STATE OF MICHIGAN
IN THE SUPREE COURT

People of the State of Michigan,

Plaintiff-Appellee,

v.

Jerard Nathaniel Welch,

Defendant-Appellant.

Supreme Court
No. 163833

Court of Appeals
No. 355030

Circuit Court
No. 2019-271266-FH

Filed under AO 2019-6

Plaintiff-Appellee's Answer

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COUNTER-STATEMENT OF JURISDICTION

The People do not dispute that this Court has jurisdiction over Defendant's interlocutory application from the Court of Appeals' judgment. See MCR 7.303(B); MCL 600.215; MICH CONST art VI, § 4.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. **Did the trial court abuse its discretion, and did the Court of Appeals clearly err, in restricting Defendant's use of evidence to legitimate purposes? Where Defendant, a drunk driver, acknowledges that snowy weather and (alleged) ordinary negligent driving by third parties are not unforeseeable, does he allege superseding causes that cut off his criminal liability for rear-ending another motorist and causing injury?**

The People answer, "No."

Defendant contends the answer should be, "Yes."

The Court of Appeals answered, "No."

SUMMARY OF THE ARGUMENT

"The linchpin in the superseding cause analysis * * * is whether the intervening cause was foreseeable based on an objective standard of reasonableness. *If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause*." *People v Schaefer*, 473 Mich 418, 437; 703 NW2d 774 (2005) (emphasis added).

Defense counsel:

"I'm not arguing that there — that what happened was unforeseeable." 11/20/2019 Tr, p 17.

Defendant, who waived preliminary examination, urged the trial court to dismiss his drunk-driving charge because of outside-the-record "facts" and his theory of the case. 12-13b, 66-78b. Now, he contends, the trial court should not have considered the facts he alleged as part of *his theory of the case* when it entered an order precluding him from advancing an illegimate defense. This Court should deny leave in this interlocutory appeal.

The People have charged Defendant with operating while intoxicated causing serious impairment of a body function ("OWICSI"), MCL 257.625(5). The Legislature has determined that an intoxicated person who "voluntarily chose to drive with the knowledge that he had consumed alcohol" has committed "gross negligence as a matter of law." *People v Lardie*, 452 Mich 231, 250-52; 551 NW2d 656 (1996). Furthermore, such a person is criminally responsible for injuring or killing another driver, without a determination of who or what is *at fault* for the crash. See MCL 257.625(4)-(5).

"It is the defendant's operation of the motor vehicle that must cause the victim's death under § 625(4), not the manner by which the defendant's intoxication may or may not have affected the defendant's operating ability." *Schaefer*, 473 Mich at 446. Notably, *Schaefer*'s two dissenting justices agreed on this point. See *id.* at 450-55 (Cavanagh, J., dissenting) and 455-56 (Kelly, J., dissenting).

In a prosecution for OWI causing death or injury, the People must prove that the defendant had the general intent to operate a vehicle knowing that he or she had consumed an intoxicant and that he or she could be intoxicated or impaired. *Lardie*, 452 Mich at 234; M Crim JI 15.11(5). "The statute is designed to deter motorists from deciding to drive after they have become intoxicated. Therefore, the *culpable act that the Legislature wishes to prevent is the one in which a person becomes intoxicated and then decides to drive*." *Lardie*, 452 Mich at 245 (emphasis added).

The trial court did not abuse its discretion — and the Court of Appeals did not clearly err — in limiting Defendant's *use* of evidence to proper purposes. See MRE 105 ("When evidence which is admissible * * * for one purpose but not admissible * * * for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

Admittedly, a colliding drunk driver is not the proximate cause of the injury/death if there is an intervening *and superseding* event that cuts off the drunk driver's liability. "The linchpin in the superseding cause analysis * * * is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause." *Schaefer*, 473 Mich at 437 (opinion of the Court). But, as counsel admitted (above), the alleged intervening causes were foreseeable.

But Defendant's allegations — slippery road conditions and ordinary negligence by third parties — are foreseeable. See *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483; 760 NW2d 287 (2008) ("[R]easonable Michigan winter residents know that each day can bring dramatically different weather conditions, ranging from blizzard conditions, to wet slush, to a dry, clear, and sunny day."); and *Schaefer*, 473 Mich at 439 ("[O]rdinary negligence by the victim or a third party will not be regarded as a superseding cause because ordinary negligence is reasonably foreseeable.").

Early on, the defense telegraphed that it wanted to make the case about who was *at fault* for the crash. See 12-13b, 69b, 79b ("Mr. Welch did not drive negligently, and he cannot be held responsible for

coincidental causes outside his control."). "My motion was essentially asking for a directed verdict." 11/20/2019 Tr, p 6.

But even under Defendant's proferred theory — that the victim vehicle's driving and the slippery roads *contributed* to the crash — there is no intervening and superseding cause that cuts off his liability *for driving drunk and rear-ending the victim vehicle*. "I'm not arguing that there — that what happened was unforeseeable." 11/20/2019 Tr, p 17. With this, Defendant's counsel inadvertently conceded that his argument is meritless. And, while it is true that a jury must determine whether an intervening cause is a superseding cause, "trial courts must make a threshold determination that there is a jury-submissible question of fact regarding gross negligence before such evidence becomes relevant and admissible." *People v Feezel*, 486 Mich 184, 196; 783 NW2d 67 (2010).

Ensuring that a trial is free of error is important to the People as much, if not more than, the defense. A prejudicial evidentiary or instructional error in the People's favor will trigger an appeal and a new trial for a convicted defendant. But the People *have no recourse* from a prejudicial error in the defense's favor:

> An acquittal is *unreviewable* whether a judge directs a jury to return a verdict of acquittal, or forgoes that formality by entering a judgment of acquittal herself. And an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, a mistaken understanding of what evidence would suffice to sustain a conviction, or a misconstruction of the statute defining the requirements to convict. In all these circumstances, the fact that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.

Evans v Michigan, 568 US 313, 318; 133 S Ct 1069; 185 L Ed 2d 124 (2013) (cleaned up, emphasis added).

The Court of Appeals correctly observed that Defendant's proferred evidence of a superseding cause was nonexistent. See *People v Welch*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2021 (Docket No. 355030), p 7 (57b) ("[A]ny such evidence of inclement weather, roadway conditions, or the fishtailing of Goemaere's vehicle do not establish a defense with respect to the causation element, either the factual or proximate cause components").

The right to present a defense "is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008) (cleaned up). Even assuming arguendo Defendant's evidence had some small amount of relevance, trial courts retain discretion to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, *confusion of the issues, or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403 (emphasis added). Similarly, "[u]nfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

The trial court's decision, as modified by the Court of Appeals, to restrict Defendant's use of the weather and others' driving to permissible purposes, was not "an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003). *If he presents evidence at trial of an intervening event that is* <u>*not*</u> *foreseeable — beyond his offer of proof — the trial court should allow the jury to consider it* as a possible superseding cause. But he has yet to do so. This Court should deny leave.

COUNTER-STATEMENT OF FACTS

The People charged Defendant with the offense of operating while intoxicated causing serious impairment of a body function ("OWICSI"), MCL 257.625(5), for an offense that occurred on December 29, 2018. 9b. Defendant waived his right to a preliminary examination in the 46th District Court and the case proceeded to circuit court. 6b.[1]

After arraignment in the circuit court, Defendant filed a motion to dismiss the case, contending that

> the Prosecution has not and cannot prove causation, because, in part the accident was the result of the actions of third parties and because Mr. Welch did not, through the operation of his vehicle, commit any act that caused the accident, and therefore it would be unconstitutional to attach criminal liability to him[.]

12-13b.

Shortly thereafter, the People filed a motion in limine (15-16b), and accompanying brief (18-24b), to exclude evidence of fault for the crash. Defendant informed the prosecution and the court that his theory of defense at trial was that he was not at fault for the crash. 30b.

In their brief, the People noted that fault is not an element of OWICSI. They cited to the standard jury instruction, which provides, in pertinent part as to the causation element of the crime:

> '[T]he defendant's operation of the vehicle caused a serious impairment of a body function to [name victim]. To 'cause'

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[1] Because the police reports and administrative hearing upon which Defendant relies in his application are not part of the lower-court record, they should not be the basis of any factual assertions in appellate proceedings. See MCR 7.310(A) ("An appeal is heard on the original papers, which constitute the record on appeal.") and MCR 7.305(A)(1)(D) (requiring that applications must contain "a concise statement of the material proceedings and facts conforming to MCR 7.212(C)(6)").

> such injury, the defendant's operation of the vehicle must have been a factual cause of the injury, that is, but for the defendant's operation of the vehicle the injury would not have occurred. In addition, operation of the vehicle must have been a proximate cause of the injury, that is, the injury must have been a direct and natural result of operating the vehicle.'

20b (quoting M Crim JI 15.12(6)). The prosecutor added that these instructions did not require the People to prove "Defendant operated his vehicle in a negligent, careless, or reckless manner." *Id.* Case law from this Court makes clear that the People need not show Defendant's fault, nor need they show that Defendant's driving was the *sole* cause of the crash. *Id.*

Only an intervening *and superseding* cause may break the causal link between a defendant's operation and a victim's injury. But ordinary negligence and bad weather do not constitute superseding causes. 21-23b. Because the defense attributed the crash to the victim vehicle entering Defendant's lane during snowy weather, there was no intervening and superseding cause. Allowing the defense to litigate fault for the accident would serve only to lead the jury to believe that Defendant's fault was something the People needed to prove at trial. 23-24b.

In his responsive brief, Defendant provided the following theory of the case:

> There was fresh snowfall on the curve where the accident occurred, and the road was slippery. Mr. Goemaere [the driver of the victim vehicle] stated that he started to lose traction immediately prior to the accident. Mr. Goemaere also stated that he was fishtailing. The witnesses saw Mr. Goemaere drift into the right lane.
>
> Before the crash, the unknown vehicle passed the Goemaeres. Mr. Welch tried to follow the unidentified vehicle in passing but was unsuccessful because the Goemaeres tried to slow down and in doing so lost traction,

> lost control, and fishtailed into Welch's lane. Mr. Welch was unable to stop and rear-ended the Goemaeres.

28b (cleaned up). The defense further contended:

> Simply, the conditions of [the] roadway overtook *Mr. Goemaere*, not Mr. Welch. Mr. Goemaere lost control and fishtailed out of his lane. Mr. Welch's inability to avoid another driver's out-of-control car is not itself negligent operation. Mr. Welch's actions were not the cause of the accident, a necessary element of the crime charged. Looked at from a different perspective, the conditions of the roadway and Mr. Goemaere's own negligent operation intervened and superseded any causal connection that Mr. Welch had, where Michigan recognizes that such intervening and superseding causes can sever the causal link for criminal liability.

30b.

Defendant therefore contended that he was not a cause of the accident. *Id.* "Either the weather or Goemaere's driving or both caused the accident." 36b. The crux of Defendant's argument was as follows:

> (1) There is no factual causation because no act of Mr. Welch caused the accident; the evidence proves that the factual cause of the accident was the weather and actions of Mr. Goemaere, as detailed above.
>
> (2) Assuming factual causation, there is no proximate causation because the weather and action of Mr. Goemaere superseded any other cause where it was coincidental and not responsive to any alleged act of Mr. Welch.
>
> (3) Mr. Welch maintains that the evidence is insufficient on causation, but he is entitled at a minimum to present the defense to the jury and have them properly instructed on all aspects of causation.

> Mr. Welch did not drive negligently, and he cannot be held responsible for coincidental causes outside his control.

38b.

After oral argument, and supplemental briefing (40-43b), the trial court issued an order granting the People's motion on January 21, 2020. 45-46b. The court explained:

> This Court concludes that Defendant cannot argue the issue of fault when Defendant is charged with Operating While Intoxicated Causing Serious Injury. In *People v Schaefer,* 473 Mich 418 (2005), the Michigan Supreme Court held that the People need not prove causation between Defendant's intoxication and the Victim's injury. In *People v Pace,* 311 Mich App 1[, 874 NW2d 164] (2015), the Michigan Court of Appeals unanimously concluded that the crime of Moving Violation Causing Serious Impairment is a strict liability offense. This Court finds that Operating While Intoxicated Causing Serious Injury is also a strict liability offense, where the prosecution need only prove beyond a reasonable doubt that Defendant committed the prohibited act, regardless of Defendant's intent and regardless of what Defendant actually knew or did not know. Because neither the snowy weather nor another vehicle amount to an intervening superseding cause under the facts presented in this case, the People are only required to prove that Defendant's operation of the vehicle was a cause of the injury.

Id.[2] On the same day, the trial court denied without prejudice Defendant's motion to dismiss or, in the alternative, for a special jury instruction. 48-49b. The trial court stayed the case pending Defendant's appeal. 4b.

The Court of Appeals, on leave granted, affirmed. *Welch*, unpub op at 1 (51b). The court observed that the language of the OWICSI statute

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[2] See p 34 n14 *infra*.

"refers to 'the operation of that motor vehicle,' rather than to the negligent or intoxicated manner of operation of the motor vehicle." *Id.* at 3 (53b) (quoting MCL 257.625(4) and (5)). In other words, it "require[s] only that the victim's death be caused by the defendant's operation of a motor vehicle, rather than the defendant's intoxicated manner of operation of that vehicle." *Id.* (citing *Schaefer*, 473 Mich at 431-33).

It then easily dispensed with Defendant's contentions that, under his theory of the case, he was not a factual cause of Defendant's injuries. As to factual cause,

> In this case, as in the *Schaefer* case, defendant's 'operation of the vehicle was undeniably a factual cause' of the victim's injuries because, but for defendant's operation of the vehicle, the collision between defendant and Jeremiah Goemaere would not have occurred. See *Schaefer*, 473 Mich at 445. In other words, if defendant had not been driving at all, he would not have been in the collision.

Id. at 5 (55b).

Turning to proximate cause, the court recognized that "'[p]roximate causation is a legal construct designed to prevent criminal liability from attaching when the result of the defendant's conduct is viewed as too remote or unnatural.'" *Id.* (quoting *People v Czuprynski*, 325 Mich App 449, 461; 926 NW2d 282 (2018)) (cleaned up).

Proximate cause turned on the existence or nonexistence of an intervening cause, and whether that "'intervening cause did indeed supersede the defendant's act as a legally significant causal factor[.]'" If so, "'then the defendant's conduct will not be deemed a proximate cause.'" *Id.* (quoting *Schaefer*, 473 Mich at 436-38).

But an intervening cause is only superseding (cutting off criminal liability) if it was not reasonably foreseeable. *Id.* at 6 (56b). Gross negligence and intentional misconduct are unforeseeable. *Id.* (quoting *Schaefer*, 473 Mich at 436-38).

The court observed that "[d]efense counsel himself stated at the hearing on the prosecution's motion in limine that he would not argue to the jury that 'it was unforeseeable that someone could fishtail into your lane.'" *Id.* (quoting 11/20/2019 Tr, p 17). (Defense counsel's statement, unabridged, was: "I'm not arguing that there — that what happened was unforeseeable. I'm not going to argue to the jury that it was unforeseeable that someone could fishtail into your lane." 11/20/2019 Tr, p 17.)

Having noted this concession, the court observed that evidence of the victim vehicle's alleged fishtailing and snowy conditions were irrelevant, "but such evidence may still arguably be relevant for other purposes like, for example, res gestae purposes as defendant argues for the first time on appeal." *Welch*, unpub op at 6 (56b). Having addressed the matter, the court explained:

> [T]hese purported background facts may be mentioned to the jury if supported by the evidence. However, because such facts, even if true, do not constitute intervening causes that superseded defendant's conduct we direct the trial court to give an appropriate limiting instruction to the jury indicating that such facts, if established, are merely background facts and do not bear on the issue of defendant's guilt for the charged offense of OWICSI. In other words, any such evidence of inclement weather, roadway conditions, or the fishtailing of Goemaere's vehicle do not establish a defense with respect to the causation element, either the factual or proximate cause components.

Id. at 7 (57b). The court, finding no abuse of discretion in the trial court's decision, affirmed, observing that "[t]he prosecution must still prove beyond a reasonable doubt that defendant's operation of the motor vehicle was a factual and proximate cause of the victim's injuries." *Id.*

The dissenting judge was skeptical of the validity of the defense, but contended that the trial court and the appellate panel erred in making such evidentiary rulings before trial. Unpub op at 3 (Gleicher, J., dissenting) (60b). "Welch cannot be precluded from introducing evidence regarding causation pretrial." *Id.*

Defendant's interlocutory application to this Court followed. The Court directed the Oakland County prosecuting attorney to respond to the application within 28 days. *People v Welch*, __ Mich __; __ NW2d __ (2022) (Docket No. 163833) (event No. 22). Additional facts may appear in the Argument portion of this brief.

ARGUMENT

I. The trial court did not abuse its discretion, and the Court of Appeals did not clearly err, in restricting Defendant's use of evidence to legitimate purposes. Where Defendant, a drunk driver, acknowledges that snowy weather and (alleged) ordinary negligent driving by third parties are foreseeable, they do not amount to *superseding* causes that cut off his criminal liability for rear-ending another motorist and causing injury.

Standard of review and issue preservation

An appellate court reviews a trial court's decisions admitting or excluding evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). The People do not dispute that Defendant preserved this issue.

Discussion

As a prefatory matter, Defendant writes that his statement of facts is "derived from the police reports and implied consent hearing transcript[3]." See Def's Application, p 8. While Defendant appended an administrative-hearing transcript to his filing in the Court of Appeals, he elected not to file *either* the reports or the hearing transcript in the trial court. Review is limited to the original record. See MCR 7.310(A) ("An appeal is heard on the original papers, which constitute the record on appeal."), MCR 7.305(A)(1)(d) and MCR 7.212(C)(6).[4] Notably,

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[3] This transcript is from a proceeding before a non-judicial administrative hearing officer in the Department of State. The main focus of the hearing was whether the officer had reasonable cause to believe Defendant had been operating while intoxicated. At times during the hearing, Defendant elicited hearsay — see MRE 801(a)-(c) — from the testifying trooper as to what he learned from eyewitnesses. The eyewitnesses never testified at the administrative hearing.

[4] Defendant's usage of the term "pretrial record" is thus a reference to a record that he did not make. See Def's Application, p 17.

Defendant also elected not to develop the record by holding a preliminary examination.

In any event, inasmuch as Defendant claims the trial court should not have made evidentiary rulings based upon *his* theory of the case and the version of the facts *he* presented, he is in error. The trial court's decision, as modified by the Court of Appeals, to restrict Defendant's use of the weather and others' driving to permissible purposes, was not "an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

The Court, in ruling on his motion, properly considered the "facts" he argued as part of *his theory of the case. If Defendant presents evidence at trial of an intervening event that is not foreseeable — beyond his offer of proof — the trial court should allow the jury to consider it* as a possible superseding cause. This Court should deny leave.

A. The trial court did not err in restricting Defendant's use of evidence to proper purposes.

Courts have discretion to restrict any party's use of evidence to proper purposes. See MRE 105 ("When evidence which is admissible * * * for one purpose but not admissible * * * for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.") Here, the Court of Appeals' decision allows Defendant to introduce evidence of snowy weather, the other motorists' driving and the road conditions, *but not to use them to argue that he was not negligent*. That is because Defendant's negligence (or lack thereof) is neither an element nor defense to the charge of OWICSI. "[W]hile the right to present a defense is a fundamental part of due process, 'it is not an absolute right,' and '[t]he accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Kowalski*, 492 Mich 106, 139; 821 NW2d 14 (2012) (quoting *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); and *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973)).

1. Defendant was operating a vehicle when he rear-ended the victim vehicle.

Defendant was operating a vehicle, even under *his version of the facts*: "Mr. Welch tried to follow the unidentified vehicle in passing but was unsuccessful because the Goemaeres tried to slow down and in doing so lost traction, lost control, and fishtailed into Welch's lane. *Mr. Welch was unable to stop and rear-ended the Goemaeres*." Def's application, p 10.[5]

To "operate" under the vehicle code means "[b]eing in actual physical control of a vehicle." MCL 257.35a. "Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *People v Wood*, 450 Mich 399, 404-05; 538 NW2d 351 (1995).

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[5] The jury instructions provide that the People must prove Defendant's *mens rea* and actual and proximate causation:

> (5) Fourth, that the defendant voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated.
>
> (6) Fifth, that the defendant's operation of the vehicle caused a serious impairment of a body function to (name injured person). To cause such injury, the defendant's operation of the vehicle must have been a factual cause of the injury, that is, but for the defendant's operation of the vehicle, the injury would not have occurred. In addition, the injury must have been a direct and natural result of operating the vehicle.

M Crim JI 15.2a.

2. Neither Defendant's claim that he did not drive negligently, nor his claim that another driver did, have any bearing on whether his *operation of the vehicle* caused an injury.

Under Michigan law, an intoxicated driver who operates a vehicle and crashes is criminally liable when another person is injured or dies in the crash, *regardless of the existence or absence of "bad driving*." This is so even if other foreseeable factors, such as bad weather or negligent driving on the part of another person, may have *also* contributed to the circumstances.

Here, Defendant merely alleges that foreseeable *factors* contributed to the crash. See 11/20/2019 Tr, p 17 ("I'm not arguing that there — that what happened was unforeseeable."). Accordingly, the trial court did not abuse its discretion in precluding Defendant from litigating who was *at fault* for the crash and this Court should deny leave.

The Legislature has determined that an intoxicated person who "voluntarily chose to drive with the knowledge that he had consumed alcohol" has committed "gross negligence as a matter of law." *Lardie*, 452 Mich at 250-52. In enacting this crime, the Legislature provided that:

> [a] person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) [operating while intoxicated, impaired or with the presence of a controlled substance], and *by the operation of that motor vehicle* causes a serious impairment of a body function of another person is guilty of a crime[.]

MCL 257.625(5) (emphasis added). This Court has interpreted identical language in subsection 4[6] of the same statute — pertaining to operating

[6] See MCL 257.625(4) (emphasis added) "A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and *by the operation of that motor vehicle causes the death of another person* is guilty of a crime[.]")

while intoxicated causing death (hereinafter "OWICD"). The high court explained that the OWICD statute:

> plainly requires that the victim's death be caused by the defendant's operation of the vehicle, *not the defendant's intoxicated operation*.
>
> Thus, the manner in which the defendant's intoxication affected his or her operation of the vehicle is unrelated to the causation element of the crime. The defendant's status as 'intoxicated' is a separate element of the offense used to identify the class of persons subject to liability under § 625(4).

Schaefer, 473 Mich at 433 (emphasis added). The *Schaefer* Court overturned a prior interpretation of the statute that the state "must prove 'that the defendant's *intoxicated* driving was a *substantial* cause of the victim's death.'" *Id.* at 433-34 (quoting *Lardie*, 452 Mich at 259-60).

The statutory language in the OWICD/OWICSI subsections is in marked contrast to the statutory language governing prosecutions for other crimes in which the People must prove bad driving. Reckless driving, for example, proscribes operation of a vehicle "*in willful or wanton disregard* for the safety of persons or property is guilty of a [crime]." MCL 257.626(2). The now-abolished[7] crime of negligent homicide proscribed operation of a vehicle "at an immoderate rate of speed or in a careless, reckless or negligent manner, but not wilfully or wantonly" causing the death of another. Former MCL 750.324 (1965 PA 38, § 324).[8]

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[7] See 2008 PA 463, enacting § 2.

[8] The overriding goal of statutory interpretation is to give effect to the Legislature's intent. *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994). A court must first examine the plain language of a statute. *People v Anstey*, 476 Mich 436, 442–443; 719 NW2d 579 (2006). Courts construe the words in a statute in light of their ordinary meaning and

Accordingly, in prosecuting a person for OWICD — or, as here, OWICSI — the prosecutor need only prove that Defendant's *operation* of the vehicle — not his *bad driving* — was an actual and proximate cause of the death/injury. *Id.* at 435-36. The law only requires the People to prove that Defendant's operation of the vehicle was *a* cause of the injuries, not the sole cause. Defendant's alleged lack of negligence — or "negligent driving" — is simply not relevant to his criminal liability.[9]

3. *Under Defendant's theory of the case*, his operation of the vehicle was *a* factual cause of the crash and injuries.

The *Schaefer* Court explained that, "[i]n determining whether a defendant's conduct is a factual cause of the result, one must ask, '*but for' the defendant's conduct*, would the result have occurred?" 473 Mich at 435-36 (emphasis added). "[F]actual causation is relatively easy to

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their context within the statute as a whole. *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012). "[T]he Legislature is presumed to be aware of the consequences of the use, or omission, of language when it enacts the laws that govern our behavior." *People v Ramsdell*, 230 Mich App 386, 392; 585 NW2d 1 (1998). Accordingly, if the statute's language is unambiguous, the court must presume that the Legislature intended the meaning clearly expressed and enforce the statute as written. *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009).

[9] This Court should decline Defendant's invitation to reconsider *Schaefer*. *Schaefer* was consistent with a plain-language interpretation of the OWICD/OWICSI statutes. Second, the *Legislature endorsed the state of the law on* mens rea *as of 2015*. That year, it enacted a bill to reform the *mens rea* requirements in criminal statutes. See MCL 8.9. At the same time, however, the Legislature explicitly stated that this *mens-rea* reform did not apply to crimes arising under the vehicle or penal codes. MCL 8.9(7). "The Legislature is presumed to legislate with 'knowledge of and regard to existing laws upon the same subject[.]'" *Nummer v Mich Dep't of Treasury*, 448 Mich 534, 553 n23; 533 NW2d 250 (1995) (quoting *Lenawee Cnty Gas & Electric Co v City of Adrian*, 209 Mich 52, 64; 176 NW 590 (1920)).

establish. As the court in *Welch v State*[10] observed, '[m]ankind might still be in Eden, but for Adam's biting an apple.'" *People v Rideout*, 272 Mich App 602, 605; 727 NW2d 630 (2006), overruled in part on other grounds 477 Mich 1062, 1062-63; 728 NW2d 459 (2007).

Under the version of the events Defendant presents on appeal,[11] Defendant was "*unable to stop* before *hitting* the out-of-control [victim] vehicle." Def's Application, p 21 (emphasis added). Thus, Defendant does not dispute that he was *operating* a vehicle nor that he collided into the victim vehicle.

There is no indication — and Defendant does not allege — that his vehicle was somehow stationery and the other vehicle *crashed into him*. Therefore, because Defendant's *operation of the vehicle* was a but-for cause of his "hitting" the victim's vehicle, Defendant's operation of the vehicle was a factual cause of the crash.

4. *Under Defendant's theory of the case*, his operation of the vehicle was a proximate cause of the injury because the intervening events he identifies were — by his admission — foreseeable.

Defendant's operation was also a *proximate* cause of the crash. To have proximately caused the crash (and resulting injuries), the crash must have been "a 'direct and natural result' of the defendant's actions." *Schaefer*, 473 Mich at 436 (quoting *People v Barnes*, 182 Mich 179, 198; 148 NW 400 (1914)). In other words, a first event is the proximate cause of a second event if the second event is a foreseeable result of the first one. *Rideout*, 477 Mich at 1062. It should go without saying that a car

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[10] 235 So 2d 906, 907 (Ala Ct App 1970).

[11] Notably, Defendant takes great pains to note that he is not wedded to any version of the events. See Def's Application, p 8 ("The following facts are derived from the police reports and implied consent hearing transcript. Mr. Welch has, in the trial court and the Court of Appeals, consistently presented these facts *arguendo*: 'for background but waiving no right to contest the accuracy, veracity, or admissibility of these allegations.").

crash is a "foreseeable" result of operating a motor vehicle on a highway, particularly one that Defendant alleges was snowy at the time.

If, however, another factor intervenes, *and if that intervening event is unforeseeable*, this "superseding" event will cut off the proximate cause:

> The linchpin in the superseding cause analysis * * * is whether the intervening cause was foreseeable based on an objective standard of reasonableness. If it was reasonably foreseeable, then the defendant's conduct will be considered a proximate cause. If, however, the intervening act by the victim or a third party was not reasonably foreseeable—e.g., *gross* negligence or intentional misconduct—then generally the causal link is severed and the defendant's conduct is not regarded as a proximate cause of the victim's injury or death.

Schaefer, 473 Mich at 437-38.

"'[G]ross negligence' is not merely an elevated or enhanced form of ordinary negligence." *Id.* at 438. It "'*means wantonness and disregard of the consequences which may ensue*, and indifference to the rights of others that is equivalent to a criminal intent.'" *Id.* (emphasis added) (quoting *Barnes*, 182 Mich at 198). "'Wantonness' is defined as '[c]onduct indicating that an actor is aware of the risks but indifferent to the results' and usually 'suggests a greater degree of culpability than recklessness[.]'" *Feezel*, 486 Mich at 195-96 (citing Black's Law Dictionary (8th ed.)).

Aside from *labeling* the other driver's actions and the weather as "superseding," Defendant has not alleged an intervening and *superseding* cause:

> 1. The accident occurred at night on a multi-lane expressway.
>
> 2. It had started to *snow* before the accident and the roadway was *slippery*.

> 3. There was no accident reconstruction.
>
> 4. The investigating MSP trooper concluded that *when trying to slow down, Goemaere lost contro*l and lost traction, causing Goemaere to fishtail into Welch's lane.
>
> 5. Welch was unable to stop before hitting the out-of-control Goemaere vehicle.
>
> 6. There is a complete lack of evidence that Mr. Welch operated his car negligently: He was driving without incident with a 'pack' of four cars. After the unidentified fourth car moved to pass the Goemaeres, Welch did the same. The cause of the accident was not Welch's driving, but Goemaere's loss of control on the new snow and fishtailing into Welch's lane.

Def's Application, pp 20-21 (emphasis added). But see *Slaughter*, 281 Mich App at 483 ("[R]easonable Michigan winter residents know that each day can bring dramatically different weather conditions, ranging from blizzard conditions, to wet slush, to a dry, clear, and sunny day.").

As the *Schaefer* Court made clear, "*ordinary* negligence by the victim or a third party will not be regarded as a superseding cause because *ordinary negligence is reasonably foreseeable*." 473 Mich at 439 (emphasis added). "[G]ross negligence 'means wantonness and disregard of the consequences which may ensue, and indifference to the rights of others that is equivalent to a criminal intent.'" *Id.* at 438 (quoting *Barnes*, 182 Mich at 198).

In any event, Defendant's attorney undercut his own argument when he told the trial court:

> *I'm not arguing that * * * what happened was unforeseeable.* ***I'm not going to argue to the jury that it was unforeseeable that someone could fishtail into your lane.*** What I am going to argue is had that not happened, but for the fact that that happened, there would not have been an accident. So that level of causation is an argument that I should be able to make to the jury.

11/20/2019 Tr, p 17 (emphasis added). As this Court has observed, "[a]nything less than that [grossly negligent conduct] constitutes, at most, merely a contributory cause of death, in addition to the defendant's conduct. *Bailey*, 451 Mich at 679.

And, while it is true that a jury must determine whether an intervening cause is a superseding cause, "*trial courts must make a threshold determination that there is a jury-submissible question of fact regarding gross negligence before such evidence becomes relevant and admissible*." *Feezel*, 486 Mich at 196 (emphasis added). The court explained:

> [T]he trial court must make a threshold determination that evidence of the victim's conduct is sufficiently probative for a proper purpose—to show gross negligence. In other words, the trial court must determine that the issue of gross negligence is 'in issue.' See *People v McKinney*, 410 Mich 413, 418; 301 NW2d 824 (1981). The court may allow the admission of evidence of the victim's [conduct][12] to aid the jury in determining whether the victim's actions were grossly negligent only when the proofs are sufficient to create a question of fact for the jury. *If a trial court cannot*

[12] The conduct at issue in *Feezel* was the victim's intoxication, which was relevant to determine whether the victim was grossly negligent where, at 2 a.m., he was "walking down the middle of the road, with his back to oncoming traffic." *Id.* at 188. The victim vehicle's actions in drifting into another lane in snowy weather are simply not analogous to walking in the middle of the road with one's back to oncoming traffic. Nor is it analogous to "the victim r[iding] a bicycle *without brakes* down a partially obstructed hill onto a busy road," which the *Schaefer* Court suggested *might* constitute gross negligence. 473 Mich at 445 (emphasis added). Compare *id.* at 437 ("For example, suppose that a defendant stabs a victim and the victim is then taken to a nearby hospital for treatment. If the physician is negligent in providing medical care to the victim and the victim later dies, the defendant is still considered to have proximately caused the victim's death because it is reasonably foreseeable that negligent medical care might be provided.").

> *come to the conclusion that a reasonable juror could view the victim's conduct as demonstrating a wanton disregard of the consequences that may ensue, however, then the evidence of [the victim's conduct] is not admissible.*

Id. at 202 (emphasis added). See also *Schaefer*, 473 Mich at 437 n63 (quoting Perkins, Criminal Law (2d ed), p 716 ("'[N]egligence, unfortunately, is entirely too frequent in human conduct to be considered 'abnormal.'")

5. The existence of multiple causes, indeed, multiple proximate causes, does not vitiate Defendant's operation of a vehicle as a proximate cause.

Defendant confuses the issue by arguing that because other events may have contributed to the crash, he cannot be a factual cause. See Def's Application, p 28 ("Goemaere swerved, causing the accident. There is no evidence of an *act* of Mr. Welch that caused the accident."). But there *was* such an act, indeed a criminal one: Defendant's *operation* of the vehicle after becoming intoxicated. As this Court explained, "[t]he statute is designed to deter motorists from deciding to drive after they have become intoxicated. Therefore, the *culpable act that the Legislature wishes to prevent is the one in which a person becomes intoxicated and then decides to drive*." *Lardie*, 452 Mich at 245 (emphasis added).

Because he operated a vehicle that, by his own admission, collided with the victim vehicle, he is a but-for cause of the crash for purposes of the OWICSI statute. As this Court has observed:

> The criminal law does not require that there be but one proximate cause of harm found. *Quite the contrary, all acts that proximately cause the harm are recognized by the law*.

People v Bailey, 451 Mich 657, 676; 549 NW2d 325 (1996) (emphasis added) amended in part on other grounds 453 Mich 1204 (1996). The intervening act "may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm." *Id.* at 677 (emphasis added) (citing Perkins & Boyce, Criminal Law (3d ed), p 784). The intervening cause must be a superseding cause.

Defendant's own words in his application and in the trial court demonstrate that his "causation" argument is simply a cover for a lack-of-his-own negligence / third-party-negligence argument:

- "This Court went so far as to establish as one of the elements that the prosecution must prove that 'the defendant's operation of the motor vehicle caused the victim's death.' *In other words, the defendant cannot be found responsible for criminal negligence when he has committed no negligence*. Mr. Welch was merely the instrument of other forces and never committed an act that the law recognizes as a factual cause." Def's Application, p 19 (emphasis added).

- "That Mr. Welch was unable to avoid Goemaere's car fishtailing into his lane does not mean that criminal liability attaches to his *non-negligent driving* because *Schaefer/Large* commands that the focus be not on Mr. Welch's intoxication but on his driving." *Id.* at 28 (emphasis added).

- "There is a complete lack of evidence that Mr. Welch operated his car *negligently*." *Id.* at 21 (emphasis added).[13]

- "[T]he conditions of the roadway and Mr. Goemaere's own *negligent* operation intervened and superseded any causal connection between Mr. Welch's driving and the accident[.]" *Id.* (emphasis added).

- "Mr. Welch is entitled to argue the element of causation to a jury, *specifically how the weather, roadway conditions, and relative* ***fault*** *of the parties affects the causation element*." *Id.* (emphasis added).

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[13] Contrary to Defendant's argument, the Legislature has determined that an intoxicated person who "voluntarily chose to drive with the knowledge that he had consumed alcohol" has committed "gross negligence as a matter of law." *Lardie*, 452 Mich at 250-52.

This Court should reject Defendant's invitation to conflate causation and mens rea so as to allow Defendant to *insert* a negligence element into the crime.

6. When Defendant made an offer of proof as what the evidence will show, the trial court did not abuse its discretion or violate his constitutional rights when it precluded him from *misusing* evidence for improper purposes.

The very rules this Court has adopted encourages parties to make offers of proof as to what the evidence will show. See, *e.g.*, MRE 103(a) (emphasis added) ("Error may not be predicated upon a ruling * * * excluding evidence, [unless] the substance of the evidence was made known to the court *by offer* or was apparent from the context within which questions were asked."). Notably, in consideration of other-acts evidence, the rules specify: "If necessary to a determination of the admissibility of the evidence under this rule, *the defendant shall be required to state the theory or theories of defense*, limited only by the defendant's privilege against self-incrimination." MRE 404(b)(2) (emphasis added).

Here, on his own volition, Defendant offered — and continues to offer — a theory of defense that his own lack of negligence and foreseeable intervening (non-superseding) events eliminate his criminal culpability. See Def's Application, pp 20-21. As a matter of law, these factors do not belong before the jury. See *Feezel*, 486 Mich at 196 ("[T]rial courts must make a threshold determination that *there is a jury-submissible question of fact* regarding gross negligence before such evidence becomes relevant and admissible."). After all, as defense counsel acknowledged, "I'm not arguing that there — that what happened was unforeseeable." 11/20/2019 Tr, p 17.

The Court of Appeals did not preclude the defense from *introducing* the alleged snowy weather and fishtailing as background facts:

> if supported by the evidence. However, because such facts, even if true, do not constitute intervening causes that superseded defendant's conduct we direct the trial court to

> give an appropriate limiting instruction to the jury indicating that such facts, if established, are merely background facts and do not bear on the issue of defendant's guilt for the charged offense of OWICSI. In other words, any such evidence of inclement weather, roadway conditions, or the fishtailing of Goemaere's vehicle do not establish a defense with respect to the causation element, either the factual or proximate cause components

Welch, unpub op at 7 (57b). **In other words, the appellate court merely restricted Defendant's *use* of these alleged facts to legitimate purposes**. See MRE 105 ("When evidence which is admissible * * * for one purpose but not admissible * * * for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.")

Defendant thus errs when he contends that that the trial court's decision impacts his due-process right to present a defense. See Def's Application, pp 29-32. "While the right to present a defense is a fundamental part of due process, it is not an absolute right, and [t]he accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Kowalski*, 492 Mich at 139 (cleaned up). Defendant's "constitutional" argument is another example of his rewriting the OWICSI to incorporate a negligence element. The trial court did not act in derogation of his constitutional rights in precluding him from litigating a non-existent defense.

Relatedly, Defendant contends that he "cannot be found responsible for criminal negligence when he has committed no negligence to cause the accident." See Def's Application, p 29. But Defendant misstates the law. First, as this Court has observed, a person who "voluntarily chose to drive with the knowledge that he had consumed alcohol" has committed "gross negligence as a matter of law." *Lardie*, 452 Mich at 250-52.

Second, as this Court has noted:

> [W]here a statute requires a criminal mind for some *but not* all of its elements, it is not one of strict liability, *United States v Freed*, 401 U.S. 601, 612; 91 S Ct 1112; 28 L Ed 2d 356 (1971). In such a case, the Legislature is not imposing liability without any fault at all; instead, it has determined that regarding that element, responsibility for the protection of the public should be placed on the person who can best avoid the harm sought to be prevented — the actor himself.

Quinn, 440 Mich at 187-88. OWICSI — and OWICD — are precisely those statutes. [14] In a prosecution for such crimes, the People must prove that the defendant had the general intent to operate a vehicle knowing that he or she had consumed an intoxicant and that he or she could be intoxicated or impaired. See *Lardie*, 452 Mich at 234; M Crim JI 15.11(5). As this Court explained, "[t]he statute is designed to deter motorists from deciding to drive after they have become intoxicated.

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[14] Notably, the Constitution does not forbid strict-liability crimes. *People v Pace*, 311 Mich App 1, 11; 874 NW2d 164 (2015) (citing *People v Quinn*, 440 Mich 178, 185; 487 NW2d 194 (1992), and *Lambert v California*, 355 US 225; 78 S Ct 240; 2 L Ed 2d 228 (1957)). In any event, OWICSI is not even a strict-liability crime.

The Court of Appeals correctly observed that the trial court erred by classifying the OWICD/OWICSI statute as one of strict liability. But this did not undermine the evidentiary ruling. *Welch*, unpub op at 7 (57b) (citing 45-46b) ("In summary, the trial court did not abuse its discretion by granting the prosecution's motion in limine precluding defendant from introducing evidence of the snowy road conditions and Jeremiah Goemaere's driving as causes of the collision that resulted in the victim's injuries. Contrary to defendant's argument, granting this motion was not tantamount to granting a directed verdict on the causation element of the crime of OWICSI. But to the extent the trial court held that OWICSI is a strict liability offense, that decision was erroneous; it is not a strict liability offense. The prosecution must still prove beyond a reasonable doubt that defendant's operation of the motor vehicle was a factual and proximate cause of the victim's injuries.").

Therefore, the *culpable act that the Legislature wishes to prevent is the one in which a person becomes intoxicated and then decides to drive*." *Lardie*, 452 Mich at 245 (emphasis added). The trial court properly rejected Defendant's attempts to add another element (negligence) to the crime. To put it simply, the People have not charged him with "criminal negligence."

7. Conclusion

Here, where Defendant merely alleged bad weather and negligent driving by a third party, and neither is unforeseeable, the trial court's decision to preclude evidence and argument of third-party negligence was not an abuse of discretion. It would not "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable[.]" MRE 401. Evidence — and commentary — on the alleged fault of a third party has no bearing on the question of whether Defendant is guilty of OWICSI.

The Court, in ruling on his motion, properly considered the "facts" he argued as part of *his theory of the case. If Defendant presents evidence at trial of an intervening event that is* <u>not</u> *foreseeable — beyond his offer of proof — the trial court should allow the jury to consider it* as a possible superseding cause. The court did not abuse its discretion in making evidentiary rulings in light of Defendant's offer of proof.

Accordingly, the trial court's decision was not "an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003). The Court of Appeals' affirmance was not clearly erroneous, will not cause material injustice, nor was it conflict with a Supreme Court decision or another decision of the Court of Appeals. See MCR 7.305(B).

B. The Court can and should deny Defendant's interlocutory application on prudential grounds.

There has yet to be a trial. Defendant will have an appeal of right from an adverse verdict after this case goes to trial. The People will have no appellate recourse from a misinstructed or misled jury that acquits. Compare *Evans*, 568 US at 318 (cleaned up, emphasis added) (holding

that acquittals are unreviewable under the Double Jeopardy Clause, regardless of the reason for the acquittal) with *People v Torres*, 452 Mich 43, 59; 549 NW2d 540 (1996) ("[A] criminal defendant may raise an issue related to an interlocutory decision in its appeal of right from a final decision.").

Defendant's application does not involve "'an asserted right the legal and practical value of which would be destroyed *if it were not vindicated before trial*.'" *United States v Hollywood Motor Car Co*, 458 US 263, 266; 102 S Ct 3081; 73 L Ed 2d 754 (1982) (emphasis added) (quoting *United States v MacDonald*, 435 US 850, 860; 98 S Ct 1547; 56 L Ed 2d 18 (1978)). The circuit-court decision he appeals is not "'effectively unreviewable on appeal from a final judgment.'" *Id.* at 265 (quoting *Coopers & Lybrand v Livesay*, 437 US 463, 468; 98 S Ct 2454; 57 L Ed 2d 351 (1978)).

In other words, the mere occurrence of further proceedings in this matter — *e.g.*, a trial — would not violate his right under the Double Jeopardy Clause or vitiate immunity from prosecution. Compare *Flanagan v United States*, 465 US 259, 266-67; 104 S Ct 1051; 79 L Ed 2d 288 (1984) (emphasis added) ("Orders denying motions to dismiss an indictment on double jeopardy or speech or debate grounds * * * finally resolve issues that are separate from guilt or innocence, and *appellate review must occur before trial* to be fully effective.") with *MacDonald*, 435 US at 863 ("[W]e decline to exacerbate pretrial delay by intruding upon accepted principles of finality to allow a defendant whose speedy trial motion has been denied before trial to obtain interlocutory appellate review.")

RELIEF

WHEREFORE, Karen D. McDonald, Prosecuting Attorney in and for the County of Oakland, by Louis F. Meizlish, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court DENY Defendant's application.

Respectfully Submitted,

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Dated: March 25, 2002

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 8,600 countable words. The document is set in Century Schoolbook, and the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs.

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