LIBERAL CONSTRUCTION—See
MECHANICS' LIENS 2

LICENSES—See
TAXATION 6

LIENS—See
MECHANICS' LIENS 1–3, 5–11

LIGITIMACY—See
EVIDENCE 7

LIMITATION OF ACTIONS

1. Michigan's borrowing statute provides in part that the period of limitation applicable to a claim accruing outside of the state shall be either that prescribed by the law of the place where the claim accrued or by the law of this state, whichever bars the claim; therefore, a products liability claim for personal injury which accrued in the state of Georgia, which has a two-year limitation period, would be barred in Michigan courts where the action was commenced after the two-year period had run, even though the action was started within Michigan's three-year limitation period for such actions (MCLA 600.5861[2]; MSA 27A.5861[2]). *Turner v Ford Motor Co,* 521.

2. An action for loss of consortium which is derivative of a products liability personal injury action which accrued in Georgia is not barred in Michigan courts where the action was commenced within the four-year limitation period provided by Georgia law for such actions and within Michigan's three-year limitation period; there is no inconsistency in barring a wife's personal injury claim as untimely while allowing the husband's claim for loss of consortium if the claims are subject to different limitation periods. *Turner v Ford Motor Co,* 521.

3. An action based on malpractice by a state licensed person must be brought within two years of the time when such person discontinues treating or otherwise serving the plaintiff, or within two years of the time when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the asserted malpractice, whichever is later (MCLA 600.5805[3], 600.5838; MSA 27A.5805[3], 27A.5838). *Biberstine v Woodworth,* 705.

LIMITATION OF ACTIONS—Cont'd

4. A cause of action by a client against his attorney for malpractice arising from inaction or delay accrues for the purpose of the statute of limitations at the time when it can be said that the attorney has had a reasonable time to act but has failed to do so; therefore, in a malpractice action by a client against his attorney based on the attorney's failure to schedule a certain debt in a bankruptcy proceeding, the alleged malpractice occurred when the attorney failed to schedule the debt within a reasonable time after having been requested to do so by his client. *Biberstine v Woodworth,* 705.

5. The state of limitations for a malpractice suit based on an attorney's failure in his client's bankruptcy proceeding to schedule a certain debt as requested by the client should start to run at the time the client was discharged in bankruptcy, because until then the attorney could have petitioned the bankruptcy court to amend the bankruptcy petition and plaintiff would not have had a claim for malpractice. Biberstine v Woodworth, 705.

LIMITED JURISDICTION—See
COURTS 6

LIMITED PERSONAL JURISDICTION—See
COURTS 4

LIMITING INSTRUCTIONS—See
EVIDENCE 2

LIMITING PRESENCE—See
DEPOSITIONS 1

LINEUPS—See
CRIMINAL LAW 42
WITNESSES 10

LITIGATION—See
DIVORCE 5
EQUITY 1
JUDGMENT 1
PLEADING 2
WORKMEN'S COMPENSATION 14

LOANS—See
SALES 1
STATUTES 4
USURY 1

LONG ARM JURISDICTION—See
COURTS 5

LOSS OF CONSORTIUM—See
LIMITATION OF ACTIONS 2

LOSS OF PROFITS—See
DAMAGES 4

MACHINERY—See
SALES 3

MALICE—See
HOMICIDE 4, 8, 12

MALPRACTICE—See
ATTORNEY AND CLIENT 2
LIMITATION OF ACTIONS 3–5
NEGLIGENCE 1

MANDAMUS—See
DRAINS 2

MANIFEST INJUSTICE—See
APPEAL AND ERROR 8, 18
CRIMINAL LAW 57
HOMICIDE 7
JUDGMENT 16

MANUFACTURERS—See
PRODUCTS LIABILITY 3, 6

MARIJUANA—See
SEARCHES AND SEIZURES 2

MARINAS—See
EQUITY 1

MASTER AND SERVANT

1. The economic reality test has been adopted by Michigan courts to discern an employment situation; among the relevant factors which demonstrate an employment relationship are: (1) control of a worker's duties, (2) the payment of wages, (3) the right to hire and fire and the right to discipline, and (4) the performance of the worker's duties as an integral part of the employer's business towards the accomplishment of a common goal. *Smith v Martindale,* 682.

2. A crane operator should have been considered to be an employee of a firm in the business of renting out cranes and crane operators as an entity to construction companies and not an employee of the construction company using this service where the facts of the case indicate under the economic reality test that the leasing firm had control of the operator's duties, that the leasing firm paid the operator's wages and that the leasing firm had the right to hire and fire and discipline the operator, even though the fourth factor of the economic reality test indicated a possible employment situation between the crane operator and the construction company; the economic reality test views its four elements as a whole, assigning primacy to no single one. *Smith v Martindale,* 682.

MASTER AND SERVANT—Cont'd
See
JUDGMENT 17
LIBEL AND SLANDER 4, 5

MAXIMUM SENTENCE—See
CRIMINAL LAW 24

MAYORS PRO TEM—See
ADMINISTRATIVE LAW 9

MECHANICS' LIENS

1. Notice of intent to claim a mechanics' lien is not required where the lien claimant deals directly with the owner of the property subject to the lien; to permit an owner who has actual notice of a claim to defeat a lien on the basis that he did not receive statutory notice would be inconsistent with the purpose of the mechanics' lien act (MCLA 570.1 *et seq.;* MSA 26.281 *et seq.). Williams & Works v Springfield,* 355.

2. The mechanics' lien act is to be construed liberally as to the determination of whether a lien has attached (MCLA 570.1 *et seq.;* MSA 26.281 *et seq.). Williams & Works v Springifield,* 355.

3. Mechanics' lienors dealt directly with the owner of the property subject to foreclosure and were thereby exempt from the requirement of serving upon the owner their statements of account and lien within 90 days of completing their work where the property was owned by a copartnership whose sole partners were an individual and a corporation wholly owned by that individual, and where all of the lienors' dealings were with that individual (MCLA 570.6; MSA 26.286). *Williams & Works v Springfield,* 355.

4. Parties claiming mechanics' liens were subcontractors, not original contractors, for purposes of the mechanics' lien statute where a part owner of the property was also the general contractor on the construction project (MCLA 570.1 *et seq.;* MSA 26.281 *et seq.). Williams & Works v Springfield,* 355.

5. Parol evidence was properly admitted to determine the intent of the parties where the waivers of claim of mechanics' lien executed by subcontractors were ambiguous. *Williams & Works v Springfield,* 355.

6. A mechanics' lien has priority over all encumbrances recorded subsequent to the commencement of building; "commencement" does not mean actual construction, but includes engineering services prior to actual construction (MCLA 570.1, 570.9; MSA 26.281, 26.289). *Williams & Works v Springfield,* 355.

7. The owner of real estate subject to a mechanics' lien has standing to raise the issue of the constitutionality of the mechanics' lien statute; a mortgagee of the real estate does not. *Williams & Works v Springfield,* 355.

MECHANICS' LIENS—Cont'd

8. The placement of mechanics' liens upon property involves state action because mechanics' liens are created, regulated and enforced by the state. *Williams & Works v Springfield,* 355.

9. A mechanics' lien, although it clouds title, does not disturb possession or right of alienation until after a foreclosure action; in effect, a lien is merely notice to others of the existence of a potential foreclosure action, and the filing of a mechanics' lien does not constitute a significant deprivation of a property interest. *Williams & Works v Springfield,* 355.

10. Due process of law is a flexible concept not requiring any particular procedural requisites, and the mechanics' lien statute is not rendered unconstitutional for failure to provide for notice prior to filing of a lien or for a hearing prior to or immediately after filing of a lien. *Williams & Works v Springfield,* 355.

11. The burden of proof is on the owner of the property to show a valid waiver of a mechanic's lien, and to be effective the waiver document should clearly and unequivocally show an express waiver. *Sturgis Savings V Italian Vil,* 577.

See
APPEAL AND ERROR 25
ATTORNEY AND CLIENT 1

MENTAL ANGUISH—See
CONTRACTS 3

MICHIGAN HOUSING LAW—See
LANDLORD AND TENANT 2, 3

MINIMUM SENTENCE—See
CRIMINAL LAW 24

MINORS—See
CRIMINAL LAW 7–9

MISCONDUCT—See
LIBEL AND SLANDER 5
WITNESSES 19

MISDEMEANORS—See
CRIMINAL LAW 61–65
STATUTES 10

MISREPRESENTATIONS—See
FALSE PRETENSES 4

MISTRIAL—See
CONSTITUTIONAL LAW 7, 10

MISUSE OF PRODUCTS—See
PRODUCTS LIABILITY 2

MODIFICATION OF AWARD—See
WORKMEN'S COMPENSATION 17, 18

MODIFICATION OF SUPPORT ORDER—See
DIVORCE 2

MONEY JUDGMENTS—See
WORKMEN'S COMPENSATION 4

MONIES—See
BAIL 7
COURTS 7
CRIMINAL LAW 54

MORTGAGEES—See
MECHANICS' LIENS 7

MORTGAGES

1. Summary judgment granting a plaintiff mortgagee priority over the mortgage of a defendant was improper where the judgment was based upon a subordination clause in the defendant's mortgage which was so obviously ambiguous that it should have put plaintiff on inquiry notice of a third-party interest in the realty. *Am Fed Savings v Orenstein,* 249.

2. *A forged document purporting to be a discharge of a mortgage and duly recorded as such does not affect the rights of one mortgagee over the rights of another mortgagee. Am Fed Savings v Orenstein,* 249.

3. *A recorded waiver of priority of a mortgage is constructive notice thereof to all persons dealing with the mortgage (MCLA 565.391; MSA 26.701). Am Fed Savings v Orenstein,* 249.

4. *An ambiguous subordination clause in a recorded mortgage should be construed against the party who drafted the clause. Am Fed Savings v Orenstein,* 249.

5. *A party who has searched the record regarding a particular piece of property and in reliance on a discharge of mortgage contained therein has attained the status of a bona fide mortgagee without notice of defects in the title should not be charged with inquiry notice as to a more subtle defect earlier in time; for purposes of inquiry notice, a mortgagee is fully entitled to rely on an apparently perfect legal title as shown by the records. Am Fed Savings v Orenstein,* 249.

See
USURY 2

MOTION FOR REVIEW—See
BAIL 5

MOTIONS

1. A trial court has the discretion to dispense with or limit oral arguments on motions; this discretion was abused where the court refused a plaintiff's request to appear in person yet allowed the defendant to appear and argue a motion unopposed (GCR 1963, 119.2). *Lawrence v Dept of Corrections,* 234.

MOTIONS—Cont'd

2. A motion for a directed verdict is a prerequisite to a motion for a judgment notwithstanding the verdict (GCR 1963, 515.2). *Distco Laminating v Union Tool,* 612.

3. The Court of Appeals, in reviewing a motion for a judgment notwithstanding the verdict, should view the evidence in the light most favorable to the party against whom the motion is directed. *Distco Laminating v Union Tool,* 612.

See

APPEAL AND ERROR 10, 16
CRIMINAL LAW 37, 38, 46, 47
HOMICIDE 9

MOTIVE—See

ARSON 1
INSURANCE 7
WITNESSES 28

MOTORCYCLES—See

ZONING 16

MOTOR VEHICLES—See

CONVERSION 1
CRIMINAL LAW 61
INSURANCE 12, 15, 16
PRODUCTS LIABILITY 1
SALES 1
SEARCHES AND SEIZURES 1–3

MOTOR VEHICLE SALES—See

CONTRACTS 1

MULTIPLE PARTIES—See

CONTRACTS 7

MULTIPLE POLICIES—See

INSURANCE 8

MUNICIPAL CORPORATIONS

1. The Michigan Constitution forbids a city to loan its credit for a private purpose, or to exercise its taxing power for anything but public purposes; public funds cannot be used to further a private enterprise (Const 1963, art 7, §§ 21, 26). *Horton v Kalamazoo,* 78.

2. The protection of the public from illegal activity is a proper purpose for the exercise of the police power. *Horton v Kalamazoo,* 78.

3. The actions of a municipal legislative body enjoy a presumption of validity. *Horton v Kalamazoo,* 78.

MUNICIPAL CORPORATIONS—Cont'd

4. An expenditure serves a public purpose, even if private parties also profit from it, where the likely benefits of the expenditure to the community outweigh its likely cost; payments made to private parties may serve a public purpose. *Horton v Kalamazoo,* 78.

5. A city may properly reimburse an employee for expenses incurred in presenting the city's case to a decision-maker on a matter of undoubted interest to the city where there is no apparent prospect of personal benefit to the employee himself. *Horton v Kalamazoo,* 78.

6. The courts should give rational construction to city charters because they are not always as judicially framed as they might be; the language employed must be given its plain meaning and no words should be treated as surplusage. *Sterling Heights v Civil Service,* 221.

7. A city ordinance which states that a suspended municipal employee has a right of appeal to the Civil Service Commission but that the right of appeal shall not apply to one or more suspensions totalling not more than seven days does not bar the Commission from conducting a hearing on an employee's appeal from a suspension of not more than seven days, but means that suspensions of less than seven days may be appealed only by *leave* of the commission. *Sterling Heights v Civil Service,* 221.

8. Grievance and other disciplinary procedures are "other terms and conditions of employment" within the meaning of the public employment relations act and the duty to perform in accordance with the terms of a collective bargaining agreement prevails over conflicting provisions of the charter of a home rule city (MCLA 423.201 *et seq.;* MSA 17.455[1] *et seq.). Sterling Heights v Civil Service,* 221.

9. A city may extend its sewer service beyond the city limits and may collect charges for the cost of such service, including a fair rate of return on the value of the property devoted to providing the sewer service (Const 1963, art 7, § 24, MCLA 117.4f[4]; MSA 5.2079[4]). *Oakland County v Detroit,* 308.

10. The rate charged by a city for its sewer service is presumed to be reasonable in the absence of a showing that the rate is capricious, arbitrary, or unreasonable. *Oakland County v Detroit,* 308.

11. A city sewer system is justified in charging a higher rate to customers located outside the city than it charges to customers within the city because the city incurs costs related to operation of the sewage treatment system which the suburbs do not, such as police and fire protection for the treatment plant, the

MUNICIPAL CORPORATIONS—Cont'd
risk of tort liability arising from the system's operation, and the loss of tax base resulting from devoting land to a tax-free utility, and because the suburban areas served by the sewer may have an enhancement in valuations which the city can not tax. *Oakland County v Detroit,* 308.

12. A regulatory ordinance, unlike a zoning ordinance, is not encumbered by a nonconforming use provision and while a preexisting nonconforming use may exist despite a zoning ordinance, a regulatory ordinance envisions no similar exceptions; therefore, neither an original nonconforming use, nor an expansion of it, excuses the enforcement of a regulatory ordinance. *Norton Shores v Carr,* 715.

See
STATES 1

MUNICIPAL CUSTOMERS—See
MUNICIPAL CORPORATIONS 11

MURDER—See
CRIMINAL LAW 46

MURDER WEAPONS—See
HOMICIDE 2

NAMED PERSONS—See
INSURANCE 14

NATIONALITY—See
TRIAL 1

NATIONAL ORIGINS—See
APPEAL AND ERROR 7

NEGLECT—See
APPEAL AND ERROR 23

NEGLIGENCE

1. An award of damages for the unwanted birth of a normal, healthy, child is not contrary to public policy; the birth of such a child does not confer an unquestionable benefit upon the parents, which outweighs, as a matter of law, any detrimental expenses related to the birth and rearing of the child. *Green v Sudakin,* 545.

2. Damages to compensate parents for the expenses of rearing an unwanted child are not speculative or ethically questionable; the cost of rearing a child is a computation which is routinely performed; the law is clear that there need only be a basis for reasonable ascertainment of the amount of the damages and where the fact of liability is proven, difficulty in determining such damages need not bar recovery. *Green v Sudakin,* 545.

NEGLIGENCE—Cont'd

3. Refusal of a trial court to give a defendant's requested instruction to the jury was proper where the instruction regarding the issue of whether a railroad breached its duty to maintain a crossing in a reasonably safe condition would have precluded the jury from considering whether the railroad should have utilized other methods of warning in addition to the sign which was erected at the crossing; a statute which prohibits the erection of warning devices at a crossing without authorization does not abrogate a railroad's duty to maintain a crossing in a safe condition (MCLA 257.615; MSA 9.2315). *Decker v N & W R Co,* 647.

4. A trial court properly instructed a jury that they should determine whether in light of all the facts and circumstances reasonable prudence required a defendant railroad to maintain warning devices at a highway crossing in addition to the signs required by law where the evidence showed that the crossing in question was a double-track crossing which intersected the roadway at an angle such that a person in an automobile had to turn his whole body to see down the tracks, and at the time of a collision between a train and an automobile visibility was only 100 to 150 feet, during an evening snowstorm, and the train was traveling at 70 miles per hour. *Decker v N & W R Co,* 647.

See
CONTRACTS 5
INSURANCE 5
JURY 2
PRODUCTS LIABILITY 1
TORTS 3

NEW TRIAL—See
APPEAL AND ERROR 16
CRIMINAL LAW 3, 37, 38

NO-FAULT ACT—See
INSURANCE 12

NOMINAL VALUE—See
TAXATION 9

NONCONFORMING USE—See
MUNICIPAL CORPORATIONS 12
NUISANCE 1, 2, 5
ZONING 4, 6, 7–10

NONOWNED AUTOMOBILES—See
INSURANCE 15

NONRESIDENTS—See
COURTS 4, 5

NO-PROGRESS DOCKET—See
COURTS 8

NOTICE—See
APPEAL AND ERROR 1
CONSTITUTIONAL LAW 2, 3
COURTS 8, 10
CRIMINAL LAW 27–30
MECHANICS' LIENS 1, 3, 10
MORTGAGES 1, 3
PLEADING 3
VENDOR AND PURCHASER 1
WORKMEN'S COMPENSATION 1, 2

NOTICE TO PROSECUTOR—See
BAIL 2

NUISANCE

1. The term "nonconforming use" in zoning cases comprehends the physical characteristics, dimensions, or location of a structure as well as the functional use thereof or of the premises on which it is located, and is used as a generic term that includes nonconforming use of conforming structures and plots, nonconforming use of nonconforming structures and plots, conforming use of nonconforming structures and plots. *Norton Shores v Carr,* 715.

2. The existence of a vested right to a prior nonconforming use does not preclude a court from finding that the nonconforming use constitutes a nuisance. *Norton Shores v Carr,* 715.

3. Nuisances may be private or public or both: a private nuisance is a civil wrong based on a disturbance of defendants' neighbors' rights in their land; a public nuisance results from an interference with the rights of the community at large. *Norton Shores v Carr,* 715.

4. A nuisance in fact and a nuisance at law, or per se, are distinguishable; a nuisance in fact is that which becomes a nuisance by reason of circumstances and surroundings and a nuisance per se is an act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings. *Norton Shores v Carr,* 715.

5. Changing the nature and size of a nonconforming use constitutes an extension of a prior nonconforming use and is therefore a nuisance. *Norton Shores v Carr,* 715.

6. A finding of a nuisance in fact is not clearly erroneous where there is sufficient credible evidence to support the trial court's conclusion. *Norton Shores v Carr,* 715.

NUISANCE—Cont'd

7. An equity court has the power to enjoin a nuisance; however, it is the policy of the courts to tailor the remedy to the problem and where possible to abate a nuisance without completely destroying the business in which the nuisance originates. *Norton Shores v Carr,* 715.

See
EQUITY 4

NULLITY—See
STATUTES 8

OBJECTION—See
APPEAL AND ERROR 8, 18

OBJECTIVE TEST—See
CRIMINAL LAW 70

OBSTRUCTION OF JUSTICE—See
BAIL 8

OCCUPATIONAL INJURIES—See
APPEAL AND ERROR 1

OFFICERS' AND DIRECTORS' LIABILITY—See
WORKMEN'S COMPENSATION 15, 17

OFFICIAL INTRUSIONS—See
SEARCHES AND SEIZURES 19

ONE-MAN GRAND JURY—See
GRAND JURY 2

OPPORTUNITY—See
ARSON 1
INSURANCE 7

OPPORTUNITY TO CROSS EXAMINE—See
WITNESSES 23

OPPORTUNITY TO RESPOND—See
CONSTITUTIONAL LAW 2

ORAL ARGUMENT—See
MOTIONS 1

ORDERS—See
APPEAL AND ERROR 2
DEPOSITIONS 1
DISMISSAL AND NONSUIT 1
WORKMEN'S COMPENSATION 11

ORDINANCES—See
MUNICIPAL CORPORATIONS 7
ZONING 5, 8, 11–13, 15, 16

OUTSIDE OF CURTILAGE—See
SEARCHES AND SEIZURES 7

OWNERS—See
MECHANICS' LIENS 3, 4, 7

PAIN AND SUFFERING—See
CONTRACTS 3
DAMAGES 3

PARENT AND CHILD

1. A court must consider the best interest of the child in making a determination of custody, and only if there is presented clear and convincing evidence that it is in the best interest of the child will a court change a previous custody order (MCLA 722.27[c]; MSA 25.312[7][c]). *Radway v Radway,* 328.

See
APPEAL AND ERROR 2, 3
DIVORCE 1–3
NEGLIGENCE 1, 2

PAROL EVIDENCE—See
CONTRACTS 4
EVIDENCE 3
MECHANICS' LIENS 5

PARTIES—See
CONTRACTS 6
DEPOSITIONS 1
INSURANCE 9
WORKMEN'S COMPENSATION 5
ZONING 1, 2

PAT-DOWN SEARCH—See
CRIMINAL LAW 26
SEARCHES AND SEIZURES 8

PATERNITY—See
EVIDENCE 6

PAYMENT OF WAGES—See
MASTER AND SERVANT 1

PERFORMANCE OF CONTRACTS—See
DAMAGES 4

PERJURY—See
CRIMINAL LAW 49

PERMANENT EMPLOYEES—See
LABOR RELATIONS 1

PERMISSIBLE USES—See
ZONING 14

PERSONAL BENEFIT—See
MUNICIPAL CORPORATIONS 5

PERSONAL CONSENT—See
CONSTITUTIONAL LAW 7

PERSONAL CONTRACTS—See
CONTRACTS 3

PERSONAL INJURY—See
COURTS 6
DAMAGES 3
LIMITATION OF ACTIONS 1

PERSONAL MANIFESTATION—See
CONSTITUTIONAL LAW 10

PERSONAL SERVICE—See
JUDGMENT 15

PERSONS—See
SEARCHES AND SEIZURES 19

PETITIONS—See
BAIL 3

PETITIONS FOR REINSTATEMENT—See
COURTS 2

PHOTOGRAPHIC IDENTIFICATION—See
CRIMINAL LAW 41, 42

PHOTOGRAPHS—See
CRIMINAL LAW 8
WITNESSES 10

PLAIN MEANING—See
MUNICIPAL CORPORATIONS 6

PLAIN VIEW—See
SEARCHES AND SEIZURES 4

PLATS—See
STATUTES 5

PLEADING

1. Failure of a plaintiff to properly plead and present for proof in the lower court the facts upon which it relies to establish its standing in a case for the review of a decision of a zoning board prevents the plaintiff from relying on such facts on appeal. *WMU Trustees v Brink,* 99.

2. A party making an unreasonable allegation or denial of fact in his pleadings may be required to pay reasonable expenses incurred by the adverse party in proving or preparing to prove or disprove such fact as the case may be, including reasonable attorney fees (GCR 1963, 111.6). *People v Cousino,* 416.

PLEADING—Cont'd

3. A party who intends to raise an issue concerning the law of any jurisdiction or governmental unit thereof outside of Michigan should give notice in his pleadings or other reasonable written notice; this requirement was sufficiently complied with by a defendant seeking an accelerated judgment based on a Georgia statute of limitations which barred the plaintiffs' claim where the defendant in its brief in support of its motion for accelerated judgment cited the proper Georgia statute as the statute which barred the plaintiffs' claim; there was no need to supply the full text of the statute to the court or to the plaintiffs because the statute was readily accessible and there was no demand before the trial court for a fuller showing (MCLA 600.2114a; MSA 27A.2114[1]). *Turner v Ford Motor Co,* 521.

See
TORTS 1–3

PLEA OF GUILTY—See
CRIMINAL LAW 6, 11, 12

POLICE ACTIVITIES—See
CONSTITUTIONAL LAW 4

POLICE CONDUCT—See
SEARCHES AND SEIZURES 8

POLICE LAWS—See
CONSTITUTIONAL LAW 11

POLICE OFFICERS—See
ADMINISTRATIVE LAW 9
ARREST 8, 9
CRIMINAL LAW 70, 72
LABOR RELATIONS 1
SEARCHES AND SEIZURES 1–3, 6, 9
WITNESSES 6, 8

POLICE POWER—See
MUNICIPAL CORPORATIONS 2

POLICIES—See
SALES 4

POLICIES OF INSURANCE—See
INSURANCE 4

POLLUTION CONTROL REPORTS—See
JUDGMENT 11

POSSESSION—See
COURTS 7

POSSESSION OF PREMISES—See
MECHANICS' LIENS 9

PRE-CUSTODY SITUATIONS—See
CRIMINAL LAW 42

PREEXISTING USE—See
MUNICIPAL CORPORATIONS 12

PREJUDICE—See
APPEAL AND ERROR 7, 15
CRIMINAL LAW 43, 47
FALSE PRETENSES 1, 3
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PRELIMINARY EXAMINATION—See
APPEAL AND ERROR 22
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PRELIMINARY HEARING—See
WITNESSES, 23

PREMEDITATED MURDER—See
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PREMEDITATION—See
CRIMINAL LAW 16, 56
HOMICIDE 1, 2, 10, 12

PREMISES—See
INSURANCE 10

PREREQUISITES—See
HOMICIDE 13

PRESENCE AT DEPOSITION—See
DEPOSITIONS 1

PRESERVING ISSUE—Se
APPEAL AND ERROR 18, 29
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PRESERVING QUESTION—See
APPEAL AND ERROR 8, 12
CRIMINAL LAW 44
HOMICIDE 7
PLEADING 1
WITNESSES 11

PRESUMPTION OF VALIDITY—See
APPEAL AND ERROR 2
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PRESUMPTIONS—See
CRIMINAL LAW 35
DIVORCE 7, 8
EVIDENCE 7
STATUTES 8, 11

PRETRIAL RELEASE—See
BAIL 4–8

PREVENTION OF PERFORMANCE—See
DAMAGES 4

PREVENTIVE MEASURES—See
PRODUCTS LIABILITY 4

PRIMARY CONTROL—See
CONSTITUTIONAL LAW 10

PRIOR CONVICTIONS—See
CRIMINAL LAW 20, 25, 32, 33, 61–63, 65
WITNESSES 18

PRIOR EVENTS—See
FALSE PRETENSES 1, 3, 5

PRIOR FELONY CONVICTIONS—See
WITNESSES 17

PRIORITIES—See
MORTGAGES 1

PRIORITY OF MORTGAGES—See
MORTGAGES 3

PRIOR ORDERS—See
JUDGMENT 9

PRIOR RECORDED TESTIMONY—See
CONSTITUTIONAL LAW 16
WITNESSES 23

PRIOR RELATIONSHIPS—See
HOMICIDE 2

PRIOR SEXUAL OFFENSES—See
CRIMINAL LAW 43

PRISONERS—See
CONSTITUTIONAL LAW 3
TORTS 1

PRIVATE DUTY—See
STATUTES 12

PRIVATE EMPLOYMENT—See
ACTION 3

PRIVATE EMPLOYMENT—Cont'd
CIVIL RIGHTS 2

PRIVATE ENTERPRISE—See
MUNICIPAL CORPORATIONS 1

PRIVATE INTERESTS—See
CONTRACTS 5

PRIVATE NUISANCE—See
NUISANCE 3

PRIVATE PARTIES—See
MUNICIPAL CORPORATIONS 4

PRIVILEGE—See
LIBEL AND SLANDER 1–7
WITNESSES 14

PROBABLE CAUSE—See
ARREST 1–6
SEARCHES AND SEIZURES 2, 5, 10, 12–16, 18

PROBATION—See
CRIMINAL LAW 50

PROBATIONARY EMPLOYEES—See
LABOR RELATIONS 1, 2

PROBATION REVOCATION—See
CRIMINAL LAW 27, 31

PROBATIVE VALUE—See
CRIMINAL LAW 8, 43, 58

PROCEEDINGS—See
WATERS AND WATER COURSES 3

PROCEDURE—See
COURTS 11

PRODUCTION—See
WITNESSES 15

PRODUCTION OF WITNESSES—See
WITNESSES 1–3, 5, 6

PRODUCTS LIABILITY

1. An automobile manufacturer has a duty to so design and manufacture his product as to eliminate any unreasonable risk of foreseeable injury to the occupants of an automobile as a result of a collision; for the lack of reasonable care in the face of such duty, he may be answerable in a negligence action, and for the sale of a vehicle defective in such respect, he may be answerable for breach of implied warranty. *Elsasser v American Motors Corp,* 379.

PRODUCTS LIABILITY—Cont'd

2. A product liability suit based upon an implied warranty theory requires proof of a defect in manufacturing or design and injury caused by or resulting from the defect; under the implied warranty theory a defect is established by proof that the product is not reasonably fit for its intended, anticipated or reasonably foreseeable use; misuse of a product may be within the intended or foreseeable use upon which a cause of action for defective design or manufacture may be based. *Elsasser v American Motors Corp,* 379.

3. A manufacturer of automobiles is not required to manufacture a crash proof vehicle, but he must recognize the existence of accidents and build his product so that it is reasonably fit in case of a collision. *Elsasser v American Motors Corp,* 379.

4. The questions of foreseeability of injury and reasonableness of protective and preventive measures in products liability actions are for the trier of fact to decide. *Elsasser v American Motors Corp,* 379.

5. A plaintiff in a products liability case needs only to establish that a defect was *a* proximate cause of his injury, not that it was *the* proximate cause. *Elsasser v American Motors Corp,* 379.

6. A manufacturer may show compliance with an industry standard to indicate the reasonableness of the manufacture of his product, but the industry standard itself is always open to the question of reasonableness. *Elsasser v American Motors Corp,* 379.

See

DAMAGES 1
LIMITATION OF ACTIONS 1

PROFITS—See
DAMAGES 4

PROHIBITIONS—See
ZONING 14

PROMISSORY NOTES—See
USURY 2

PROMOTERS—See
STATUTES 2

PROOF OF DEFECT—See
PRODUCTS LIABILITY 2

PROOF OF GUILT—See
CRIMINAL LAW 16

PROOF OF SERVICE—See
DIVORCE 9

PROOF OF SERVICE—Cont'd
JUDGMENT 14

PROOFS—See
CRIMINAL LAW 59
FALSE PRETENSES 2
HOMICIDE 13

PROPERTY

1. One important purpose of the recording statutes is to impart certainty so that parties can rely on the public record of outstanding property interests; it is impermissible to resort to extrinsic evidence to determine what property interests are protected by recording, the constructive notice imparted by the record of an instrument being strictly limited to that which is set forth on its face. Am Fed Savings v Orenstein, 249.

See
TAXATION 1, 2, 4, 7, 8

PROPERTY INTERESTS—See
MECHANICS' LIENS 9
PROPERTY 1

PROPERTY OWNERSHIP—See
APPEAL AND ERROR 25
ZONING 17

PROPERTY TAXES—See
TAXATION 10

PROPERTY USES—See
NUISANCE 1
ZONING 8, 11, 12, 14

PROSECUTING WITNESS—See
RAPE 1

PROSECUTORS—See
CRIMINAL LAW 22, 34

PROSECUTOR'S DUTY—See
WITNESSES 16, 27

PROSECUTOR'S MISCONDUCT—See
CRIMINAL LAW 51

PROSECUTOR'S OPTION—See
CRIMINAL LAW 3
HOMICIDE 5

PROTECTIVE SEARCHES—See
SEARCHES AND SEIZURES 12, 17

PROTEST—See
TAXATION 11

PROXIMATE CAUSE—See
PRODUCTS LIABILITY 6

PUBLICATION—See
JUDGMENT 15
LIBEL AND SLANDER 1, 2, 4

PUBLIC DUTY—See
STATUTES 12

PUBLIC EMPLOYMENT RELATIONS ACT—See
MUNICIPAL CORPORATIONS 8

PUBLIC INTEREST—See
CONTRACTS 5
LIBEL AND SLANDER 1

PUBLIC NUISANCE—See
NUISANCE 3

PUBLIC OBLIGATIONS—See
USURY 1

PUBLIC POLICY—See
ARBITRATION AND AWARD 1
CONTRACTS 2, 5
CRIMINAL LAW 71, 72
JUDGMENT 11
NEGLIGENCE 1
WORDS AND PHRASES 1

PUBLIC PURPOSE—See
CONSTITUTIONAL LAW 1
MUNICIPAL CORPORATIONS 1, 2, 4
STATES 1

PUBLIC RECORDS—See
PROPERTY 1

PUBLIC UTILITIES—See
TAXATION 5

PURPOSE—See
EVIDENCE 2

PURPOSE OF CAUSING DEATH—See
HOMICIDE 11

QUALIFICATION TO TESTIFY—See
WITNESSES 13

QUALIFIED PRIVILEGE—See
LIBEL AND SLANDER 1, 2, 4, 5

QUESTION OF FACT—See
APPEAL AND ERROR 30

QUESTION OF FACT—Cont'd
ATTORNEY AND CLIENT 2
CONTRACTS 7
CRIMINAL LAW 55
HOMICIDE 1, 4
PRODUCTS LIABILITY 4

RACE—See
TRIAL 1

RACE CAR DRIVERS—See
CONTRACTS 5, 6

RACE PROMOTERS—See
CONTRACTS 6

RAILROADS—See
NEGLIGENCE, 3, 4

RAILWAY LABOR ACT—See
ADMINISTRATIVE LAW 7

RAISING ISSUES—See
PLEADING 3

RAPE

1. A complaining witness's reputation for lack of chastity might be admissible in a rape prosecution if the defendant can show that he knew of that reputation and the evidence is necessary to support the defendant's claim that he had no intent to force himself on her. *People v Walker,* 202.

See
CRIMINAL LAW 1, 3, 4

REAL PROPERTY—See
MECHANICS' LIENS 7, 9
MORTGAGES 1, 2
TAXATION 7–9
VENDOR AND PURCHASER 1
ZONING 8, 17

REARING OF CHILDREN—See
NEGLIGENCE 2

REASONABLE ASCERTAINMENT—See
NEGLIGENCE 2

REASONABLE BELIEF—See
ARREST 1, 2

REASONABLE CARE—See
PRODUCTS LIABILITY 1

REASONABLE CAUSE—See
ARREST 7, 11

REASONABLE DOUBT—See
CRIMINAL LAW 16, 35, 60

REASONABLE FEES—See
ATTORNEY AND CLIENT 1

REASONABLE FITNESS—See
PRODUCTS LIABILITY 2, 3

REASONABLENESS—See
CONSTITUTIONAL LAW 11
MUNICIPAL CORPORATIONS 10
SEARCHES AND SEIZURES 3, 6, 7, 19
WATERS AND WATER COURSES 1, 2
ZONING 5, 17

REASONABLE STANDARDS—See
PRODUCTS LIABILITY 6

REASSESSMENT—See
DRAINS 2

RECOGNIZANCE BONDS—See
APPEAL AND ERROR 13
BAIL 1–3
COURTS 2

RECORD—See
BAIL 6
CONSTITUTIONAL LAW 10
CRIMINAL LAW 66–69

RECORDER'S COURT—See
APPEAL AND ERROR 13
BAIL 1, 2
COURTS 2, 7
CRIMINAL LAW 54

RECORDER'S COURT JUDGES—See
COURTS 3

RECORDING STATUTES—See
MORTGAGES 3
PROPERTY 1

RECORDS—See
MECHANICS' LIENS 6

RECOVERY—See
APPEAL AND ERROR 27
NEGLIGENCE 2

RECREATIONAL FACILITIES—See
TAXATION 7

REDUCTION IN INCOME—See
DIVORCE 1–3

REFEREES—See
WORKMEN'S COMPENSATION 3, 7

REFUNDS—See
TAXATION 11

REFUSAL TO TESTIFY—See
WITNESSES 20

REGULATION OF COSTS—See
COSTS 2

REGULATORY ORDINANCES—See
MUNICIPAL CORPORATIONS 12

REIMBURSEMENT—See
DRAINS 1
MUNICIPAL CORPORATIONS 5

REINSTATEMENT OF BONDS—See
COURTS 2

REINSTATEMENT OF CASE—See
COURTS 8

RELATION TO CRIME—See
ARREST 10

RELEASE DECISION—See
BAIL 8

RELEVANCE—See
APPEAL AND ERROR 7
FALSE PRETENSES 6

RELEVANCE OF TESTIMONY—See
WITNESSES 28

RELEVANT TESTIMONY—See
WITNESSES 3

RELIEF—See
APPEAL AND ERROR 3, 27

RELIGION—See
TRIAL 1

REMAND—See
APPEAL AND ERROR 10
CRIMINAL LAW 3

REMAND—Cont'd
DIVORCE 4
HOMICIDE 5

REMARKS OF COUNSEL—See
APPEAL AND ERROR 8

REMARKS OF PROSECUTOR—See
CRIMINAL LAW 22

REMEDIAL STATUTES—See
ATTORNEY AND CLIENT 1

REMEDIES—See
WORKMEN'S COMPENSATION 19

REPAIRS—See
INSURANCE 10, 11
LANDLORD AND TENANT 1–3

REPUTATION—See
APPEAL AND ERROR 10
CRIMINAL LAW 18
HOMICIDE 3
RAPE 1

REQUESTS FOR INSTRUCTIONS—See
CRIMINAL LAW 53

REQUIREMENTS—See
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RESCISSION OF CONTRACTS—See
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CRIMINAL LAW 3, 33

RES GESTAE—See
CRIMINAL LAW 58

RES GESTAE WITNESSES—See
WITNESSES 1–3, 5–9, 15, 16, 26–30

RES JUDICATA—See
ADMINISTRATIVE LAW 3
APPEAL AND ERROR 4, 9
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RESOLUTION—See
ACTION 1, 2

RESPONDEAT SUPERIOR—See
WORKMEN'S COMPENSATION 19

RESTRICTIONS—See
CONSTITUTIONAL LAW 4
ZONING 11

REVERSAL—See
HOMICIDE 5

REVERSAL OF CONVICTIONS—See
CRIMINAL LAW 12

REVERSIBLE ERROR—See
CRIMINAL LAW 10

REVIEW—See
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REVIEW OF RECORD—See
APPEAL AND ERROR 22

REVOCATION OF PROBATION—See
CRIMINAL LAW 27–31

RIGHT OF ACTION—See
TORTS 2

RIGHT OF ALIENATION—See
MECHANICS' LIENS 9

RIGHTS—See
WORKMEN'S COMPENSATION 7, 8, 11, 13

RIGHTS IN LAND—See
NUISANCE 3

RIGHTS OF PARTIES—See
MORTGAGES 2

RIGHT TO CONTEST—See
CRIMINAL LAW 30

RIGHT TO COUNSEL—See
APPEAL AND ERROR 23
CRIMINAL LAW 27, 32, 40, 41
GRAND JURY 2
WITNESSES 10

RIGHT TO HEARING—See
CRIMINAL LAW 30

RIGHT TO TESTIFY—See
CRIMINAL LAW 63

RIPARIAN RIGHTS—See
WATERS AND WATER COURSES 1–3

ROBINSON HEARING—See
WITNESSES 1

RULES—See
ADMINISTRATIVE LAW 2

SAFETY—See
ZONING 16

SALES

1. An installment sales contract is defined as including any contract for the retail sale of a motor vehicle in the Motor Vehicles Sales Finance Act and including any loan or other form of contract which has a similar purpose or effect (MCLA 492.102[9]; MSA 23.628[2][9]). *Oakland Bank v Anderson,* 432.

2. A finding by a trial court, in an action for rescission of a contract to purchase a laminating machine, that the plaintiff's use of the machine after commencement of the action was not sufficient to bar rescission, although the use was admittedly "ownership like", will not be set aside where the finding was not clearly erroneous. *Distco Laminating v Union Tool,* 612.

3. A purchaser's substantial use of a machine following the purchaser's commencement of a suit to rescind the contract wherein the machine was purchased may not be so substantial as to equal acceptance of the machine through "an act inconsistent with the seller's ownership"; a buyer's efforts to remedy defects do not constitute a waiver of the right of rescission (MCLA 440.2606[1][c]; MSA 19.2606[1][c]). *Distco Laminating v Union Tool,* 612.

4. The Uniform Commercial Code is to be liberally construed so as to promote its underlying purposes and policies (MCLA 440.1102 *et seq.;* MSA 19.1102 *et seq.). Distco Laminating v Union Tool,* 612.

5. Interest expenses incurred by a purchaser are not recoverable from the seller in the purchaser's action to rescind the sales contract because the item purchased failed to meet contract specifications where the seller did not have reason to know of the purchaser's borrowing to make the purchase (MCLA 440.2714; MSA 19.2714). *Distco Laminating v Union Tool,* 612.

See
CONTRACTS 1

SALES CONTRACTS—See
CONVERSION 1

SAME SUBJECT MATTER—See
ADMINISTRATIVE LAW 6

SANITY—See
CONSTITUTIONAL LAW 15
CRIMINAL LAW 35, 36

SEARCHES AND SEIZURES

1. A general search of an automobile by police after a stop for a traffic violation is not justified where there is no suspicion of an offense other than the traffic violation. *People v Robert L Thompson,* 54.

2. A police officer was justified in searching a defendant's automobile where the defendant was stopped for a traffic violation and upon approaching the defendant, who was standing outside his automobile, the officer detected the smell of burning marijuana, placed the defendant under arrest, and searched his person, finding marijuana and a large sum of money; the officer had reasonable cause to belive that the automobile contained more contraband or additional evidence of possession or use of marijuana. *People v Robert L Thompson,* 54.

3. Reasonableness is the test that is to be applied for both the stop of and the search of moving motor vehicles; said reasonableness will be determined from the facts and circumstances of each case; fewer foundation facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved, and a stop of a motor vehicle for investigatory purposes may be based upon fewer facts than those necessary to support a finding of reasonableness where both a stop and a search is conducted by the police. *People v Robert L Thompson,* 54.

4. Police officers must be rightfully in a position in which evidence is plainly visible in order to apply the plain view doctrine; to justify a seizure of evidence without a warrant, there must be a prior justification for the officer's intrusion and discovery of the evidence must be inadvertent. *People v Johnson,* 70.

5. A finding of probable cause for a search and seizure without a warrant cannot be grounded on legally inadmissible evidence. *People v Johnson,* 70.

6. The reasonableness of any search or seizure must be determined as of the time of the search or seizure; in the determination of reasonableness, consideration may be given to the information possessed by the police officer who is conducting the search or seizure. *People v Garcia,* 260.

7. The proviso in a section of an article of the Michigan Constitution protecting against "unreasonable searches and seizures" which prohibits the exclusion from evidence of "any narcotic drug, firearm, bomb, explosive or any other dangerous weapon,

SEARCHES AND SEIZURES—Cont'd

seized by a peace officer outside the curtilage of any dwelling house" precludes a construction of the Michigan search and seizure clause imposing a higher standard of reasonableness for searches and seizures of items named in the proviso than the United States Supreme Court has held applicable under the Fourth Amendment (US Const, Am IV, Const, 1963, art 1, § 11). *People v Garcia,* 260.

8. The interim bail statute embodies a legislative policy affording a qualification for higher state standards on police conduct involved in searches and seizures than those required under the Federal standard; therefore, it was unreasonable for a police officer after arresting defendant for a minor traffic violation and completing an otherwise proper frisk for weapons to proceed with a more intrusive search of the defendant's inner pockets which cannot be justified either as a protective search for weapons or as an effort to uncover evidence of a traffic offense, and evidence seized in the further search should be suppressed (MCLA 780.581; MSA 28.872[1]). *People v Garcia,* 260.

9. The interim bail statute does not circumvent the right of a police officer to guarantee his own safety by restricting his right to search an individual who is under full custodial arrest; a police officer has every right to insure that the individual he has arrested does not possess any instrument which could be used as a weapon to harm the officer or effectuate an escape (MCLA 780.581; MSA 28.872[1]). People v Garcia, 260.

10. Suppression of a loaded pistol from evidence was erroneous where the pistol was seized under circumstances where the only sensible thing for a police officer was to determine if an object dropped in a hole in an automobile where a radio speaker had once been installed was a weapon that could be used against him or illegal contraband. *People v Robertson,* 446.

11. A furtive gesture in removing from a man's waistband and secreting a dark colored object, in a high crime area, in the early hours of the morning, after a lawful stop of an automobile, gave the police a reason to search and seize and a loaded pistol seized under such circumstances should not be suppressed from trial evidence. *People v Robertson,* 446.

12. Evasive action, such as an attempt to flee, coupled with furtive gestures, such as removing a dark colored object from a man's waistband and secreting it, is sufficient justification for an officer to conduct a limited protective search. *People v Robertson,* 446.

13. There must be probable cause to believe that a felony has been or is being committed to justify the search of an automobile without a warrant. People v Robertson, 446.

SEARCHES AND SEIZURES—Cont'd

14. The burden is on the people to show the police acted with probable cause and in response to exigent circumstances, thus bringing the search under one of the specific exceptions to the warrant requirement before a search without a warrant can be sustained. People v Robertson, 446.

15. The fact that a driver committed several traffic violations is totally irrelevant to a determination of whether an officer has probable cause to search his automobile; the lawfulness of a traffic stop is not a factor in determining whether there was probable cause to search. People v Robertson, 446.

16. A mere furtive gesture does not create probable cause to search an automobile; furtive gestures which raise a mere suspicion, without some additional specific knowledge on the part of an officer, are insufficient to justify a search without a warrant because mere suspicion is not probable cause. People v Robertson, 446.

17. A search cannot be characterized as a "protecitve" search where there is no testimony that the officer knew what the object which was later seized was or that he feared for his safety; evidence is illegally seized and should be suppressed where the record is barren as to any fears which would justify an immediate protective search of an automobile. People v Robertson, 446.

18. A search warrant was not required to justify the taking of hair samples from a defendant which were compared with hairs found at the scene of the crime charged and introduced into evidence at trial where there was sufficient evidence at the time the samples were taken to establish probable cause that the defendant committed the crime, the hair samples were removed by a medical doctor in a hospital environment after defendant was already in custody and at a time when he was conscious and alert, and where there was nothing to suggest that the hair samples were obtained by force; the intrusion into or upon the integrity of the defendant's person was very minor, and the potential for abuse of this procedure by police for harassment purposes is not great. *People v Rankins,* 694.

19. Not all official intrusions of an individual's person require a search warrant in order to be reasonable; some official in-custody investigative techniques designed to uncover incriminating evidence from a person's body are such minor intrusions into or upon the "integrity of an individual's person" that they are not, in the absence of a search warrant, unreasonable intrusions. *People v Rankins,* 694.

See

COURTS 7

CRIMINAL LAW 26, 54

SEARCH INCIDENT TO ARREST—See

SEARCHES AND SEIZURES 2, 9

SEARCH OF RECORDS—See
MORTGAGES 5

SEARCH WARRANTS—See
SEARCHES AND SEIZURES 18, 19

SEARCH WITHOUT WARRANT—See
SEARCHES AND SEIZURES 13, 14

SECOND DEGREE MURDER—See
HOMICIDE 12

SECOND LOOK—See
HOMICIDE 1

SECRET PROCEEDINGS—See
CRIMINAL LAW 49

SECURITIES—See
STATUTES 1, 2, 4

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SEIZED MONIES—See
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SEIZURES—See
CONTRACTS 1
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SELF-DEFENSES—See
HOMICIDE 3

SELF-INCRIMINATION—See
WITNESSES 14

SELLING PRICE—See
TAXATION 2

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CRIMINAL LAW 24, 25

SEPARATE MAINTENANCE—See
DIVORCE 6

SERVICE OF PROCESS—See
DIVORCE 9
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SETTING ASIDE VERDICT—See
CRIMINAL LAW 47

SETTLEMENTS—See
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SEWER RATES—See
MUNICIPAL CORPORATIONS 9–11

SEXUAL PENETRATION—See
CRIMINAL LAW 4

SIGNATURES—See
CONTRACTS 7

SIGNIFICANT CONTRACTS RULE—See
TORTS 2

SIMILAR DEFENSES—See
CRIMINAL LAW 43

SOLICITATION OF FUNDS—See
STATUTES 3

SPANKING—See
CRIMINAL LAW 8

SPECIAL DAMAGES—See
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SPECIAL VERDICTS—See
CRIMINAL LAW 36

SPECIFIC KNOWLEDGE—See
SEARCHES AND SEIZURES 16

SPECULATION—See
STATUTES 2

SPECULATIVE DAMAGES—See
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STANDARD OF REVIEW—See
ADMINISTRATIVE LAW 8
APPEAL AND ERROR 14
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STANDING—See
MECHANICS' LIENS 7
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STATE ACTION—See
MECHANICS' LIENS 8

STATE LICENSE—See
LIMITATION OF ACTIONS 3

STATEMENTS OF DEFENDANT—See
CRIMINAL LAW 10

STATE OF MIND—See
CRIMINAL LAW 18

STATES

1. The state and its political subdivisions are limited to such legislative acts and such governmental powers as exhibit a public purpose. *Horton v Kalamazoo,* 78.

STATE STANDARDS—See
SEARCHES AND SEIZURES 8

STATE TAX COMMISSION—See
TAXATION 10

STATUTE OF LIMITATION—See
LIMITATION OF ACTIONS 1–5
PLEADING 3

STATUTES

1. The Uniform Securities Act makes unlawful various acts in connection with the offer, sale or purchase of any security and whether or not a particular transaction comes within the purview of the act depends upon the language of the statute and the real nature of the transaction; it is the court's responsibility to ascertain the substance of the transaction and the real intent and purpose of the parties (MCLA 451.501, 451.809; MSA 19.776[101], 19.776[409]). *People v Breckenridge,* 6.

2. The purpose of securities laws, in general, is to prevent stockholders and promoters from perpetrating frauds and impositions on unsuspecting investors in hazardous undertakings and to protect credulous and incompetent persons from their own inclinations to speculate in hazardous enterprises. *People v Breckenridge,* 6.

3. The salient feature of securities sales under the Uniform Securities Act is the public solicitation of venture capital to be used in a business enterprise; subjection of the investor's money to the risks of an enterprise over which she or he has no managerial control is the basic economic reality of a security transaction as defined in the act. *People v Breckenridge,* 6.

4. Security statutes must turn on the economic realities underlying a transaction and where the underlying realities establish that a loan was made rather than the offering, selling, or purchase of securities there is no violation of the Uniform Securities Act, which was intended to protect investors, not persons engaged in commercial loan transactions. *People v Breckenridge,* 6.

STATUTES—Cont'd

5. The statute which sets forth the requirements of who has standing to apply to a circuit court to "vacate, correct, alter or revise" a recorded plat contains a conflict as to whether such action may be brought by a single lot owner in a subdivision or whether two-thirds of the landowners must join in the action; a rule of statutory construction that whenever possible all portions of a statute should be given effect leads to a construction which allows standing to the owner of a single lot as well as to a group of two-thirds of the lot owners if such a group should bring an action; this construction is further reinforced by the presence of a section which confers standing upon a single lot owner to bring an action to "amend" a plat (MCLA 560.222; MSA 26.430[222]). *Matter of Sequanota Heights Plat,* 49.

6. The general rules of statutory construction require that every word, phrase, clause, and sentence of the provision to be construed must be given force and effect and that no word, phrase, or clause shall be rendered nugatory; it is not to be presumed that the Legislature intended to do a useless thing and if possible every part of a statute must be given effect. *People v Malchi White,* 226.

7. Statutes dealing with the same matter are *in pari materia* and must be construed together to reach a harmonious result; it is important that the evident intent and meaning of the statutes as well as the force of them should be preserved. *Allstate Ins Co v DeFrain,* 503.

8. A statute should not be presumed to be a nullity; if reasonably possible, every part should be given effect. *Turner v Ford Motor Co,* 521.

9. It is a fundamental rule of statutory construction that courts are bound, whenever possible, so to construe statutes as to give them validity and a reasonable construction; seeming inconsistencies in the various provisions of a statute should be reconciled, if possible, so as to arrive at a meaning which gives effect to all parts of the statute. *People v Bernard Smith,* 561.

10. Statutory provisions should be construed whenever possible so as not to conflict with other statutory provisions; where one statutory provision expresses a specific intention that conflicts with a general intention expressed elsewhere, the particular intention is to be regarded as an exception to the general intention; therefore, the offense of attempted larceny in a building should be treated as a misdemeanor for purposes of determining the admissibility of such a conviction for impeachment purposes, despite the fact that a general statute makes this crime a felony since it is punishable by imprisonment in a state prison, because the specific statute defining the crime makes it a misdemeanor (MCLA 750.7, 750.92; MSA 28.197, 28.287). *People v Bernard Smith,* 561.

STATUTES—Cont'd

11. It is presumed that the Legislature intended to make some change in existing law when the Legislature adopts an amendment to a statute; courts must give some meaning to a legislative amendment; a change of phraseology in a statute raises the presumption that a change of meaning was intended. *English v Saginaw Cnty Treasurer,* 626.

12. Legislative intent to provide a common-law civil remedy based on a criminal statute may be inferred from the statute where the statute creates a private duty for the benefit of particular individuals or a class rather than a duty to the public. *Wilkerson v Seder,* 726.

See

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APPEAL AND ERROR 13
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SUSPENSIONS—See
ADMINISTRATIVE LAW 9
MUNICIPAL CORPORATIONS 7

SUSPICION OF CRIMINAL ACTIVITY—See
ARREST 4

SUSPICIONS—See
ARREST 9, 11, 12
SEARCHES AND SEIZURES 1, 16

TAXATION

1. The definition of "true cash value" supplied by the general property tax law, which is "the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained for the property at private sale, and not at forced or auction sale", is not the exclusive test for determining the value of property for tax purposes (MCLA 211.27; MSA 7.27). *Consumers Pwr v Big Prairie Twp,* 120.

2. There are five possible tests for determining the true cash value of property for tax assessing purposes: (1) actual cash value determined by the current selling price of the property or similar properties at private sale after negotiation, (2) adjusted reproduction cost method, (3) capitalization of income method, (4) depreciated net cost (book value), and (5) a comparison method, involving a determination of the depreciated reconstruction cost of equivalent building and facilities; it is the duty of the Tax Tribunal to adopt that method which is most appropriate to the individual case as the particular facts may indicate. *Consumers Pwr v Big Prairie Twp,* 120.

3. Courts will not interfere with the assessment of property for taxation by assessing officers, or the Tax Tribunal on appeal, where it appears that any of the acceptable methods has been used for the determination of cash value and there is absent a showing of an unfair result or discrimination. *Consumers Pwr v Big Prairie Twp,* 120.

TAXATION—Cont'd

4. A tax assessing authority in performing an assessment might conceivably utilize any one of the five accepted methods for arriving at true cash value, however, the Tax Tribunal must weigh each method in determining the true cash value of the subject property, although it is impermissible to make the assessment through an averaging process in which all methods are utilized; the weighing process involves comparing the values determined by the application of each of the five methods and seeing which of the values so determined, in light of the assessor's experience and reasoned judgment, best approximates the cash value of the property. *Consumers Pwr v Big Prairie Twp,* 120.

5. The Tax Tribunal's decision that adjusted depreciated reconstruction cost is the most appropriate method for determining the value of a dam utilized by a specific hydroelectric generating station owned by a public utility company was proper where the decision reflects a proper weighing of the various acceptable methods for arriving at true cash value. *Consumers Pwr v Big Prairie Twp,* 120.

6. The Tax Tribunal's decision in an action to determine the true cash value of a hydroelectric generating facility to totally discount the possibility that the Federal Power Commission would take over the facility without compensation upon the expiration of the current license granted by the FPC was not clearly erroneous where the predominance of factors suggests the improbability of a takeover. *Consumers Pwr v Big Prairie Twp,* 120.

7. The Tax Tribunal in an action to determine the true cash value of a hydroelectric generating facility, including the real property within the entire project, erred in determining the value of certain uplands as having a market value by failing to take account of the effect of the inclusion of all the project uplands within a recreational use plan approved by the Federal Power Commission where no reasonable possibility was demonstrated that the government restriction on the use of the property will be changed. *Consumers Pwr v Big Prairie Twp,* 120.

8. Actual income that may be derived from certain land owned by a utility company must be considered for determining the value of the land for tax assessment purposes where the company's ability to allow others to use the land is greatly restricted by governmental regulation; although land does not depreciate, its value may be significantly impaired by governmental regulation. *Consumers Pwr v Big Prairie Twp,* 120.

9. A nominal value, for tax assessment purposes, should be assigned to land owned by a utility company where neither income nor return of investment can be realized therefrom unless the Federal Power Commission exercises its takeover

TAXATION—Cont'd
rights, in which case it would have to pay historical cost at a maximum, and where the predominance of factors suggests the improbability of the takeover. *Consumers Pwr v Big Prairie Twp,* 120.

10. The Legislature, in enacting the Tax Tribunal Act, which created the Tax tribunal and gave the Tribunal jurisdiction over tax issues which previously could be raised either before the State Tax Commission or in circuit court, intended that the Tax Tribunal would retain all of the jurisdiction formerly exercised over property tax decisions made by the STC, including the increasing of assessments (MCLA 205.701 *et seq.;* MSA 7.650[1] *et seq.). Consumers Pwr v Prairie Twp,* 120.

11. Computation of franchise fees and acceptance of a corporation's annual report exhausts the Treasury Department's authority under the franchise fee act; therefore, payment of any deficiency assessed after the computation of the fee and acceptance of the annual report, based on unauthorized field audits, is not required of a taxpayer under the act and refund of amounts paid under protest is proper (MCLA 450.310; MSA 21.210[1], since repealed). *Giffels Assoc v Treasury Dept,* 730.

TAXATION OF COSTS—See
COSTS 1, 2
CRIMINAL LAW 50

TAXING POWER—See
MUNICIPAL CORPORATIONS 1

TAX TRIBUNAL—See
TAXATION 5–7

TAX TRIBUNAL COST—See
TAXATION 10

TERMINATION AT WILL—See
CONTRACTS 2

TESTIMONY—See
APPEAL AND ERROR 22
CONSTITUTIONAL LAW 16
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TESTS—See
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THEORIES OF RECOVERY—See
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THEORY OF CASE—See
CRIMINAL LAW 48, 52

THE SOCIAL WELFARE ACT—See
ADMINISTRATIVE LAW 5

THIRD PERSONS—See
CRIMINAL LAW 19

TIME ELEMENT—See
COURTS 9, 10
FALSE PRETENSES 1–3

TIME LAPSE—See
HOMICIDE 1

TIMELY OBJECTIONS—See
APPEAL AND ERROR 18

TIMELY SERVICE—See
CRIMINAL LAW 28, 29

TIME OF SEARCH—See
SEARCHES AND SEIZURES 6

TITLE—See
CRIMINAL LAW 54
COURTS 7
MORTGAGES 5

TORTS

1. An allegation by a plaintiff prison inmate that his property was stolen by prison employees is an allegation of conversion, which is an intentional tort; the commission of an intentional tort is not a governmental function, and in such a case the defendant Department of Corrections if possibly liable under a theory of *respondeat superior* is not protected by governmental immunity (MCLA 691.1407; MSA 3.996[107]). *Lawrence v Dept of Corrections,* 234.

2. Michigan courts have consistently held that the substantive law to be applied in a torts case is the law of the place where the tort occurred; the Court of Appeals is bound to follow a Supreme Court decision which expressly rejected the "significant contacts" approach unless the Court of Appeals is convinced by overwhelming evidence that the Supreme Court would overrule that decision today. *Turner v Ford Motor Co,* 521.

3. Generally, a party may contract against liability for harm caused by his negligence in performance of a contractual duty, but he may not do so with respect to his gross negligence; if the performance of a tortious act for which indemnification is claimed under the contract is only an undesired possibility in the performance of the contract, and the contract does not tend to induce the act, the indemnification provision is valid. *Tope v Waterford Racing Corp,* 591.

TORTS—Cont'd
See
COURTS 6

TOWNSHIPS—See
ZONING 12, 14, 16

TRAFFIC OFFENSES—See
CRIMINAL LAW 26
SEARCHES AND SEIZURES 8, 15

TRANSCRIPTS—See
BAIL 5
CRIMINAL LAW 68

TREATMENT—See
LIMITATION OF ACTIONS 3

TRIAL

1. The law is blind to differences in race, religion, and nationality; appeals to prejudice, whether overt or covert, have no place in the administration of justice. *George v Travelers Indemnity Co,* 106.

2. It is reversible error to deny the opposing party a fair trial by making irrelevant and inflammatory ethnic allusions. *George v Travelers Indemnity Co,* 106.

3. A trial judge did not abuse his discretion in asking a jury to redeliberate in order to correct the form of their verdict where the judge made no comment to the jury which compromised their determination of the facts, the judge's response to the initial verdict was addressed solely to the improper form of the verdict, and the verdict ultimately returned was in the form the judge originally requested. *Alvarado v Scutt,* 421.

See
CONSTITUTIONAL LAW 5

TRIAL COURT—See
CRIMINAL LAW 44

TRIAL COURT FINDINGS—See
APPEAL AND ERROR 28
NUISANCE 6

TRIAL STRATEGY—See
CRIMINAL LAW 23

TRUE CASH VALUE—See
TAXATION 1, 2, 4–7
WITNESSES 4

UNAVAILABLE WITNESSES—See
WITNESSES 14

UNDERLYING FELONY—See
HOMICIDE 4–8

UNENFORCEABLE PROMISES—See
CONTRACTS 8–10

UNIFORM COMMERCIAL CODE—See
SALES 4

UNIFORM SECURITIES ACT—See
STATUTES 1, 3, 4

UNINSURED MOTORISTS—See
INSURANCE 15, 16

UNITED STATES CODE—See
ADMINISTRATIVE LAW 7

UNLAWFUL SEIZURE—See
CONVERSION 1

UNLAWFULLY DRIVING AWAY—See
CRIMINAL LAW 61

UNREASONABLE SEARCHES—See
SEARCHES AND SEIZURES 7

UNWANTED CHILD—See
NEGLIGENCE 1, 2

UPLANDS—See
TAXATION 7

USE OF EVIDENCE—See
EVIDENCE 2

USES—See
SALES 2, 3
WATERS AND WATER COURSES 1
ZONING 12

USES OF PROPERTY—See
NUISANCE 1

USURY

1. The criminal usury act creates a public obligation not to engage in usurious loan transactions and provides for remedies where the statute is violated; therefore, no civil cause of action may be based on the criminal usury act (MCLA 438.31c, 438.32, 438.41, 438.42; MSA 19.15[1][c], 19.15[2], 19.15[51], 19.15[52]). *Wilkerson v Seder,* 726

2. Summary judgment was properly granted to a defendant who allegedly drafted a usurious promissory note where the note and mortgage which it represents did not on their face disclose a usurious interest rate and where none of the pleadings, affidavits or depositions contained facts raising an issue as to the defendant's knowledge of the interest rate (GCR 1963, 117.2[3]). *Wilkerson v Seder,* 726.

UTILITIES—See
MUNICIPAL CORPORATIONS 11
TAXATION 8, 9

VACATING PLEA—See
CRIMINAL LAW 11

VALIDITY—See
ZONING 15

VALID PROMISES—See
CONTRACTS 9

VALID SERVICE—See
JUDGMENT 14

VALUE—See
TAXATION 4–6, 9
WITNESSES 4

VALUE OF PROPERTY—See
TAXATION 1

VALUE OF SERVICES—See
DAMAGES 4

VEHICLE SALES ACT—See
CONTRACTS 1

VENDOR AND PURCHASER

1. A purchaser of real estate has the duty to investigate the title of his vendor and to take notice of any adverse rights or equities of third parties which he has the means of discovering and as to which he is put on inquiry; if he fails to inquire with due diligence he is chargeable, as a matter of law, with notice of the facts which the inquiry would have disclosed. *Am Fed Savings v Orenstein,* 249.

VENTURE CAPITAL—See
STATUTES 3

VERDICT OF GUILTY—See
CRIMINAL LAW 16

VERDICTS—See
JURY 2
TRIAL 3

VESTED RIGHTS—See
NUISANCE 3
ZONING 17

VETERANS'S PREFERENCE ACT—See
ADMINISTRATIVE LAW 9

VIOLATION OF PROBATION—See
CRIMINAL LAW 27–30

VIOLATIONS OF LAW—See
JUDGMENT 11

VOICE PROBLEMS—See
CRIMINAL LAW 48, 52

VOLUNTARY DISMISSALS—See
ACTION 1

VOLUNTARY PAYMENTS—See
WORKMEN'S COMPENSATION 8, 10, 11, 13

VOLUNTARY PLEA—See
CRIMINAL LAW 11, 12

WAIVER—See
APPEAL AND ERROR 25
CONSTITUTIONAL LAW 9, 10
CRIMINAL LAW 30, 31, 66–69
MECHANICS' LIENS 5, 11
MORTGAGES 3
WORKMEN'S COMPENSATION 18

WAIVER OF ACCELERATION—See
BILLS AND NOTES 2

WALKER HEARINGS—See
CRIMINAL LAW 10

WARNING DEVICES—See
NEGLIGENCE 3, 4

WARRANTY—See
PRODUCTS LIABILITY 1

WATERS AND WATER COURSES

1. Reasonableness remains the criterion for use of water by riparian owners; where there are several owners to an inland lake, such proprietors and their lessees and licensees may use the whole lake for boating, swimming, fishing and other similar riparian rights, so far as they do not interfere with the reasonable use of the waters by other riparian owners. *Pierce v Riley,* 39.

2. Matters to be considered in determining whether a use of riparian rights is reasonable include (1) what the use is for, (2) its extent, duration, necessity, and its application, (3) the nature and size of the stream, and the several uses to which it is put, (4) the extent of the injury to the one proprietor, and of the benefit to the other, and (5) all other factors which may bear upon the reasonableness of the use. *Pierce v Riley,* 39.

WATERS AND WATER COURSES—Cont'd

3. There is nothing in the Inland Lakes and Streams Act that limits the rights of a riparian owner to institute proceedings in any circuit court of the state against any person when necessary to protect the owner's riparian rights (MCLA 281.961; MSA 11.475[11]). *Pierce v Riley,* 39.

WEAPONS—See
SEARCHES AND SEIZURES 9–11

WEIGHT OF EVIDENCE—See
CRIMINAL LAW 7
DAMAGES 2
JURY 1

WEIGHT OF TESTIMONY—See
WITNESSES 4, 12

WILFUL DISREGARD—See
DIVORCE 3

WITHDRAWAL OF COUNSEL—See
COURTS 11

WITHDRAWAL OF PLEA—See
CRIMINAL LAW 12

WITHHOLDING FINAL DETERMINATIONS—See
ADMINISTRATIVE LAW 3

WITHOUT WARRANT—See
ARREST 1–6
SEARCHES AND SEIZURES 4, 5

WITNESSES

1. A trial judge's finding at a *Robinson* hearing that although the prosecutor lacked due diligence in the production of a res gestae witness due diligence would not have produced the missing witness was error where the prosecution attempted to serve the subpoena only two days prior to trial and, had the police contacted the witness a reasonable time before trial, she would have known not to leave when she did for a two-week vacation and would have been available as a witness. *People v Hendrix,* 33.

2. An exception to the general rule requiring the production of res gestae witnesses exists where the testimony of the witness would be merely cumulative. *People v Hendrix,* 33.

3. The testimony of a res gestae witness who was not produced at trial would have been relevant and would not have been merely cumulative to that of three other witnesses who were produced where (1) a defendant was identified by the three witnesses as one of the perpetrators of a robbery, (2) there was

WITNESSES—Cont'd

no dispute that the robbery had taken place and therefore only the identity of the perpetrators was at issue, (3) the nonproduced witness had viewed the perpetrator from a unique vantage point, yet was unable to identify the defendant as the perpetrator, and (4) the missing witness's nonidentification of the defendant would have been in conflict with the identification testimony of those who did testify; therefore, the trial judge erred in his conclusion that the witness's testimony would have been merely cumulative. *People v Hendrix,* 33.

4. The fact that an expert witness testifying as to the true cash value of a hydroelectric plant had not previously appraised a hydroelectric plant goes only to the weight to be given to his testimony, not its competence, where the expert was otherwise qualified to make such an assessment. *Consumers Pwr v Big Prairie Twp,* 120.

5. A prosecutor has a duty to indorse and produce all res gestae witnesses; all witnesses whose names are indorsed on the information must be produced at trial unless production is excused by the trial court or is waived by the defense (MCLA 767.40; MSA 28.980). *People v Kaigler,* 340.

6. A trial judge's decision to excuse production of a res gestae witness will not be reversed unless that decision represents an abuse of the judge's discretion; a trial judge did not abuse his discretion by excusing the producing of a former police officer who had taken the original report from the complaining witness where the former officer's testimony would have merely duplicated that of his partner, who did testify regarding the taking of the report, and by excusing another officer who was one of two officers who verified that a vehicle found at the scene of the crime was stolen, where that officer's partner also testified. *People v Kaigler,* 340.

7. A prosecutor has no duty to indorse and produce a defendant's accomplice, even though the accomplice might otherwise be considered a res gestae witness. *Poeple v Kaigler,* 340.

8. A police officer who, after a defendant was arrested, arrived at the scene in order to drive away a stolen vehicle, was not a res gestae witness, and a trial court did not abuse its discretion by refusing to require the indorsement and production of the officer where the officer was not indorsed and where the officer's partner did testify and any further testimony would have been cumulative. *People v Kaigler,* 340.

9. A trial court properly ruled that an individual was not a res gestae witness where that individual resided in a house adjacent to a defendant, the police knocked at his door and talked with him after they had arrested the defendant, and where he stated that he did not know the defendant or the defendant's companion, that he did not own either of the two automobiles that the defendant was working on and that he had not witnessed any of the preceding events. *People v Kaigler,* 340.

WITNESSES—Cont'd

10. Generally, Michigan decisions specify: (1) except in exigent circumstances, photographs of an accused known to be in custody or who can be readily produced for a lineup may not be shown to witnesses or purposes of identification; (2) a lineup cannot be conducted without providing a defendant with proper representation. *People v McNeill,* 368.

11. Failure to object to the admission of the testimony of child witnesses as incompetent waives the right to assert the alleged error on appeal (MCLA 600.2163; MSA 27A.2163). *People v McNeill,* 368.

12. Instructions on the weight and credibility of testimony of child witnesses was adequate where both prosecution and defense counsel in opening argument directed the jury's attention toward carefully weighing the testimony of these witnesses and where the court itself gave an instruction couched particularly in terms of weighing the credibility of such young witnesses. *People v McNeill,* 368.

13. The determination of whether an expert witness is qualified to testify rests within the sound discretion of the trial court. *Elsasser v American Motors Corp,* 379.

14. A witness who refuses to testify at trial, asserting his privilege against self-incrimination, may properly be found to be unavailable for purposes of a statute which allows introduction of an unavailable witness's preliminary examination testimony, and no prejudice resulted to a defendant from introduction of such a witness's prior testimony where defense counsel had been present at the earlier hearings at which the testimony was given and where defense counsel admittedly communicated with the witness prior to trial and was not surprised at the witness's assertion of privilege (MCLA 768.26; MSA 28.1049). *People v Castaneda,* 453.

15. Failure of the prosecution to indorse and produce a res gestae witness may be excused when the prosecutor makes a showing of due diligence in searching for the witness, and a trial judge's finding of due diligence will not be overturned on appeal unless a clear abuse of discretion is shown. *People v Castaneda,* 453.

16. The people are obligated to call res gestae witnesses to testify in a criminal trial, whether their testimony is favorable or unfavorable, and a res gestae witness so called may be impeached by the prosecution the same as though the witness had been called by the defendant (MCLA 767.40a; MSA 28.980[1]). *People v Castaneda,* 453.

17. A witness may be impeached by inquiry about prior felony convictions, but a prosecutor should present the witness for whatever testimony he has to give before attempting to impeach him; a defendant was not prejudiced by the prosecutor asking a witness, as his first question, about a prior conviction

WITNESSES—Cont'd
where the question was objected to before it was answered, the witness did not answer and a curative instruction was given. *People v Castaneda,* 453.

18. A defendant was not prejudiced where the prosecutor asked the defendant's character witness whether she knew of a prior conviction of the defendant where the question was objected to, the objection was sustained, and the jury was instructed to disregard it because there was no such prior conviction and where the record shows no bad faith on the part of the prosecutor because there was an error in the conviction record. *People v Castaneda,* 453.

19. Prior clearance should be obtained from the trial judge as to the qustioning on cross-examination of any character witness regarding any alleged misconduct of a defendant. *People v Castaneda,* 453.

20. A defendant was not prejudiced by a witness's refusal to answer certain questions at trial because of a claim of Fifth Amendment rights and by the subsequent reading to the jury of the witness's testimony from the preliminary examination and at a guilty plea revocation hearing where the defendant vigorously cross-examined the witness at the preliminary examination and presented evidence in his own behalf at the hearing, the testimony which the witness did give at trial exculpated the defendant, and the witness did appear before the jury. *People v Castaneda,* 453.

21. Perfunctory cross-examination of a witness at a preliminary examination may be sufficient to admit the transcript of this witness's testimony at a later trial at which the witness is unavailable. *People v Wittebort,* 529.

22. Generally, the transcript of a witness's testimony at a preliminary hearing is admissible at a later criminal trial at which the witness is unavailable where the defendant was represented by counsel at the preliminary hearing and apparently failed to exercise what was an adequate opportunity for cross-examination. *People v Wittebort,* 529.

23. Admissibility of a witness's prior recorded sworn testimony at a preliminary hearing turns upon the opportunity for cross-examination at the preliminary hearing; adequacy of opportunity depends upon qualitative factors such as the presence and participation of counsel, the nature of the proceeding, the character of the witness and his connection with the events, the extent and subject of his direct testimony, and the time and preparatory opportunities available to the accused and his attorney. *People v Wittebort,* 529.

24. Mere opportunity at a preliminary examination to cross-examine a witness who later becomes incapable of testifying at trial may be insufficient for a trial court to admit the testimony of that witness, but where the record indicates that cross-exami-

WITNESSES—Cont'd

nation would have been counter-productive to the defendant and where counsel participated to the extent of interposing objections to questions asked on direct examination of the witness, the constitutionally mandated adequate opportunity to cross-examine the witness has been met and the earlier testimony of the witness is admissible at the later trial. *People v Wittebort,* 529.

25. Questions about the state of a persons' knowledge can only be proved by statements of witnesses or by circumstantial evidence. *Sturgis Savings v Italian Vil,* 577.

26. A res gestae witness is one who was an eyewitness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense. *People v Abdo,* 635.

27. A prosecutor is required to indorse on an information and produce at trial all res gestae witnesses (MCLA 767.40; MSA 28.980). *People v Abdo,* 635.

28. A trial court erred in finding that certain witnesses were not res gestae witnesses because they had not witnessed a shooting, where the criminal transaction involved included an altercation in a restaurant, with several participants, followed by the shooting on the street outside the restaurant, and where the only witness to testify as to direct knowledge of the shooting was the victim; the testimony of the unindorsed witnesses to the events inside the restaurant would be relevant to the questions of identity of the assailant and of motive. *People v Abdo,* 635.

29. A defendant was entitled to a new trial where the evidence upon which he was convicted was not overwhelming, credibility was a key issue, the identity of the defendant as the perpetrator of the crime was contested, and where several witnesses whose testimony if allowed to be presented would have been primarily noncumulative and in support of the defense, were erroneously found at a post-trial hearing not to be res gestae witnesses. *People v Abdo,* 635.

30. The fact that a res gestae witness is called as a defense witness does not excuse the prosecutor's failure to indorse the witness; part of the purpose of the res gestae rule is to allow the defendant to cross-examine witnesses called as res gestae witnesses. *People v Abdo,* 635.

See

APPEAL AND ERROR 22
BAIL 8
CONSTITUTIONAL LAW 16
CRIMINAL LAW 10, 53
EVIDENCE 7
GRAND 2

WITNESSES—Cont'd
JURY 1

WORDS AND PHRASES

1. "Public policy" evolves into constitutional provisions, statutes, and judicial decisions, and more often abides only in the customs and conventions of the people, in their clear consciousness and conviction of what is naturally and inherently just and right between man and man; where a course of conduct is cruel or shocking to the average man's conception of justice, it must be held to be obviously contrary to public policy. *Tope v Waterford Racing Corp,* 591.

See
EVIDENCE 5
INSURANCE 10
MUNICIPAL CORPORATIONS 6
NUISANCE 1
STATUTES 6, 9–11
TAXATION 1

WORKERS' DISABILITY COMPENSATION ACT—See
WORKMEN'S COMPENSATION 13

WORKMEN'S COMPENSATION

1. The complaints by an employee to his supervisors regarding dust conditions in his place of employment were not sufficient, under the workmen's compensation statute regarding notice of death or disability, to give the employer notice of the employee's injured or disabled condition resulting from the dust where the employee never informed his supervisors that the dust conditions were causing him injury or were disabling him (MCLA 418.441; MSA 17.237[441]). *Hilton v Gen Motors,* 21.

2. Notice of a work-related injury occurring to an employee is sufficiently given to his employer if the employer is informed thereby of the fact of injury or disability; the sufficiency of such notice does not turn upon whether the employer is or is not informed of the cause of disability; therefore, the fact that the employee indicates in sickness and accident benefit reports to the employer that the injury he received was not work-related does not make his notice insufficient under the workmen's compensation statute regarding notice of death or disability (MCLA 418.441; MSA 17.237[441]). *Hilton v Gen Motors,* 21.

3. A determination regarding the work-related nature of an injury under the workmen's compensation law is to be made by the workmen's compensation referee and not by the employer. *Hilton v Gen Motors,* 21.

4. A workmen's compensation award is grounded in contract, and is not a money judgment, therefore, the interest rate on an award is 5%, the statutory contract rate, and not 6%, the money judgment rate (MCLA 438.31; MSA 19.15[1]). *Guerrero v Brighton Athletic Ass'n,* 58.

WORKMEN'S COMPENSATION—Cont'd

5. A trial judge's refusal, in an action to enforce a workmen's compensation award, to permit any testimony by the individual defendants directed to the question of who were the officers and directors of the defendant association at the time the plaintiff was injured was error where (1) the trial judge relied upon a 1973 annual corporation report to establish the identities of the individual officers and directors to be liable, (2) that report was filed after the injury occurred, (3) the 1972 report, which was the last one filed prior to the injury, lists two directors not shown on the 1973 report, and (4) the trial judge concluded that the defendants' answer, in which they admitted the *existence* and *content* of the records, precluded them from asserting that the officers or any of them were not in fact the proper defendants. *Guerrero v Brighton Athletic Ass'n,* 58.

6. A dispute or controversy within the meaning of the Workers' Disability Compensation Act is a jurisdictional element and its existence at the time a claim is properly filed with the Workmen's Compensation Bureau vests the bureau with jurisdiction over the claim which cannot be unilaterally divested by either party to the dispute (MCLA 418.847; MSA 17.237[847]). *Adams v A & P,* 91.

7. An employer cannot, by an agreement to pay worker's compensation, divest the hearing referee of authority to render a final order settling the rights of the parties. *Adams v A & P,* 91.

8. *A dispute or controversy within the meaning of the Workers' Disability Compensation Act exists even though an employer offers to begin voluntary payment of compensation benefits where all of the worker's proofs have been submitted and where there still is a genuine dispute between the parties regarding rate of compensation and date of injury. Adams v A & P,* 91.

9. *The Worker's Disability Compensation Act clearly indicates that any dispute or controversy can be submitted for a determination of rights (MCLA 418.841, 418.847; MSA 17.237[841], 17.237[847]). Adams v A & P,* 91.

10. *The simple expedient of voluntary payment of compensation benefits by an employer determines nothing in the absence of an admission or stipulation as to all the conditions of liability; neither the payment of compensation nor the accepting of the same by an employee or his dependents shall be considered as a determination of the rights of the parties under the Worker's Disability Compensation Act (MCLA 418.831; MSA 17.237[831]). Adams v A & P,* 91.

11. *The payment of workmen's compensation by an employer under an award, order, or proper stipulation determines the rights of the parties and such compensation cannot be discontinued or reduced without a further order or award. Adams v A & P,* 91.

WORKMEN'S COMPENSATION—Cont'd

12. *The Workmen's Compensation Appeal Board is the final fact finder in the cases before it, but if the board interprets the Workers' Disability Compensation Act erroneously in reaching its decision appellate courts have the duty and authority to correct any such erroneous construction. Adams v A & P,* 91.

13. *Neither the Workers' Disability Compensation Act nor the general court rules contain any express provision which would allow an employer to unilaterally force an end to proceedings by offering voluntarily to pay compensation benefits; furthermore, such an offer does not deny a claimant the right to proceed further to have the rights of the parties determined. Adams v A & P,* 91.

14. *Due process requires that a workmen's compensation plaintiff is entitled to a full and impartial determination of his claim even though voluntary payments of benefits are offered by an employer. Adams v A & P,* 91.

15. Generally, a workmen's compensation claim may be discharged in bankruptcy, though in Michigan the officers and directors of a bankrupt corporation may be found liable for that portion of a claim which remains unsatisfied after execution against the corporation (11 USCA 22[b], 103[a], MCLA 418.647; MSA 17.237[647]). *LeBlond v All Right Auto Parts,* 509.

16. The Worker's Disability Compensation Act provides for prompt enforcement of awards through the expeditious entry of judgments in the circuit courts (MCLA 418.863; MSA 17.237[863]). *LeBlond v All Right Auto Parts,* 509.

17. A plaintiff injured worker who has received a workmen's compensation award against a bankrupt corporation may properly seek entry of a judgment in circuit court on his award against the officers and directors of the corporation prior to any execution of the award against the bankrupt corporation; however, the award should be modified by the circuit court to provide for the possibility of recovery from the bankrupt corporation. *LeBlond v All Right Auto Parts,* 509.

18. A plaintiff injured worker who has received a workmen's compensation award against a bankrupt corporation may receive a judgment on the award against the officers and directors of the corporation; the award should be reduced by the amount of the officers' and directors' provable share of the distributable assets possessed by the corporation; where such a plaintiff fails to assert his claim in the bankruptcy proceeding he waives his right to the funds of the bankrupt corporation. *LeBlond v All Right Auto Parts,* 509.

19. Workmen's compensation is the exclusive remedy for an injured employee from his employer; however, where an employee was injured by the actions of another worker at a construction site and the other worker was employed by some-

WORKMEN'S COMPENSATION—Cont'd
one other than the injured employee's employer, then the injured employee might recover further by suing the other worker's employer under the *respondeat superior* doctrine. *Smith v Martindale,* 682.

See
APPEAL AND ERROR 1

WORKMEN'S COMPENSATION APPEAL BOARD—See
APPEAL AND ERROR 1

WORK RELATED DISABILITIES—See
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ZONING

1. An owner of land located within 300 feet of premises which are the subject of a decision of a zoning board of appeals is a proper party to any review of that decision instituted in the circuit court and is entitled to notice of the circuit court proceedings; however, such a landowner does not have standing to institute the circuit court review unless he is an "aggrieved party" (MCLA 125.590, 125.591; MSA 5.2940, 5.2941). *WMU Trustees v Brink,* 99.

2. The facts upon which a plaintiff in a zoning case relies to establish his standing must be alleged and proven; it is not necessary to decide whether an allegation of ownership of contiguous land would be sufficient to establish standing to institute circuit court review of a decision of a zoning board of review where a plaintiff did not allege that he owned land contiguous to the land which is the subject of the zoning board's actions. *WMU Trustees v Brink,* 99.

3. A plaintiff must allege and prove that he has suffered some special damages not common to other property owners similarly situated in order to have any status to challenge in court the actions of a zoning board of appeals; an allegation that the action of the board may result in a higher cost to the plaintiff in the event the plaintiff is able to acquire the subject property in the future is not an allegation of special damages sufficient to confer standing. *WMU Trustees v Brink,* 99.

4. Extended or expanded uses of land or structures exceeding the boundaries of an existing nonconforming use are unlawful uses that violate the statute governing nonconforming use; however, a lesser or diminishing nonconforming use is not only lawful, but proceeds toward the objectives of the statute (MCLA 125.583a; MSA 5.2933[1]). *Village of Holly v Gromak,* 241.

5. Zoning ordinances, as a rule, stand by themselves and the reasonableness of an ordinance must be judged by the circumstances of each case. *Village of Holly v Gromak,* 241.

ZONING—Cont'd

6. A decision of whether to permit a proposed change in a nonconforming use must be made by viewing each situation in the light of all the surrounding facts and circumstances. *Village of Holly v Gromak,* 241.

7. A zoning board of appeals and courts, in considering a proposed change in a nonconforming use, should consider, in addition to the use of the property at the time of the enactment of the zoning ordinance, such factors as prior interruptions in the nonconforming use and the reasons for them, expansions or contractions of the nonconforming use and the intent of the user in making such changes, whether there has been a partial or total abandonment of the nonconforming use, and the role of governmental agencies involved. *Village of Holly v Gromak,* 241.

8. Generally, a nonconforming use may not be expanded; one of the goals of zoning is the eventual elimination of nonconforming uses so that growth and development sought by ordinances can be achieved. *Norton Shores v Carr,* 715.

9. The continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance; therefore, a nonconforming use is restricted to the area that was nonconforming at the time the ordinance was enacted. *Norton Shores v Carr,* 715.

10. The necessary elements of abandonment of a nonconforming use are the intent to abandon and some act or omission on the part of the owner or holder which clearly manifests his or her voluntary decision to abandon. *Norton Shores v Carr,* 715.

11. The language of a zoning ordinance must be interpreted, for purposes of determining the extent of a restriction upon the use of property, in favor of the property owner where doubt exists as to the intention of the legislative body. *Peacock Twp v Panetta,* 733.

12. A township zoning ordinance should be construed to allow the operation of a primitive campground upon land zoned agricultural where the zoning ordinance permits all uses in an agricultural district that are permitted in a commercial-residential district and where the ordinance allows any recognized "mercantile business" in the commercial-residential districts but fails to define the term "mercantile business", thus leaving it unclear as to what types of uses the drafters of the ordinance intended to permit. *Peacock Twp v Panetta,* 733.

13. It is permissible to inquire into the conditions of the area where a zoning ordinance is intended to operate when construing a zoning ordinance. *Peacock Twp v Panetta,* 733.

ZONING—Cont'd

14. An implication arises that a campground is a permissible use of property in sections of a township where they are not expressly prohibited where the township's zoning ordinance expressly prohibits the construction of campgrounds in certain sections of the township. *Peacock Twp v Panetta,* 733.

15. A zoning ordinance is presumed valid and the burden is on a party attacking an ordinance to establish its invalidity. *Peacock Twp v Panetta,* 733.

16. A township's interim zoning ordinance prohibiting the establishment, alteration or extension of campgrounds within the township for a period of one year advances a reasonable and rational governmental interest where the ordinance was passed in order to allow the township time to evaluate the fire hazards and safety concerns incidental to the large number of campers present in the township during motorcycle rallies. *Peacock Twp v Panetta,* 733.

17. A prior nonconforming use is a vested right to continue the lawful use of real estate in the manner it was used prior to the adoption of a zoning ordinance; though the ordinance be reasonable, it cannot operate to oust the property owner of his vested right; to establish a nonconforming use it is essential to show nonconformance in a reasonably substantial manner. *Peacock Twp v Panetta,* 733.

See

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NUISANCE 1, 2
PLEADING 1