MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

January 27, 2005 to July 6, 2005

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
CLIFFORD W. TAYLOR, Laingsburg	2009
Justices	
MICHAEL F. CAVANAGH, East Lansing	2007
ELIZABETH A. WEAVER, Glen Arbor	2011
MARILYN KELLY, Bloomfield Hills	2013
MAURA D. CORRIGAN, Grosse Pointe Park	2007
ROBERT P. YOUNG, Jr., Grosse Pointe Park	2011
STEPHEN J. MARKMAN, Mason	2013

Commissioners

GLEN M. BIS, Chief Commissioner[1]
MICHAEL J. SCHMEDLEN, Chief Commissioner[2]
SHARI M. OBERG, Deputy Chief Commissioner[2]

JOHN K. PARKER	DON W. ATKINS
TIMOTHY J. RAUBINGER	JÜRGEN O. SKOPPEK
LYNN K. RICHARDSON	DANIEL C. BRUBAKER
KATHLEEN A. FOSTER	MICHAEL S. WELLMAN
NELSON S. LEAVITT	GARY L. ROGERS
DEBRA A. GUTIERREZ-McGUIRE	RICHARD B. LESLIE
PATRICK J. WRIGHT[3]	FREDERICK M. BAKER, Jr.
ANNE-MARIE HYNOUS VOICE	KATHLEEN M. DAWSON[4]
	RUTH E. ZIMMERMAN[5]

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO
Reporter of Decisions: DANILO ANSELMO

[1] Died February 13, 2005.

[2] From March 18, 2005.

[3] To June 17, 2005.

[4] From March 7, 2005.

[5] From July 1, 2005.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM C. WHITBECK, Lansing	2011
Chief Judge Pro Tem	
MICHAEL R. SMOLENSKI, Grand Rapids	2007
Judges	
DAVID H. SAWYER, Grand Rapids	2011
WILLIAM B. MURPHY, Grand Rapids	2007
MARK J. CAVANAGH, Royal Oak	2009
RICHARD ALLEN GRIFFIN, Traverse City	2009[1]
JANET T. NEFF, Grand Rapids	2007
KATHLEEN JANSEN, St. Clair Shores	2007
E. THOMAS FITZGERALD, Owosso	2009
HELENE N. WHITE, Detroit	2011
HENRY WILLIAM SAAD, Bloomfield Hills	2009
RICHARD A. BANDSTRA, Grand Rapids	2009
JOEL P. HOEKSTRA, Grand Rapids	2011
JANE E. MARKEY, Grand Rapids	2009
PETER D. O'CONNELL, Mt. Pleasant	2007
HILDA R. GAGE, Bloomfield Hills	2007
MICHAEL J. TALBOT, Grosse Pointe Farms	2009
KURTIS T. WILDER, Canton	2011
BRIAN K. ZAHRA, Northville	2007
PATRICK M. METER, Saginaw	2009
DONALD S. OWENS, Williamston	2011
JESSICA R. COOPER, Beverly Hills	2007
KIRSTEN FRANK KELLY, Grosse Pointe Park	2007
CHRISTOPHER M. MURRAY, Grosse Pointe Farms	2009
PAT M. DONOFRIO, Clinton Township	2011
KAREN FORT HOOD, Detroit	2009
BILL SCHUETTE, Midland	2009
STEPHEN L. BORRELLO, Saginaw	2007

Chief Clerk: SANDRA SCHULTZ MENGEL
Research Director: LARRY S. ROYSTER

[1] Resigned June 26, 2005.

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH, Jonesville,	2009
2.	ALFRED M. BUTZBAUGH, Berrien Springs,	2007
	JOHN M. DONAHUE, St. Joseph,	2011
	CHARLES T. LaSATA, Benton Harbor,	2011
	PAUL L. MALONEY, St. Joseph,	2009
3.	DAVID J. ALLEN, Detroit,	2009
	WENDY M. BAXTER, Detroit,	2007
	ANNETTE J. BERRY, Plymouth,	2007
	GREGORY D. BILL, Northville Twp.,	2007
	SUSAN D. BORMAN, Detroit,	2009
	ULYSSES W. BOYKIN, Detroit,	2009
	MARGIE R. BRAXTON, Detroit,	2011
	HELEN E. BROWN, Grosse Pointe Park,	2009
	WILLIAM LEO CAHALAN, Grosse Ile,	2007
	BILL CALLAHAN, Detroit,	2009
	JAMES A. CALLAHAN, Grosse Pointe,	2011
	MICHAEL J. CALLAHAN, Belleville,	2009
	JAMES R. CHYLINSKI, Grosse Pointe Woods,	2011
	ROBERT J. COLOMBO, Jr., Grosse Pointe,	2007
	SEAN F. COX, Canton Twp.,	2011
	DAPHNE MEANS CURTIS, Detroit,	2009
	CHRISTOPHER D. DINGELL, Trenton,	2009
	GERSHWIN ALLEN DRAIN, Detroit,	2011
	MAGGIE DRAKE, Detroit,	2011
	PRENTIS EDWARDS, Detroit,	2007
	VONDA R. EVANS, Dearborn,	2009
	EDWARD EWELL, Jr., Detroit,	2007
	PATRICIA SUSAN FRESARD, Grosse Pointe Woods,	2011
	JOHN H. GILLIS, Jr., Grosse Pointe,	2009
	WILLIAM J. GIOVAN, Grosse Pointe Farms,	2009
	DAVID ALAN GRONER, Grosse Pointe Park,	2011
	RICHARD B. HALLORAN, Jr., Detroit,	2007
	AMY PATRICIA HATHAWAY, Grosse Pointe Park,	2007

		Term Expires January 1 of
	CYNTHIA GRAY HATHAWAY, Detroit,	2011
	DIANE MARIE HATHAWAY, Grosse Pointe Park,	2011
	MICHAEL M. HATHAWAY, Detroit,	2011
	THOMAS EDWARD JACKSON, Detroit,	2007
	VERA MASSEY JONES, Detroit,	2009
	MARY BETH KELLY, Grosse Ile,	2009
	TIMOTHY MICHAEL KENNY, Livonia,	2011
	ARTHUR J. LOMBARD, Grosse Pointe Farms,	2009
	KATHLEEN I. MACDONALD, Grosse Pointe Woods,	2011
	SHEILA GIBSON MANNING, Detroit,	2011
	KATHLEEN M. McCARTHY, Dearborn,	2007
	WADE H. McCREE, Detroit,	2007
	WARFIELD MOORE, Jr., Detroit,	2009
	BRUCE U. MORROW, Detroit,	2011
	JOHN A. MURPHY, Plymouth Twp.,	2011
	SUSAN BIEKE NEILSON, Grosse Pointe Woods,	2009
	MARIA L. OXHOLM, Detroit,	2007
	LITA MASINI POPKE, Canton,	2011
	DANIEL P. RYAN, Redford,	2007
	MICHAEL F. SAPALA, Grosse Pointe Park,	2007
	RICHARD M. SKUTT, Detroit,	2007
	LESLIE KIM SMITH, Northville Twp.,	2007
	VIRGIL C. SMITH, Detroit,	2007
	JEANNE STEMPIEN, Northville,	2011
	CYNTHIA DIANE STEPHENS, Detroit,	2007
	CRAIG S. STRONG, Detroit,	2009
	BRIAN R. SULLIVAN, Grosse Pointe Park,	2011
	DEBORAH A. THOMAS, Detroit,	2007
	EDWARD M. THOMAS, Detroit,	2009
	ISIDORE B. TORRES, Grosse Pointe Park,	2011
	MARY M. WATERSTONE, Detroit,	2007
	CAROLE F. YOUNGBLOOD, Grosse Pointe,	2007
	ROBERT L. ZIOLKOWSKI, Northville,	2009
4.	EDWARD J. GRANT, Jackson,	2011
	JOHN G. McBAIN, Jr., Rives Junction,	2009
	CHARLES A. NELSON, Jackson,	2007
	CHAD C. SCHMUCKER, Jackson,	2011
5.	JAMES H. FISHER, Hastings,	2009
6.	JAMES M. ALEXANDER, Bloomfield Hills,	2009
	MARTHA ANDERSON, Troy,	2009
	STEVEN N. ANDREWS, Bloomfield Hills,	2009
	RAE LEE CHABOT, Franklin,	2011
	MARK A. GOLDSMITH, Huntington Woods,	2007

		Term Expires January 1 of
	NANCI J. GRANT, West Bloomfield,	2009
	DENISE LANGFORD-MORRIS, West Bloomfield,	2007
	CHERYL A. MATTHEWS, Sylvan Lake,	2011
	JOHN JAMES McDONALD, Farmington Hills,	2011
	FRED M. MESTER, Bloomfield Hills,	2009
	RUDY J. NICHOLS, Clarkston,	2009
	COLLEEN A. O'BRIEN, Rochester Hills,	2011
	DANIEL PATRICK O'BRIEN, Holly,	2011
	WENDY LYNN POTTS, Birmingham,	2007
	GENE SCHNELZ, Novi,	2009
	EDWARD SOSNICK, Bloomfield Hills,	2007
	DEBORAH G. TYNER, Franklin,	2007
	MICHAEL D. WARREN, Jr., Beverly Hills,	2007
	JOAN E. YOUNG, Bloomfield Village,	2011
7.	DUNCAN M. BEAGLE, Fenton,	2011
	JOSEPH J. FARAH, Grand Blanc,	2011
	JUDITH A. FULLERTON, Flint,	2007
	JOHN A. GADOLA, Fenton,	2009
	ARCHIE L. HAYMAN, Flint,	2007
	GEOFFREY L. NEITHERCUT, Flint,	2007
	DAVID J. NEWBLATT, Linden,	2011
	ROBERT M. RANSOM, Flushing,	2009[1]
	RICHARD B. YUILLE, Flint,	2009
8.	DAVID A. HOORT, Portland,	2011
	CHARLES H. MIEL, Stanton,	2009
9.	STEPHEN D. GORSALITZ, Portage,	2011
	J. RICHARDSON JOHNSON, Portage,	2007
	RICHARD RYAN LAMB, Kalamazoo,	2007
	PHILIP D. SCHAEFER, Portage,	2011
	WILLIAM G. SCHMA, Kalamazoo,	2009
10.	FRED L. BORCHARD, Saginaw,	2011
	LEOPOLD P. BORRELLO, Saginaw,	2007
	WILLIAM A. CRANE, Saginaw,	2011
	LYNDA L. HEATHSCOTT, Saginaw,	2007
	ROBERT L. KACZMAREK, Freeland,	2009
11.	CHARLES H. STARK, Munising,	2009
12.	GARFIELD W. HOOD, Pelkie,	2009
13.	THOMAS G. POWER, Traverse City,	2011
	PHILIP E. RODGERS, Jr., Traverse City,	2009
14.	JAMES M. GRAVES, Jr., Muskegon,	2007
	TIMOTHY G. HICKS, Muskegon,	2011

[1] Retired May 31, 2005.

		Term Expires January 1 of
	WILLIAM C. MARIETTI, North Muskegon,	2011
	JOHN C. RUCK, Whitehall,	2009
15.	MICHAEL H. CHERRY, Coldwater,	2009
16.	JAMES M. BIERNAT, Sr., Clinton Twp.,	2011
	RICHARD L. CARETTI, Fraser,	2011
	MARY A. CHRZANOWSKI, Harrison Twp.,	2011
	DIANE M. DRUZINSKI, Clinton Twp.,	2009
	PETER J. MACERONI, Clinton Twp.,	2009
	DONALD G. MILLER, Harrison Twp.,	2007
	DEBORAH A. SERVITTO, Mt. Clemens,	2009
	EDWARD A. SERVITTO, Jr., Warren,	2007
	MARK S. SWITALSKI, Ray Twp.,	2007
	MATTHEW S. SWITALSKI, Clinton Twp.,	2009
	ANTONIO P. VIVIANO, Clinton Twp.,	2011
	TRACEY A. YOKICH, St. Clair Shores,	2013
17.	GEORGE S. BUTH, Grand Rapids,	2011
	KATHLEEN A. FEENEY, Rockford,	2009
	DONALD A. JOHNSTON, III, Grand Rapids,	2007
	DENNIS C. KOLENDA, Rockford,	2007
	DENNIS B. LEIBER, Grand Rapids,	2007
	STEVEN MITCHELL PESTKA, Grand Rapids,	2011
	JAMES ROBERT REDFORD, East Grand Rapids,	2011
	PAUL J. SULLIVAN, Grand Rapids,	2009
	DANIEL V. ZEMAITIS, Grand Rapids,	2009
18.	LAWRENCE M. BIELAWSKI, Linwood,	2009
	WILLIAM J. CAPRATHE, Bay City,	2011
	KENNETH W. SCHMIDT, Bay City,	2007
19.	JAMES M. BATZER, Manistee,	2009
20.	CALVIN L. BOSMAN, Grand Haven,	2011
	WESLEY J. NYKAMP, Holland,	2009
	EDWARD R. POST, Grand Haven,	2011
	JON VAN ALLSBURG, Holland,	2013
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013
22.	ARCHIE CAMERON BROWN, Ann Arbor,	2011
	TIMOTHY P. CONNORS, Ann Arbor,	2007
	MELINDA MORRIS, Ann Arbor,	2007
	DONALD E. SHELTON, Saline,	2009
	DAVID S. SWARTZ, Ann Arbor,	2009
23.	RONALD M. BERGERON, Standish,	2009
	WILLIAM F. MYLES, East Tawas,	2009
24.	DONALD A. TEEPLE, Sandusky,	2009
25.	THOMAS L. SOLKA, Marquette,	2011

		Term Expires January 1 of
	JOHN R. WEBER, Marquette,	2009
26.	JOHN F. KOWALSKI, Alpena,	2009
27.	ANTHONY A. MONTON, Pentwater,	2007
	TERRENCE R. THOMAS, Newaygo,	2009
28.	CHARLES D. CORWIN, Cadillac,	2009
29.	JEFFREY L. MARTLEW, DeWitt,	2011
	RANDY L. TAHVONEN, Elsie,	2009
30.	LAURA BAIRD, Okemos,	2007
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011
	JAMES R. GIDDINGS, Williamston,	2011
	JANELLE A. LAWLESS, Okemos,	2009
	PAULA J.M. MANDERFIELD, East Lansing,	2007
	BEVERLEY NETTLES-NICKERSON, Okemos,	2009
31.	JAMES P. ADAIR, Port Huron,	2007
	PETER E. DEEGAN, Port Huron,	2011
	DANIEL J. KELLY, Fort Gratiot,	2009
32.	ROY D. GOTHAM, Bessemer,	2009
33.	RICHARD M. PAJTAS, Charlevoix,	2009
34.	MICHAEL J. BAUMGARTNER, Prudenville,	2011
35.	GERALD D. LOSTRACCO, Owosso,	2009
36.	WILLIAM C. BUHL, Paw Paw,	2007
	PAUL E. HAMRE, Lawton,	2009
37.	ALLEN L. GARBRECHT, Battle Creek,	2011
	JAMES C. KINGSLEY, Albion,	2009
	STEPHEN B. MILLER, Battle Creek,	2011
	CONRAD J. SINDT, Homer,	2007
38.	JOSEPH A. COSTELLO, Jr., Monroe,	2009
	MICHAEL W. LaBEAU, Monroe,	2007
	MICHAEL A. WEIPERT, Monroe,	2011
39.	HARVEY A. KOSELKA, Adrian,	2009
	TIMOTHY P. PICKARD, Adrian,	2007
40.	MICHAEL P. HIGGINS, Lapeer,	2009
	NICK O. HOLOWKA, Imlay City,	2011
41.	MARY BROUILLETTE BARGLIND, Iron Mountain,	2011
	RICHARD J. CELELLO, Iron Mountain,	2009
42.	PAUL J. CLULO, Midland,	2009
	THOMAS L. LUDINGTON, Sanford,	2007
43.	MICHAEL E. DODGE, Edwardsburg,	2011
44.	STANLEY J. LATREILLE, Howell,	2007
	DAVID READER, Howell,	2011
46.	ALTON T. DAVIS, Grayling,	2011
	DENNIS F. MURPHY, Gaylord,	2009

		Term Expires January 1 of
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	HARRY A. BEACH, Otsego,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	SCOTT P. HILL-KENNEDY, Big Rapids,	2007[2]
	LAWRENCE C. ROOT, Big Rapids,	2007[3]
50.	NICHOLAS J. LAMBROS, Sault Ste. Marie,	2007
51.	RICHARD I. COOPER, Ludington,	2009
52.	M. RICHARD KNOBLOCK, Bad Axe,	2009
53.	SCOTT LEE PAVLICH, Cheboygan,	2011
54.	PATRICK REED JOSLYN, Caro,	2007
55.	KURT N. HANSEN, Gladwin,	2009[4]
56.	THOMAS S. EVELAND, Dimondale,	2007
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2007

[2] From May 31, 2005.

[3] Retired February 11, 2005.

[4] Retired July 5, 2005.

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH, Monroe,	2009
	TERRENCE P. BRONSON, Monroe,	2007
	JACK VITALE, Monroe,	2011
2A.	NATALIA M. KOSELKA, Adrian,	2011
	JAMES E. SHERIDAN, Adrian,	2009
2B.	DONALD L. SANDERSON, Hillsdale,	2009
3A.	DAVID T. COYLE, Coldwater,	2009
3B.	JEFFREY C. MIDDLETON, Three Rivers,	2009
	WILLIAM D. WELTY, Three Rivers,	2007
4.	PAUL E. DEATS, Edwardsburg,	2009
5.	GARY J. BRUCE, St. Joseph,	2011
	ANGELA PASULA, Stevensville,	2009
	SCOTT SCHOFIELD, Niles,	2009
	LYNDA A. TOLEN, Stevensville,	2007
	DENNIS M. WILEY, St. Joseph,	2011
7.	ARTHUR H. CLARKE, III, South Haven,	2009
	ROBERT T. HENTCHEL, Paw Paw,	2011
8-1.	QUINN E. BENSON, Kalamazoo,	2009
	ANNE E. BLATCHFORD, Kalamazoo,	2011
	PAUL J. BRIDENSTINE, Kalamazoo,	2007
	CAROL A. HUSUM, Kalamazoo,	2011
8-2.	ROBERT C. KROPF, Portage,	2009
8-3.	RICHARD A. SANTONI, Kalamazoo,	2009
	VINCENT C. WESTRA, Kalamazoo,	2011
10.	SAMUEL I. DURHAM, Jr., Battle Creek,	2011
	JOHN R. HOLMES, Battle Creek,	2007
	FRANKLIN K. LINE, Jr., Marshall,	2009
	MARVIN RATNER, Battle Creek,	2009
12.	CHARLES J. FALAHEE, Jr., Jackson,	2009
	JOSEPH S. FILIP, Jackson,	2011
	JAMES M. JUSTIN, Jackson,	2007
	R. DARRYL MAZUR, Jackson,	2009
14A.	RICHARD E. CONLIN, Ann Arbor,	2009
	J. CEDRIC SIMPSON, Ypsilanti,	2007
	KIRK W. TABBEY, Saline,	2011
14B.	JOHN B. COLLINS, Ypsilanti,	2009

		Term Expires January 1 of
15.	JULIE CREAL GOODRIDGE, Ann Arbor,	2007
	ELIZABETH POLLARD HINES, Ann Arbor,	2011
	ANN E. MATTSON, Ann Arbor,	2009
16.	ROBERT B. BRZEZINSKI, Livonia,	2009
	KATHLEEN J. McCANN, Livonia,	2007
17.	KAREN KHALIL, Redford,	2011
	CHARLOTTE L. WIRTH, Redford,	2009
18.	C. CHARLES BOKOS, Westland,	2009
	GAIL McKNIGHT, Westland,	2007
19.	WILLIAM C. HULTGREN, Dearborn,	2011
	MARK W. SOMERS, Dearborn,	2009
	RICHARD WYGONIK, Dearborn,	2007[1]
20.	LEO K. FORAN, Dearborn Heights,	2007
	MARK J. PLAWECKI, Dearborn Heights,	2009
21.	RICHARD L. HAMMER, Jr., Garden City,	2009
22.	SYLVIA A. JAMES, Inkster,	2007
23.	GENO SALOMONE, Taylor,	2007
	WILLIAM J. SUTHERLAND, Taylor,	2009
24.	JOHN T. COURTRIGHT, Allen Park,	2009
	RICHARD A. PAGE, Allen Park,	2011
25.	DAVID A. BAJOREK, Lincoln Park,	2009
	DAVID J. ZELENAK, Lincoln Park,	2011
26-1.	RAYMOND A. CHARRON, River Rouge,	2009
26-2.	MICHAEL F. CIUNGAN, Ecorse,	2009
27.	RANDY L. KALMBACH, Wyandotte,	2007
28.	JAMES A. KANDREVAS, Southgate,	2009
29.	LAURA REDMOND MACK, Wayne,	2011
30.	BRIGETTE R. OFFICER, Highland Park,	2011
31.	PAUL J. PARUK, Hamtramck,	2009
32A.	ROGER J. La ROSE, Harper Woods,	2009
33.	JAMES KURT KERSTEN, Trenton,	2009
	MICHAEL K. McNALLY, Trenton,	2007
	EDWARD J. NYKIEL, Grosse Ile,	2011
34.	TINA BROOKS GREEN, New Boston,	2007
	BRIAN A. OAKLEY, Romulus,	2011
	DAVID M. PARROTT, Belleville,	2009
35.	MICHAEL J. GEROU, Plymouth,	2011
	RONALD W. LOWE, Canton,	2007
	JOHN E. MacDONALD, Northville,	2009
36.	DEBORAH ROSS ADAMS, Detroit,	2011
	LYDIA NANCE ADAMS, Detroit,	2011
	TRUDY DunCOMBE ARCHER, Detroit,	2007
	MARYLIN E. ATKINS, Detroit,	2007
	JOSEPH N. BALTIMORE, Detroit,	2009
	NANCY McCAUGHAN BLOUNT, Detroit,	2009
	DAVID MARTIN BRADFIELD, Detroit,	2009

[1] From March 14, 2005.

		Term Expires January 1 of
	IZETTA F. BRIGHT, Detroit,	2011
	DONALD COLEMAN, Detroit,	2007
	NANCY A. FARMER, Detroit,	2007
	DEBORAH GERALDINE FORD, Detroit,	2011
	RUTH ANN GARRETT, Detroit,	2007
	JIMMYLEE GRAY, Detroit,	2009
	KATHERINE HANSEN, Detroit,	2011
	BEVERLY J. HAYES-SIPES, Detroit,	2009
	PAULA G. HUMPHRIES, Detroit,	2011
	PATRICIA L. JEFFERSON, Detroit,	2009
	VANESA F. JONES-BRADLEY, Detroit,	2007
	DEBORAH L. LANGSTON, Detroit,	2007
	WILLIE G. LIPSCOMB, Jr., Detroit,	2009
	LEONIA J. LLOYD, Detroit,	2011
	MIRIAM B. MARTIN-CLARK, Detroit,	2011
	DONNA R. MILHOUSE, Detroit,	2007
	B. PENNIE MILLENDER, Detroit,	2011
	JEANETTE O'BANNER-OWENS, Detroit,	2009
	MARK A. RANDON, Detroit,	2009
	KEVIN F. ROBBINS, Detroit,	2007
	DAVID S. ROBINSON, Jr., Detroit,	2007
	C. LORENE ROYSTER, Detroit,	2007
	RUDOLPH A. SERRA, Detroit,	2007
	TED WALLACE, Detroit,	2011
37.	JOHN M. CHMURA, Warren,	2007
	JENNIFER FAUNCE, Warren,	2009
	DAWNN M. GRUENBURG, Warren,	2011
	WALTER A. JAKUBOWSKI, Jr., Warren,	2007
38.	NORENE S. REDMOND, Eastpointe,	2009
39.	JOSEPH F. BOEDEKER, Roseville,	2009
	MARCO A. SANTIA, Fraser,	2007
	CATHERINE B. STEENLAND, Roseville,	2011
40.	MARK A. FRATARCANGELI, St. Clair Shores,	2007
	JOSEPH CRAIGEN OSTER, St. Clair Shores,	2009
41A.	MICHAEL S. MACERONI, Sterling Heights,	2009
	DOUGLAS P. SHEPHERD, Macomb Twp.,	2007
	STEPHEN S. SIERAWSKI, Sterling Heights,	2011
	KIMBERLEY ANNE WIEGAND, Sterling Heights,	2007
41B.	LINDA DAVIS, Clinton Twp.,	2009
	JOHN C. FOSTER, Clinton Twp.,	2011
	SEBASTIAN LUCIDO, Clinton Twp.,	2007[2]
42-1.	DENIS R. LeDUC, Washington,	2009
42-2.	PAUL CASSIDY, New Baltimore,	2007
43.	KEITH P. HUNT, Ferndale,	2007
	JOSEPH LONGO, Madison Heights,	2011
	ROBERT J. TURNER, Ferndale,	2009

[2] From July 1, 2005.

		Term Expires January 1 of
44.	TERRENCE H. BRENNAN, Royal Oak,	2009
	DANIEL SAWICKI, Royal Oak,	2007
45A.	WILLIAM R. SAUER, Berkley,	2009
45B.	MICHELLE FRIEDMAN APPEL, Huntington Woods,	2009
	DAVID M. GUBOW, Huntington Woods,	2009
46.	STEPHEN C. COOPER, Southfield,	2011
	SHEILA R. JOHNSON, Southfield,	2009
	SUSAN M. MOISEEV, Southfield,	2007
47.	JAMES BRADY, Farmington Hills,	2009
	MARLA E. PARKER, Farmington Hills,	2011
48.	MARC BARRON, Birmingham,	2011
	DIANE D'AGOSTINI, Bloomfield Hills,	2007
	KIMBERLY SMALL, West Bloomfield,	2009
50.	LEO BOWMAN, Pontiac,	2007
	MICHAEL C. MARTINEZ, Pontiac,	2009
	PRESTON G. THOMAS, Pontiac,	2011
	CYNTHIA THOMAS WALKER, Pontiac,	2009
51.	RICHARD D. KUHN, Jr., Waterford,	2009
	PHYLLIS C. McMILLEN, Waterford,	2007
52-1.	ROBERT BONDY, Milford,	2007
	BRIAN W. MacKENZIE, Novi,	2009
	DENNIS N. POWERS, Highland,	2007
52-2.	DANA FORTINBERRY, Clarkston,	2009
	KELLEY RENAE KOSTIN, Clarkston,	2011
52-3.	LISA L. ASADOORIAN, Rochester Hills,	2007
	NANCY TOLWIN CARNIAK, Rochester Hills,	2011
	JULIE A. NICHOLSON, Rochester Hills,	2009
52-4.	WILLIAM E. BOLLE, Troy,	2009
	DENNIS C. DRURY, Troy,	2007
	MICHAEL A. MARTONE, Troy,	2011
53.	L. SUZANNE GEDDIS, Brighton,	2011
	MICHAEL K. HEGARTY, Brighton,	2009[3]
	A. JOHN PIKKARAINEN, Brighton,	2007
54A.	LOUISE ALDERSON, Lansing,	2011
	PATRICK F. CHERRY, Lansing,	2009
	FRANK J. DeLUCA, Lansing,	2007
	CHARLES F. FILICE, Lansing,	2009
	AMY R. KRAUSE, Lansing,	2011
54B.	RICHARD D. BALL, East Lansing,	2011
	DAVID L. JORDON, East Lansing,	2007
55.	ROSEMARIE ELIZABETH AQUILINA, East Lansing,	2011
	PAMELA J. McCABE, Mason,	2009[4]

[3] Died May 1, 2005.

[4] Retired May 31, 2005.

		Term Expires January 1 of
56A.	PAUL F. BERGER, Charlotte,	2009
	HARVEY J. HOFFMAN, Grand Ledge,	2011
56B.	GARY R. HOLMAN, Hastings,	2007
57.	STEPHEN E. SHERIDAN, Saugatuck,	2007
	GARY A. STEWART, Plainwell,	2009
58.	SUSAN A. JONAS, Spring Lake,	2009
	RICHARD J. KLOOTE, Grand Haven,	2007
	BRADLEY S. KNOLL, Holland,	2009
	KENNETH D. POST, Zeeland,	2011
59.	PETER P. VERSLUIS, Grand Rapids,	2011
60.	HAROLD F. CLOSZ, III, North Muskegon,	2009
	FREDRIC A. GRIMM, Jr., North Muskegon,	2009
	MICHAEL JEFFREY NOLAN, Twin Lake,	2007
	ANDREW WIERENGO, Muskegon,	2011
61.	PATRICK C. BOWLER, Grand Rapids,	2009
	DAVID J. BUTER, Grand Rapids,	2009
	J. MICHAEL CHRISTENSEN, Grand Rapids,	2011
	JEANINE NEMESI LaVILLE, Grand Rapids,	2007
	BEN H. LOGAN, II, Grand Rapids,	2007
	DONALD H. PASSENGER, Grand Rapids,	2011
62A.	M. SCOTT BOWEN, Wyoming,	2009
	STEVEN M. TIMMERS, Grandville,	2007
62B.	WILLIAM G. KELLY, Kentwood,	2009
63-1.	STEVEN R. SERVAAS, Rockford,	2009
63-2.	SARA J. SMOLENSKI, East Grand Rapids,	2009
64A.	RAYMOND P. VOET, Ionia,	2009
64B.	DONALD R. HEMINGSEN, Sheridan,	2009
65A.	RICHARD D. WELLS, DeWitt,	2009
65B.	JAMES B. MACKIE, Alma,	2009
66.	WARD L. CLARKSON, Corunna,	2007
	TERRANCE P. DIGNAN, Owosso,	2009
67-1.	DAVID J. GOGGINS, Flushing,	2009
67-2.	JOHN L. CONOVER, Davison,	2009
	RICHARD L. HUGHES, Otisville,	2011
67-3.	LARRY STECCO, Flushing,	2009
67-4.	MARK C. McCABE, Fenton,	2009
	CHRISTOPHER ODETTE, Grand Blanc,	2007
68.	WILLIAM H. CRAWFORD, II, Flint,	2007
	HERMAN MARABLE, Jr., Flint,	2007
	MICHAEL D. McARA, Flint,	2009
	NATHANIEL C. PERRY, III, Flint,	2009
	RAMONA M. ROBERTS, Flint,	2011
70-1.	TERRY L. CLARK, Saginaw,	2007
	M. RANDALL JURRENS, Saginaw,	2011
	M. T. THOMPSON, Jr., Saginaw,	2009
70-2.	CHRISTOPHER S. BOYD, Saginaw,	2011
	DARNELL JACKSON, Saginaw,	2009
	KYLE HIGGS TARRANT, Saginaw,	2007

		Term Expires January 1 of
71A.	LAURA CHEGER BARNARD, Metamora,	2009
	JOHN T. CONNOLLY, Lapeer,	2007
71B.	KIM DAVID GLASPIE, Cass City,	2009
72.	RICHARD A. COOLEY, Jr., Port Huron,	2011
	DAVID C. NICHOLSON, Port Huron,	2007
	CYNTHIA SIEMEN PLATZER, Lakeport,	2009
73A.	JAMES A. MARCUS, Applegate,	2009
73B.	KARL E. KRAUS, Bad Axe,	2009
74.	CRAIG D. ALSTON, Bay City,	2009
	TIMOTHY J. KELLY, Bay City,	2007
	SCOTT J. NEWCOMBE, Bay City,	2011
75.	ROBERT L. DONOGHUE, Midland,	2007[5]
	JOHN HENRY HART, Midland,	2009
76.	WILLIAM R. RUSH, Mt. Pleasant,	2009
77.	SUSAN H. GRANT, Big Rapids,	2009
78.	H. KEVIN DRAKE, Fremont,	2009
79.	PETER J. WADEL, Branch,	2009
80.	GARY J. ALLEN, Gladwin,	2009
81.	ALLEN C. YENIOR, Sterling,	2009
82.	RICHARD E. NOBLE, West Branch,	2009
83.	DANIEL L. SUTTON, Prudenville,	2009
84.	DAVID A. HOGG, Harrietta,	2009
85.	BRENT V. DANIELSON, Manistee,	2009
86.	JOHN D. FORESMAN, Traverse City,	2011
	MICHAEL J. HALEY, Traverse City,	2009
	THOMAS J. PHILLIPS, Traverse City,	2007
87.	PATRICIA A. MORSE, Gaylord,	2009
88.	THEODORE O. JOHNSON, Alpena,	2009
89.	HAROLD A. JOHNSON, Jr., Cheboygan,	2009
90.	RICHARD W. MAY, Charlevoix,	2009
91.	MICHAEL W. MacDONALD, Sault Ste. Marie,	2009
92.	BETH GIBSON, Newberry,	2009
93.	MARK E. LUOMA, Munising,	2009
94.	GLENN A. PEARSON, Gladstone,	2009
95A.	JEFFREY G. BARSTOW, Menominee,	2009
95B.	MICHAEL J. KUSZ, Iron Mountain,	2009
96.	DENNIS H. GIRARD, Marquette,	2011
	ROGER W. KANGAS, Ishpeming,	2009
97.	PHILLIP L. KUKKONEN, Hancock,	2009
98.	ANDERS B. TINGSTAD, Jr., Bessemer,	2009

[5] From June 23, 2005.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE, Grosse Pointe,	2008
CARL F. JARBOE, Grosse Pointe Park,	2006
LYNNE A. PIERCE, Grosse Pointe Woods,	2008
MATTHEW R. RUMORA, Grosse Pointe Farms,	2006

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	JAMES H. COOK	2007
Alger/Schoolcraft	WILLIAM W. CARMODY	2007
Allegan	MICHAEL L. BUCK	2007
Alpena	DOUGLAS A. PUGH	2007
Antrim	NORMAN R. HAYES	2007
Arenac	JACK WILLIAM SCULLY	2007
Baraga	TIMOTHY S. BRENNAN	2007
Barry	WILLIAM M. DOHERTY	2007
Bay	KAREN TIGHE	2007
Benzie	NANCY A. KIDA	2007
Berrien	MABEL JOHNSON MAYFIELD	2009
Berrien	THOMAS E. NELSON	2007
Branch	FREDERICK L. WOOD	2007
Calhoun	PHILLIP E. HARTER	2011
Calhoun	GARY K. REED	2007
Cass	SUSAN L. DOBRICH	2007
Cheboygan	ROBERT JOHN BUTTS	2007
Chippewa	LOWELL R. ULRICH	2007
Clare/Gladwin	THOMAS P. McLAUGHLIN	2007
Clinton	LISA SULLIVAN	2007
Crawford	JOHN G. HUNTER	2007
Delta	ROBERT E. GOEBEL, JR.	2007
Dickinson	THOMAS D. SLAGLE	2007
Eaton	MICHAEL F. SKINNER	2007
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2007
Genesee	ALLEN J. NELSON	2009
Genesee	ROBERT E. WEISS	2007
Gogebic	JOEL L. MASSIE	2007
Grand Traverse	DAVID L. STOWE	2007
Gratiot	JACK T. ARNOLD	2007
Hillsdale	MICHAEL E. NYE	2007
Houghton	CHARLES R. GOODMAN	2007

Huron	DAVID L. CLABUESCH	2007
Ingham	R. GEORGE ECONOMY	2007
Ingham	RICHARD JOSEPH GARCIA	2009
Ionia	ROBERT SYKES, JR.	2007
Iosco	JOHN D. HAMILTON	2007
Iron	C. JOSEPH SCHWEDLER	2007
Isabella	WILLIAM T. ERVIN	2007
Jackson	SUSAN E. VANDERCOOK	2007
Kalamazoo	CURTIS J. BELL, JR.	2007[1]
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalkaska	LYNNE MARIE BUDAY	2007
Kent	NANARUTH H. CARPENTER	2011
Kent	PATRICIA D. GARDNER	2007
Kent	JANET A. HAYNES	2009
Kent	G. PATRICK HILLARY	2007
Keweenaw	JAMES G. JAASKELAINEN	2007
Lake	MARK S. WICKENS	2007
Lapeer	JUSTUS C. SCOTT	2007
Leelanau	JOSEPH E. DEEGAN	2007
Lenawee	CHARLES W. JAMESON	2007
Livingston	SUSAN L. RECK	2007
Luce/Mackinac	THOMAS B. NORTH	2007
Macomb	KATHRYN A. GEORGE	2009
Macomb	PAMELA GILBERT O'SULLIVAN	2007
Manistee	JOHN R. DeVRIES	2007
Marquette	MICHAEL J. ANDEREGG	2007
Mason	MARK D. RAVEN	2007
Mecosta/Osceola	LaVAIL E. HULL	2007
Menominee	WILLIAM A. HUPY	2007
Midland	DORENE S. ALLEN	2007
Missaukee	CHARLES R. PARSONS	2007
Monroe	JOHN A. HOHMAN, JR.	2007
Monroe	PAMELA A. MOSKWA	2009
Montcalm	EDWARD L. SKINNER	2007
Montmorency	MICHAEL G. MACK	2007
Muskegon	NEIL G. MULLALLY	2011
Muskegon	GREGORY C. PITTMAN	2007
Newaygo	GRAYDON W. DIMKOFF	2007
Oakland	BARRY M. GRANT	2009
Oakland	LINDA S. HALLMARK	2007

[1] From February 28, 2005.

Oakland	EUGENE ARTHUR MOORE	2011
Oakland	ELIZABETH M. PEZZETTI	2011
Oceana	WALTER A. URICK	2007
Ogemaw	EUGENE I. TURKELSON	2007
Ontonagon	JOSEPH D. ZELEZNIK	2007
Oscoda	KATHRYN JOAN ROOT	2007
Otsego	MICHAEL K. COOPER	2007
Ottawa	MARK A. FEYEN	2007
Presque Isle	KENNETH A. RADZIBON	2007
Roscommon	DOUGLAS C. DOSSON	2007
Saginaw	FAYE M. HARRISON	2009
Saginaw	PATRICK J. McGRAW	2007
St. Clair	ELWOOD L. BROWN	2009
St. Clair	JOHN R. MONAGHAN	2007
St. Joseph	THOMAS E. SHUMAKER	2007
Sanilac	R. TERRY MALTBY	2007
Shiawassee	JAMES R. CLATTERBAUGH	2007
Tuscola	W. WALLACE KENT, JR.	2007
Van Buren	FRANK D. WILLIS	2007
Washtenaw	NANCY CORNELIA FRANCIS	2009
Washtenaw	JOHN N. KIRKENDALL	2007
Wayne	JUNE E. BLACKWELL-HATCHER	2007
Wayne	FREDDIE G. BURTON, JR.	2007
Wayne	JUDY A. HARTSFIELD	2007
Wayne	JAMES E. LACEY	2007
Wayne	MILTON L. MACK, JR.	2011
Wayne	CATHIE B. MAHER	2011
Wayne	MARTIN T. MAHER	2009
Wayne	DAVID J. SZYMANSKI	2009
Wexford	KENNETH L. TACOMA	2007

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	26
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	34
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	5
Emmet	Petoskey	33
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Leland	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	50
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	26
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
Wayne	Detroit	3
Wexford	Cadillac	28

TABLE OF CASES REPORTED

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(Lines set in small type refer to actions on application for leave to appeal from the Court of Appeals starting at page 851, and to special orders in other matters starting at page 1201.)

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ADMINISTRATIVE ORDER

ADMINISTRATIVE ORDER RESCINDED

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MICHIGAN RULES OF PROFESSIONAL CONDUCT

RULES OF THE STATE BAR OF MICHIGAN

RULES RETAINED

MICHIGAN COURT RULES OF 1985

ADMINISTRATIVE ORDER
No. 2005-1

ADOPTION OF CONCURRENT JURISDICTION PLANS FOR THE 41ST CIRCUIT COURT, THE 95B DISTRICT COURT, AND THE IRON COUNTY PROBATE COURT, AND FOR THE 32ND CIRCUIT COURT AND THE ONTONAGON COUNTY PROBATE COURT

Entered May 17, 2005, effective September 1, 2005 (File No. 2004-04) —REPORTER.

Administrative Order No. 2003-1 and MCL 600.401 *et seq*. authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of this Court.

The Court hereby approves adoption of the following concurrent jurisdiction plans effective September 1, 2005:

41st Circuit Court, 95B District Court, and Iron County Probate Court

32nd Circuit Court and Ontonagon County Probate Court

The plans shall remain on file with the state court administrator.

Amendments of concurrent jurisdiction plans may be implemented by local administrative order pursuant to

MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

It is further ordered that Administrative Order No. 1999-2 is rescinded effective September 1, 2005.

MARKMAN, J. (*concurring*). I wish to incorporate by reference the views that I expressed in concurring with Administrative Order No. 2004-2.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted February 1, 2005, effective May 1, 2005 (File No. 2004-40)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 3.215. DOMESTIC RELATIONS REFEREES.

(A) Qualifications of Referees. A referee appointed pursuant to MCL 552.507(1) must be a member in good standing of the State Bar of Michigan. A non-attorney friend of the court who was serving as a referee when this rule took effect on May 1, 1993, may continue to serve.

(B) Referrals to the Referee.

(1) The chief judge may, by administrative order, direct that specified types of domestic relations motions be heard initially by a referee.

(2) To the extent allowed by law, the judge to whom a domestic relations action is assigned may refer other motions in that action to a referee

(a) on written stipulation of the parties,

(b) on a party's motion, or

(c) on the judge's own initiative.

(3) In domestic relations matters, the judge to whom an action is assigned, or the chief judge by administra-

tive order, may authorize referees to conduct settlement conferences and, subject to judicial review, scheduling conferences.

(C) Scheduling of the Referee Hearing.

(1) Within 14 days after receiving a motion referred under subrule (B)(1) or (B)(2), the referee must arrange for service of a notice scheduling a referee hearing on the attorneys for the parties, or on the parties if they are not represented by counsel. The notice of hearing must clearly state that the matter will be heard by a referee.

(2) The referee may adjourn a hearing for good cause without preparing a recommendation for an order, except that if the adjournment is subject to any terms or conditions, the referee may only prepare a recommendation for an adjournment order to be signed by a judge.

(D) Conduct of Referee Hearings.

(1) The Michigan Rules of Evidence apply to referee hearings.

(2) A referee must provide the parties with notice of the right to request a judicial hearing by giving

(a) oral notice during the hearing, and

(b) written notice in the recommendation for an order.

(3) Testimony must be taken in person, except that, for good cause, a referee may allow testimony to be taken by telephone or other electronically reliable means.

(4) An electronic or stenographic record must be kept of all hearings.

(E) Posthearing Procedures.

(1) Within 21 days after a hearing, the referee must either make a statement of findings on the record or

submit a written, signed report containing a summary of testimony and a statement of findings. In either event, the referee must make a recommendation for an order and arrange for it to be submitted to the court and the attorneys for the parties, or the parties if they are not represented by counsel. A proof of service must be filed with the court.

(a) The referee must find facts specially and state separately the law the referee applied. Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.

(b) The referee's recommended order must include:

(i) a signature line for the court to indicate its approval of the referee's recommended order;

(ii) notice that if the recommended order is approved by the court and no written objection is filed with the court clerk within 21 days after the recommended order is served, the recommended order will become the final order;

(iii) notice advising the parties of any interim effect the recommended order may have; and

(iv) prominent notice of all available methods for obtaining a judicial hearing.

(c) If the court approves the referee's recommended order, the recommended order must be served within 7 days of approval, or within 3 days of approval if the recommended order is given interim effect, and a proof of service must be filed with the court. If the recommendation is approved by the court and no written objection is filed with the court clerk within 21 days after service, the recommended order will become a final order.

(2) If the hearing concerns income withholding, the referee must arrange for a recommended order to be submitted to the court forthwith. If the recommended order is approved by the court, it must be given immediate effect pursuant to MCL 552.607(4).

(3) A party may obtain a judicial hearing on any matter that has been the subject of a referee hearing and that resulted in a statement of findings and a recommended order by filing a written objection and notice of hearing within 21 days after the referee's recommendation for an order is served on the attorneys for the parties, or the parties if they are not represented by counsel. The objection must include a clear and concise statement of the specific findings or application of law to which an objection is made. Objections regarding the accuracy or completeness of the recommendation must state with specificity the inaccuracy or omission.

(4) The party who requests a judicial hearing must serve the objection and notice of hearing on the opposing party or counsel in the manner provided in MCR 2.119(C).

(5) A circuit court may, by local administrative order, establish additional methods for obtaining a judicial hearing.

(6) The court may hear a party's objection to the referee's recommendation for an order on the same day as the referee hearing, provided that the notice scheduling the referee hearing advises the parties that a same-day judicial hearing will be available and the parties have the option of refusing a same-day hearing if they have not yet decided whether they will object to the referee's recommendation for an order.

(7) The parties may waive their right to object to the referee's recommendation for an order by consenting in writing to the immediate entry of the recommended order.

(F) Judicial Hearings.

(1) The judicial hearing must be held within 21 days after the written objection is filed, unless time is extended by the court for good cause.

(2) To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:

(a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;

(b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;

(c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;

(d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

(3) If the court determines that an objection is frivolous or has been interposed for the purpose of delay, the court may assess reasonable costs and attorney fees.

(G) Interim Effect for Referee's Recommendation for an Order.

(1) Except as limited by subrules (G)(2) and (G)(3), the court may, by an administrative order or by an order in the case, provide that the referee's recommended

order will take effect on an interim basis pending a judicial hearing. The court must provide notice that the referee's recommended order will be an interim order by including that notice under a separate heading in the referee's recommended order, or by an order adopting the referee's recommended order as an interim order.

(2) The court may not give interim effect to a referee's recommendation for any of the following orders:

(a) An order for incarceration;

(b) An order for forfeiture of any property;

(c) An order imposing costs, fines, or other sanctions.

(3) The court may not, by administrative order, give interim effect to a referee's recommendation for the following types of orders:

(a) An order under subrule (G)(2);

(b) An order that changes a child's custody;

(c) An order that changes a child's domicile;

(d) An order that would render subsequent judicial consideration of the matter moot.

Staff Comment: The February 1, 2005, effective May 1, 2005, amendments implement 2004 PA 210, which redefines "de novo hearings" and allows trial courts to give interim effect to a referee's recommended order pending a hearing de novo pursuant to Michigan Court Rules.

The staff comment is not an authoritative construction by the Court.

Adopted February 1, 2005, effective May 1, 2005 (File No. 2003-65)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(E) [Unchanged.]

(F) Appointment of Lawyer; Trial Court Responsibilities in Connection With Appeal.

(1) [Unchanged.]

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,

(i) the trial or plea proceeding transcript,

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. If the appointed lawyer timely requests additional transcripts, the trial court shall order such transcripts within 14 days after receiving the request.

(3) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1)-(2) [Unchanged.]

(3) Duties of Court Reporter or Recorder.

(a) Certificate. Within 7 days after a transcript is ordered by a party or the court, the court reporter or recorder shall furnish a certificate stating:

(i) that the transcript has been ordered, that payment for the transcript has been made or secured, that it will be filed as soon as possible or has already been filed, and the estimated number of pages for each of the proceedings requested;

(ii) as to each proceeding requested, whether the court reporter or recorder filing the certificate recorded the proceeding; and if not,

(iii) the name and certification number of the court reporter or recorder responsible for the transcript of that proceeding.

(b)-(g) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(C) [Unchanged.]

(D) Records Kept by the Clerk. [Unchanged.]

(1) Indexes and Case Files. [Unchanged.]

(a)-(b) [Unchanged.]

(c) Register of Actions. The clerk shall keep a case history of each case, known as a register of actions. The register of actions shall contain both pre- and post-judgment information. When a case is commenced, a register of actions form shall be created. The case identification information in the alphabetical index shall be entered on the register of actions. In addition, the following shall be noted chronologically on the register of actions as it pertains to the case:

(i) the offense (if one);

(ii) the judge assigned to the case;

(iii) the fees paid;

(iv) the date and title of each filed document;

(v) the date process was issued and returned, as well as the date of service;

(vi) the date of each event and type and result of action;

(vii) the date of scheduled trials, hearings, and all other appearances or reviews, including a notation indicating whether the proceedings were heard on the record and the name and certification number of the court reporter or recorder present;

(viii) the orders, judgments, and verdicts;

(ix) the judge at adjudication and disposition;

(x) the date of adjudication and disposition; and

(xi) the manner of adjudication and disposition.

Each notation shall be brief, but shall show the nature of each paper filed, each order or judgment of the court, and the returns showing execution. Each notation shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(d) [Unchanged.]

(2)-(4) [Unchanged.]

(E)-(G) [Unchanged.]

Staff Comment: The February 1, 2005, effective May 1, 2005, amendments were recommended by the Court of Appeals Record Production Work Group.

The amendment of MCR 6.425(F) expedites the ordering of additional transcripts in criminal appeals that have been requested by appointed counsel by requiring trial courts to order additional transcripts within 14 days after receiving a timely request.

Although the rules contain no specific deadline within which counsel is required to order additional transcripts, the Court of Appeals has always applied a 28-day guideline to ensure that appellate attorneys are quickly reviewing their orders of appointment to determine whether additional transcripts are necessary. Court of Appeals Internal Operating Procedure 7.204(C)(2) states that appointed counsel should review the

order shortly after appointment to confirm that all necessary transcripts were ordered. The same concept is stated in IOP 7.210(B)(1)-1. The 28-day guideline is stated in IOP 7.210(B)(1)-2.

The amendment of MCR 7.210(B)(3)(a) enhances an attorney's ability to discover and order missing transcripts in all appeals by requiring the court reporter or recorder to specifically articulate on the certificate for each proceeding requested: the estimated length of the transcript ordered and the identity of the court reporter or recorder responsible for the transcript if it is not the individual filing the certificate.

The amendment of MCR 8.119(D)(1)(c) expedites the ordering of transcripts in all appeals by requiring the circuit court's register of actions to include a notation as to whether a hearing was held on the record, and the name and certification number of the court reporter or recorder responsible for transcribing the hearing. The subrule is also divided for the ease of the reader.

The staff comment is not an authoritative construction by the Court.

Adopted February 1, 2005, effective May 1, 2005 (File No. 2004-11)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 6.445. PROBATION REVOCATION.

(A)-(G) [Unchanged.]

(H) Review.

(1) In a case involving a sentence of incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that

(a) the probationer has a right to appeal, if the underlying conviction occurred as a result of a trial, or

(b) the probationer is entitled to file an application for leave to appeal, if the underlying conviction was the result of a plea of guilty or nolo contendere.

(2) [Unchanged.]

Staff Comment: The February 1, 2005, amendment of MCR 6.445(H), effective May 1, 2005, requires a sentencing judge to advise a probationer whose probation is revoked that the probationer is entitled to appeal by right if the probationer's underlying conviction resulted from a trial. Where the underlying conviction resulted from a plea of guilty or nolo contendere, the probationer would be entitled to file an application for leave to appeal.

The staff comment is not an authoritative construction by the Court.

Amendment of MCR 7.203 retained February 1, 2005 (File Nos. 2002-34, 2002-44)—REPORTER.

By order dated October 5, 2004, 471 Mich cxiv, this Court adopted the amendment of Rule 7.203 of the Michigan Court Rules, effective immediately, to process appeals arising solely from orders granting or denying motions for summary disposition in accordance with Administrative Order No. 2004-5, which was also adopted October 5, 2004, 471 Mich xci, effective January 1, 2005. Notice and an opportunity for comment at the January 27, 2005, public hearing having been provided, and consideration having been given, the amendment of Rule 7.203 is retained.

Amendment of MCR 7.204 retained February 1, 2005 (File No. 2004-43)—REPORTER.

By order dated November 2, 2004, 471 Mich cxv, this Court adopted the amendment of Rule 7.204 of the Michigan Court Rules with immediate effect. Notice and an opportunity for comment at the January 27, 2005, public hearing having been provided, and consideration having been given, the amendment of Rule 7.204 is retained.

Amendments of MCR 9.124 and 9.126 retained February 1, 2005 (File No. 2004-53)—REPORTER.

By order dated November 2, 2004, 471 Mich cxvii, this Court adopted the amendments of Rules 9.124 and 9.126 of the Michigan Court Rules with immediate effect. Notice and an opportunity for comment at the January 27, 2005, public hearing having been provided, and consideration having been given, the amendments of Rules 9.124 and 9.126 are retained.

Adopted March 8, 2005, effective immediately (File No. 2005-06)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 5.784. Proceedings on a Durable Power of Attorney for Health Care or Mental Health Treatment.

(A) Petition, Who Shall File. The petition concerning a durable power of attorney for health care or mental health treatment must be filed by any interested party or the patient's attending physician.

(B) Venue. Venue for any proceeding concerning a durable power of attorney for health care or mental health treatment is proper in the county in which the patient resides or the county where the patient is found.

(C) Notice of Hearing, Service, Manner and Time.

(1) Manner of Service. If the address of an interested party is known or can be learned by diligent inquiry, notice must be by mail or personal service, but service by mail must be supplemented by facsimile or telephone contact within the period for timely service when the hearing is an expedited hearing or a hearing on the

initial determination regarding whether the patient is unable to participate in medical or mental health treatment decisions.

(2) Waiving Service. At an expedited hearing or a hearing on an initial determination regarding whether the patient is unable to participate in medical or mental health treatment decisions, the court may dispense with notice of the hearing on those interested parties who could not be contacted after diligent effort by the petitioner.

(3) Time of Service. Notice of hearing must be served at least 2 days before the time of a hearing on an initial determination regarding whether the patient is unable to participate in medical or mental health treatment decisions. Notice of an expedited hearing must be served at such time as directed by the court. Notice of other hearings must be served at such time as directed by MCR 5.108.

(D) Hearings.

(1) Time. Hearings on a petition for an initial determination regarding whether a patient is unable to participate in a medical or mental health treatment decision must be held within 7 days of the filing of the petition. The court may order an expedited hearing on any petition concerning a durable power of attorney for health care or mental health treatment decisions on a showing of good cause to expedite the proceedings. A showing of good cause to expedite proceedings may be made ex parte.

(2) Trial. Disputes concerning durable powers of attorney for health care or mental health treatment decisions are tried by the court without a jury.

(3) Proof. The petitioner has the burden of proof by a preponderance of evidence on all contested issues ex-

cept that the standard is by clear and convincing evidence on an issue whether a patient has authorized the patient advocate under a durable power of attorney for health care to decide to withhold or withdraw treatment, which decision could or would result in the patient's death, or authorized the patient advocate under a durable power of attorney for mental health treatment to seek the forced administration of medication or hospitalization.

(4) Privilege, Waiver. The physician-patient privilege must not be asserted.

(E) Temporary Relief. On a sufficient showing of need, the court may issue a temporary restraining order pursuant to MCR 3.310 pending a hearing on any petition concerning a durable power of attorney for health care or mental health treatment.

Staff Comment: Public Acts 532, 551-557, and 559 of 2004, effective January 3, 2005, authorize a durable power of attorney for mental health treatment decisions. The amendments of MCR 5.784 broaden the rule to cover proceedings concerning durable powers of attorney for mental health treatment.

The staff comment is not an authoritative construction by the Court.

Adopted March 8, 2005, effective immediately (File No. 2004-37)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 7.217. Involuntary Dismissal of Cases.

(A)-(C) [Unchanged.]

(D) Reinstatement.

(1) Within 21 days after the date of the clerk's notice of dismissal pursuant to this rule, the appellant or

plaintiff may seek relief from dismissal by showing mistake, inadvertence, or excusable neglect.

(2) The chief judge of the Court of Appeals will decide all untimely motions for reinstatement of an appeal.

Staff Comment: The March 8, 2005, amendment of MCR 7.217(D)(2) requires the chief judge of the Court of Appeals to decide all untimely motions for reinstatement of an appeal that is involuntarily dismissed for want of prosecution.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the court.

Retained May 31, 2005 (File No. 2005-06)—REPORTER.

RULE 5.784. PROCEEDINGS ON A DURABLE POWER OF ATTORNEY FOR HEALTH CARE OR MENTAL HEALTH TREATMENT.

[Amendment of Rule 5.784 is retained.]

Retained May 31, 2005 (File No. 2003-20)—REPORTER.

RULE 9.216. APPEARANCE BEFORE COMMISSION.

[Amendment of Rule 9.216 is retained.]

Administrative file closed May 31, 2005 (File No. 2004-13)—REPORTER.

On order of the Court, the proposed amendment of Rule 2.504 of the Michigan Court Rules having been published for comment at 471 Mich 1215-1216 (2005), and an opportunity having been provided for comment in writing and at a public hearing on May 26, 2005, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Adopted May 31, 2005, effective September 1, 2005 (File No. 2004-47)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 7.302. APPLICATION FOR LEAVE TO APPEAL.

(A)-(B) [Unchanged.]

(C) When to File.

(1)-(3)[Unchanged.]

(4) Decisions Remanding for Further Proceedings. If the decision of the Court of Appeals remands the case to a lower court for further proceedings, an application for leave may be filed within 28 days in appeals from orders terminating parental rights, 42 days in other civil cases, or 56 days in criminal cases, after

(a) the Court of Appeals decision ordering the remand,

(b) the Court of Appeals clerk mails notice of an order denying a timely filed motion for rehearing of a decision remanding the case to the lower court for further proceedings, or

(c) the Court of Appeals decision disposing of the case following the remand procedure, in which case an application may be made on all issues raised in the Court of Appeals, including those related to the remand question.

(5)-(6) [Unchanged.]

(D)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 7.302(C)(4), effective September 1, 2005, allows a party to seek leave to appeal in the Michigan Supreme Court from the denial of a motion for rehearing of a Court of Appeals decision to remand a case to the trial court. The amendment also adds language that clarifies that a 28-day time limit applies to applications for leave to appeal in appeals from orders terminating parental rights.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

Adopted June 8, 2005, effective immediately (File No. 2004-33)—REPORTER.

On order of the Court, the need for immediate action having been found, the notice requirements are dispensed with and the following amendments of Rule 9.221 of the Michigan Court Rules are adopted, effective immediately. MCR 1.201(D). The amendments will be considered at a future public hearing by the Court.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 9.221. CONFIDENTIALITY; DISCLOSURE.

(A) Scope of Rule. Except as provided in this rule, all papers filed with the commission and all proceedings before it are confidential in nature and are absolutely privileged from disclosure by the commission or its staff, including former members and employees, in any other matter, including but not limited to civil, criminal, legislative, or administrative proceedings. All the commission's investigative files and commission-generated documents are likewise confidential and privileged from disclosure. Nothing in this rule prohibits the respondent judge from making statements regarding the judge's conduct.

(B) Before Filing a Formal Complaint.

(1) Before a complaint is filed, neither a commissioner nor a member of the commission staff may disclose the existence or contents of an investigation,

testimony taken, or papers filed in it, except as needed for investigative purposes.

(2) The commission may at any time make public statements as to matters pending before it on its determination by a majority vote that it is in the public interest to do so, limited to statements

(a) that there is an investigation pending,

(b) that the investigation is complete and there is insufficient evidence for the commission to file a complaint, or

(c) with the consent of the respondent, that the investigation is complete and some specified disciplinary action has been taken.

(C) Discretionary Waiver of Confidentiality or Privilege. The commission may waive the confidentiality or privilege protections if:

(1) the respondent waives, in writing, the right to confidentiality or privilege;

(2) the grievant waives, in writing, the right to confidentiality or privilege;

(3) the witness whose statement, testimony, or other evidentiary item will be disclosed waives, in writing, the right to confidentiality or privilege; and

(4) a majority of the commission determines that the public interest will be served by doing so.

(D) After Filing of Formal Complaint.

(1) When the commission issues a complaint, the following shall not be confidential or privileged:

(a) the complaint and all subsequent pleadings filed with the commission or master, all stipulations entered, all findings of fact made by the master or commission,

and all reports of the master or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and

(b) the formal hearing before the master or commission, and the public hearing provided for in MCR 9.216.

(2) This subrule neither limits nor expands a respondent's right to discovery under MCR 9.208(C).

(3) The confidentiality or privilege of any otherwise nonpublic disciplinary action is waived in any proceeding on a concurrent or subsequent formal complaint.

(E) Disclosure to Grievant.

(1) Upon completion of an investigation or proceeding on a complaint, the commission shall disclose to the grievant that the commission

(a) has found no basis for action against the judge or determined not to proceed further in the matter,

(b) has taken an appropriate corrective action, the nature of which shall not be disclosed, or

(c) has recommended that the respondent be publicly censured, suspended, removed, or retired from office.

(F) Public Safety Exception. When the commission receives information concerning a threat to the safety of any person or persons, information concerning such person may be provided to the person threatened, to persons or organizations responsible for the safety of the person threatened, and to law enforcement or any appropriate prosecutorial agency.

(G) Disclosure to State Court Administrator.

(1) [Unchanged.]

(2) [Unchanged.]

(H) Disclosure to Attorney Grievance Commission. Notwithstanding the prohibition against disclosure in this rule, the commission shall disclose information concerning a judge's misconduct in office, mental or physical disability, or some other ground that warrants commission action under Const 1963, art 6, § 30, to the Attorney Grievance Commission, upon request. Absent a request, the commission may make such disclosure to the Attorney Grievance Commission. In the event of a dispute concerning the release of information, either the Attorney Grievance Commission or the Judicial Tenure Commission may petition the Supreme Court for an order resolving the dispute.

Staff Comment: New subrule (A) explains that Judicial Tenure Commission proceedings and investigative files are confidential and privileged from disclosure. The subrule addresses the ruling in *Lawrence v Van Aken,* 316 F Supp 2d 547 (WD Mich, 2004), which required the commission to disclose its investigative files because the language of MCR 9.221 did not render the files "privileged" from disclosure.

Subrule (B) clarifies that, before it files a formal complaint, the commission is limited in the type of information it can divulge regarding an investigation. New subrule (C) allows the commission to waive confidentiality of its records, in certain specified circumstances, and divulge information related to an investigation. New subrule (D) clarifies when the commission can reveal information about an investigation after the commission files a formal complaint.

New subrule (E) specifies the instances in which the commission can disclose information about the investigation to the grievant. New subrule (F) creates a "public safety exception" to the rule prohibiting disclosure. This exception authorizes the commission to disclose threats against a person to the person whose safety is threatened. Subrule (H) allows either the Judicial Tenure Commission or the Attorney Grievance Commission to ask the Supreme Court to resolve a dispute regarding the disclosure of the commission's investigatory records.

The staff comment is not an authoritative construction by the Court.

Adopted June 28, 2005, effective September 1, 2005 (File No. 2004-46)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 7.211. Motions in Court of Appeals.

(A)-(B) [Unchanged.]

(C) Special Motions. If the record on appeal has not been sent to the Court of Appeals, except as provided in subrule (C)(6), the party making a special motion shall request the clerk of the trial court or tribunal to send the record to the Court of Appeals. A copy of the request must be filed with the motion.

(1)-(8) [Unchanged.]

(9) Motion to Seal Court of Appeals File in Whole or in Part.

(a) Trial court files that have been sealed in whole or in part by a trial court order will remain sealed while in the possession of the Court of Appeals. Public requests to view such trial court files will be referred to the trial court.

(b) Materials that are subject to a protective order entered under MCR 2.302(C) may be submitted for inclusion in the Court of Appeals file in sealed form if they are accompanied by a copy of the protective order. A party objecting to such sealed submissions may file an appropriate motion in the Court of Appeals.

(c) Except as otherwise provided by statute or court rule, the procedure for sealing a Court of Appeals file is governed by MCR 8.119(F).

(d) Any party or interested person may file an answer in response to a motion to seal a Court of Appeals file within 7 days after the motion is served on the other parties, or within 7 days after the motion is filed in the Court of Appeals, whichever is later.

(e) An order granting a motion shall include a finding of good cause, as defined by MCR 8.119(F)(2), and a finding that there is no less restrictive means to adequately and effectively protect the specific interest asserted.

(f) An order granting or denying a motion to seal a Court of Appeals file in whole or in part may be challenged by any person at any time during the pendency of an appeal.

(D)-(E) [Unchanged.]

Staff Comment: The September 1, 2005, amendment of MCR 7.211(C) creates new subrule (9) to clarify the procedure for motions to seal Court of Appeals files and to unseal previously sealed files. The rule incorporates by reference the procedures for sealing files in the trial courts set forth in MCR 8.119(F). The amendment also contains additional language unique to cases pending in the Court of Appeals.

The staff comment is not an authoritative construction by the Court.

AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Adopted June 15, 2005, effective immediately (File No. 2003-19)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 1.15. Safekeeping Property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. All funds of the client paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in an interest- or dividend-bearing account in one or more identifiable banks, savings and loan associations, or credit unions maintained in the state in which the law office is situated, and no funds belonging to the lawyer or the law firm shall be deposited therein except as provided in this rule. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) [Unchanged.]

(c) [Unchanged.]

(d)(1) Except as set forth in paragraph (d)(2), a lawyer who or a law firm which receives client funds shall maintain a pooled interest- or dividend-bearing trust account, as defined by the Michigan State Bar Foundation, at a bank or savings and loan association authorized by state or federal law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or in an open-end investment company registered with the Securities and Exchange Commission for deposit of client funds, other than advances for costs and expenses, which at the time of receipt and deposit the lawyer or law firm reasonably anticipates will generate $50 or less in interest during the period for which it is anticipated such funds are to be held. Such an account shall comply with the following:

(A) No interest from the account shall be made available to the lawyer or law firm.

(B) The account shall include all client funds which are not expected to earn more than $50 in interest during the period it is anticipated such funds are to be held unless such funds are deposited in an interest-bearing account specified in paragraph (d)(2). The good-faith decision by the lawyer as to whether funds are expected to earn this amount is not reviewable by a disciplinary body.

(C) Funds deposited with a bank, savings and loan association, or open-end investment company shall be subject to withdrawal upon request and without delay as soon as permitted by law.

(D) The interest or dividend rate paid shall not be less than the highest rate generally available from the bank, savings and loan association, or open-end investment company to its non-IOLTA customers when the account meets the same minimum balance or other

eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the institution's standard practice, but institutions may elect to pay a higher rate, and may elect to waive any fees, on IOLTA accounts.

(E) The lawyer or law firm shall direct the bank, savings and loan association, or open-end investment company to:

(i) remit the interest, less per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees and a reasonable administrative or maintenance fee, at least quarterly to the Michigan State Bar Foundation;

(ii) transmit, with each remittance to the Michigan State Bar Foundation, a report which shall identify each lawyer or law firm and the amount of the remittance attributable to each account maintained by each lawyer or law firm, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average account balance for the period for which the report is made; and

(iii) transmit to the depositing lawyer or law firm a report, in accordance with normal procedures for reporting to depositors.

(2) [Unchanged.]

Staff Comment: The amendments of MRPC 1.15, effective immediately, are intended to provide interest rate parity with investments in non-IOLTA accounts in order to maximize the return on the investments for the benefit of the Michigan Bar Foundation.

The staff comment is not an authoritative construction by the Court.

AMENDMENT OF STATE BAR RULES

Adopted May 10, 2005, effective immediately (File No. 2005-15)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below:]

RULE 2. MEMBERSHIP.

Those persons who are licensed to practice law in this state shall constitute the membership of the State Bar of Michigan, subject to the provisions of these rules. Law students may become law student section members of the State Bar. None other than a member's correct name shall be entered upon the official register of attorneys of this state. Each member, upon admission to the State Bar and in the annual dues statement, must provide the State Bar with the member's correct name and address, and such additional information as may be required. If the address provided is a mailing address only, the member also must provide a street or building address for the member's business or residence. No member shall practice law in this state until such information has been provided. Members shall notify the State Bar promptly in writing of any change of name or address. The State Bar shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a member to alter or change the member's name. The name and address on file with the State Bar at the time shall control in any matter arising under

these rules involving the sufficiency of notice to a member or the propriety of the name used by the member in the practice of law or in a judicial election or in an election for any other public office. Every active member shall annually provide a certification as to whether the member or the member's law firm has a policy to maintain interest-bearing trust accounts for deposit of client and third-party funds. The certification shall be placed on the face of the annual dues notice and shall require the member's signature or electronic signature.

RULE 5. BOARD OF COMMISSIONERS.

Sec. 1.-Sec. 3 [Unchanged.]

Sec. 4. Nomination and Election of Commissioners. A commissioner is elected by the active members having their principal offices in the election district. To be nominated, a member must have his or her principal office in the election district and file a petition signed by at least 5 persons entitled to vote for the nominee with the secretary at the principal office of the State Bar between April 1 and April 30. Voting eligibility is determined annually on May 1. Before June 2, the secretary shall mail or electronically deliver a ballot to everyone entitled to vote. A ballot will not be counted unless marked and returned to the secretary at the principal office of the State Bar in a sealed envelope bearing a postmark date not later than June 15, or returned electronically or telephonically in conformity with State Bar election procedure not later than June 15. A board of 3 tellers appointed by the president shall canvass the ballots, and the secretary shall certify the count to the supreme court clerk. A member of or a candidate for the board may not be a teller. The candidate receiving the highest number of votes will be declared elected. In the case of a tie vote, the tellers

shall determine the successful candidate by lot. In an election in which terms of differing length are to be filled, the successful candidate with the lowest vote shall serve the shortest term to be filled.

Sec. 5.-Sec. 7 [Unchanged.]

RULE 6. REPRESENTATIVE ASSEMBLY.

Sec. 1.-Sec. 3 [Unchanged.]

Sec. 4. Nomination and Election of Representatives. A representative is elected by the active members having their principal offices in a judicial circuit. To be nominated, a member must have his or her principal office in the judicial circuit and file a petition signed by at least 5 persons entitled to vote for the nominee with the secretary at the principal office of the State Bar between April 1 and April 30. Voting eligibility is determined annually on May 1. Before June 2, the secretary shall mail or electronically deliver a ballot to everyone entitled to vote. When an assembly member seeks reelection, the election notification must disclose his or her incumbency and the number of meetings of the assembly that the incumbent has attended in the following form: "has attended ____ of ____ meetings during the period of [*his or her*] incumbency." A ballot may not be counted unless marked and returned to the secretary at the principal office of the State Bar in a sealed envelope bearing a postmark date not later than June 15, or returned electronically or telephonically in conformity with State Bar election procedure not later than June 15. A board of tellers appointed by the president shall canvass the ballots and the secretary shall certify the count to the supreme court clerk. A member of or candidate for the assembly may not be a teller. The candidate receiving the highest number of votes will be declared elected. In the case of a tie vote, the tellers shall determine the successful candidate by

lot. An election will occur in each judicial circuit every 3 years, except that in a judicial circuit entitled to 3 or more representatives, one-third will be elected each year. If a short-term representative is to be elected at the same election as a full-term one, the member with the higher vote total is elected to the longer term.

Sec. 5.-Sec. 8 [Unchanged.]

PORTRAIT PRESENTATION OF "THE BIG FOUR"

MARCH 8, 2005

CHIEF JUSTICE TAYLOR: Welcome. It is my pleasant task to welcome all of you to this very special session of the Michigan Supreme Court. A particular welcome to Nancy Diehl and John Berry from the State Bar and to Wally Riley, from the Supreme Court Historical Society, who will serve as master of ceremonies today.

Before I turn the proceedings over to Mr. Riley, I would like to say a few brief words on what this painting represents to the Court today. The casual observer would look on this painting, fine as it is, as just an image of four gentlemen who are wearing quaint old clothes and sporting whiskers. What possible interest, they might ask, does this image hold for us today?

Obviously, this painting reminds us of the origins of our Court, and also of the distinguished lawyers and scholars who comprised "The Big Four." Their fair-mindedness and learning not only led to national recognition of this Supreme Court as one of the best in the country, but also set a very high standard for all the justices who would follow them.

Even more importantly, the calm faces of these four justices remind all of us how essential a role the law plays in maintaining democracy, especially in uncertain times.

And the world in which these men lived and worked was one beset by uncertainty. The United States had

recently been torn by a bitter and devastating war in which over 3.8 million men, representing over ten percent of the nation's population, participated.[1] Of those, 970,000 young men[2] died or were maimed. It bears noting that the Michigan contribution to that war paid testament to our abolitionist heritage. Consider this when attempting to appreciate it: At Spotsylvania, in the overland campaign commanded by General Grant, the 17th Michigan Infantry lost 190 out of 225 men in a single attack.[3] In the same campaign at Petersburg, six regiments of Michigan infantry were victims of the slaughter in the crater formed by the tunneling explosion[4] depicted in the recent film *Cold Mountain*. In all, 14,700 Michigan men gave their lives.[5] The war changed the American economy also. For example, we are informed by Professor Willis Dunbar in his book *Michigan: A History of the Wolverine State* that between 1860 and 1870 the number of manufacturing establishments increased by 174 percent and the amount of capital invested by 201 percent. In this atmosphere of upheaval, both during the war and in the postwar years, people longed for restored stability.

That was the world inhabited by Justices THOMAS COOLEY, ISAAC CHRISTIANCY, JAMES V. CAMPBELL, and BENJAMIN F. GRAVES. And they met the challenge of uncertain times by affirming, through their professional discipline and fidelity, the stability provided by our Constitution and laws.

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[1] Source: The United States Civil War Center, Louisiana State University.

[2] *Id*.

[3] Dunbar, *Michigan: A History of the Wolverine State* (Grand Rapids: Wm. B. Eerdmans Publishing Co, 1965), p 453.

[4] *Id*.

[5] Catton, *Michigan: A History* (New York: W. W. Norton & Co, 1984), p 149.

This was not an easy or, at times, popular course. For example, in 1865, the Court, which at that time included Justices CHRISTIANCY, CAMPBELL, and COOLEY, was called upon to decide whether Michigan's election laws violated the state Constitution's requirement that voters reside in the state. The case is reported at 13 *Michigan Reports* 127, and is entitled *The People on relation of Daniel S. Twitchell v. Amos C. Blodgett*. Twitchell and Blodgett were contenders for the office of prosecuting attorney in Washtenaw County. Twitchell argued, and the Court accepted, that he would have won the election if soldiers' votes had been counted. The law at issue was enacted in February 1864 to allow soldiers on duty outside the state to vote. Its adoption had been urged here and in other unionist states by President Lincoln as he felt, correctly as it would work out, that the soldiers' vote would be strongly Republican. In short, in this very Republican state, it was a very popular measure. Needless to say, a decision upholding the law would have insured the justices' popularity.

But the justices, almost certainly going against their own personal inclinations, held that the law violated the state Constitution. Justice COOLEY wrote that the text of the Constitution was clear, and that the "fair and natural import of the terms employed . . . is what should govern."

He went on to say that violating this rule of construction would undermine "the anchor of our safety." He concluded: "And, believing as I do, that a high and sacred regard for law and constitutional order is being begotten of these times, I regard it as especially important that the judiciary should do nothing to postpone or check this result by decisions which strain or bend the meaning of words to meet unexpected emergencies."

It was not a popular decision. In fact, in addition to Mr. Twitchell, some state legislators also lost elections as a result of the ruling.

Living as we do in a time when so many of our daughters and sons are away fighting a war, we can also imagine and appreciate the feelings of those who saw the Court's action as displaying a shocking indifference to the plight of those in uniform. But the Court clearly and decisively said that its role was to uphold the Constitution and follow the original understanding of the words used in the documents, regardless of personal inclination or public reaction. That took integrity, character, and great courage.

This is the stuff of which our heritage consists both as a Court and as citizens. These four men remind us that the law does, indeed, provide "the anchor of our safety" and they call on us to preserve that source of stability, justice, and strength.

I now ask Mr. Riley to proceed with the program.

MR. RILEY: Thank you Mr. Chief Justice. On behalf of the board of directors of the Michigan Supreme Court Historical Society, welcome to today's special session to acknowledge the loan of the Big Four Portrait by the State Bar of Michigan to the Michigan Supreme Court.

The portrait that we will soon unveil has become a somewhat famous part of Michigan's legal history. It is based not on any real moment, but on an artist's idea of how the justices, who would become known as the Big Four, might have looked as they transacted their business of the Court. Copies of the painting in various sizes and shapes can be found downtown on the side of Cooley Law School, in the Learning Center just downstairs, and in offices around the state of many attorneys.

Recently, the painting was hung at 306 Townsend Street, home of the State Bar of Michigan. In fact, it was painted to be hung over the mantel in that room in that building. When that building was renovated, the painting was taken down and placed in storage and then with the help of the society's former executive director, Jill Wright, the painting was located and restored to its original pristine condition.

After today, it will be hung in the conference center on the first floor of this Hall of Justice. Of course, we have the individual portraits of each one of the Big Four in the Court's collection of portraits. But their grouping is unique.

The story behind the painting of this portrait, and of the justices featured in it, is an interesting one. And to tell you about it, may I present to you John T. Berry, executive director of the State Bar of Michigan, and Ms. Nancy J. Diehl, president of the State Bar of Michigan.

MR. BERRY: May it please the Court, Chief Justice TAYLOR and justices, and distinguished guests. It's a privilege to be here today and, when you come to such an event, it is a privilege in and of itself, but sometimes other events connected to it give it even more importance in your own life and in the lives of the bar that I represent.

And, very quickly, I want to share two of those events. One, this morning, I mentor a law student and we were talking about the state of the law, about the role of attorneys. And this painting has come to be known in this community and throughout this state for a lot of reasons, the reasons that you so well articulated, Chief Justice, but also it represents the role of attorneys as ministers of justice. Not just hired guns but the role to be able to be part of a judicial system, a system that we can all be proud of. And I talked to that young

student about that role and the challenges that they have to understand that role. The fact that this Court would take this time to be able to hang this painting with what all it represents, the State Bar truly thanks this Court and all that have been part of it.

This portrait affected me as well in another way. Two and a half years ago I had the privilege of going to Nigeria on behalf of the Justice Department to talk about the rule of law, and I tried to look at one thing from the state of Michigan that I thought might represent something that would set up that moment. And as I was driving down the street and I saw that mural, I suddenly recognized that that might be the one thing. And, believe it or not, it was. That was a country that is trying to emulate what this country is all about. Even though their constitution is similar to ours and even though they are attempting to do what we are, this is inbred into who we are and what we are about. So this painting carries for us a lot of meaning that goes beyond some of the things that initially we may think brings meaning to it. It is my privilege to tell you about that portrait.

The Big Four portrait that we are presenting today was originally commissioned by attorney Frank G. Mixter and was donated to the State Bar of Michigan in 1967. Artist John Coppin painted the portrait to fit the space that was located over the fireplace in what was then the State Bar lounge. That area of the building is now the Board of Commissioners meeting room. Frank Mixter devoted himself to helping others through his law practice and his involvement with the Lincoln Park city affairs, community organizations, and the Lincoln Park schools. A true community benefactor, he generously gave of his time and of his money to many organizations, including the State Bar of Michigan. We

were hoping that Frank Mixter's son, attorney Kenneth Mixter, could join us today. Although he and his wife are out of the country, Ken wrote a note that he wanted me to share with you. "Dear Mr. Berry: I received your invitation to the ceremony acknowledging the loan of the portrait of the Big Four to the Michigan Supreme Court and its new permanent display in the Supreme Court building. I regret that I will be unable to attend as my wife and I will be out of the country on vacation. My father and mother, Frank G. Mixter and Grace D. Mixter, who commissioned the painting, would be very proud of the fact that the painting will be hanging in the Supreme Court building. On behalf of myself, the rest of the family, we look forward to visiting the building in the future and thank you very much for including us in the ceremony. Sincerely yours, Kenneth G. Mixter."

The Big Four portrait artist, John S. Coppin, was born in Mitchell, Ontario. After settling in Bloomfield Hills, he became a prominent portrait painter, muralist, and illustrator. As director of *AAA Motor News* magazine, the forerunner of *Michigan Living* magazine, he was noted for providing covers for that publication for more than forty years. John Coppin's portrait subjects included actor Sir Alec Guinness, General Motors president James M. Rosh, automobile tycoon Henry Ford, and four Michigan governors. In addition to museums, locations of his work include the Michigan state capitol building, Rittenburg University in Ohio, Detroit College of Law, the University of Detroit, Detroit Public Library, the Detroit Historical Museum, the Shakespeare Theatre in Ontario, and the Van Wexell Hall in Sarasota, Florida. In 1999, Mr. Coppin's family generously gave their permission for this painting to be replicated on the wall of Cooley Law School. The sixty by ninety foot mural is a faithful reproduction of the oil

painting. Then being at Cooley Law School, THOMAS E. BRENNAN said the goal of replicating the portrait on the wall of the law school was for the painting to serve as a reminder of the continuum of the law.

The painting being donated today is a composite of Michigan Supreme Court Justices JAMES V. CAMPBELL, BENJAMIN F. GRAVES, THOMAS M. COOLEY, and ISAAC B. CHRISTIANCY. Known as the Big Four, these justices did not pose for the painting as already noted. Rather, the artist John Coppin copied individual portraits of the justices painted by the 19th Century L. T. Ives and put them together in the courtroom. Mr. Coppin even found the original court bench and court clock, which, as a composite, shows these four great jurists in action. On behalf of the State Bar of Michigan, I am pleased to present this painting today to permanently reside in Michigan's Hall of Justice. Thank you very much.

MS. DIEHL: Good afternoon, Chief Justice and other distinguished justices. Thank you for a few smiles. No one told me I was going to be addressing you this afternoon and individually all so pleasant, but you look so imposing up there this afternoon. I just have to get a few rules straight. I understand I have no time limit and you will not be asking me any questions. All right.

JUSTICE YOUNG: Don't be too sure.

MS. DIEHL: All right, Justice YOUNG. Okay. That's why I studied. It is truly an honor to be here this afternoon and represent the State Bar of Michigan.

Many of you today probably have heard about the Big Four painting. Over the years I certainly have. But just who were these justices and what was their significance in terms of Michigan legal history? Justices CAMPBELL, CHRISTIANCY, COOLEY, and GRAVES served on the Michigan Supreme Court together from 1868 to 1875 and came to be known as the Big Four. They were recognized in legal circles throughout the country for their

insightful decisions and also credited with providing the direction and structure of today's Michigan Supreme Court. Known as exceptionally scholarly men, these four justices possessed a high degree of the fair-mindedness essential to a jurist. Each articulated his views and opinions that were marked by energy and clearness of expression.

The Michigan Supreme Court begins with the state Constitution of 1850, stating that the judges of the circuit courts would also serve as judges of the Supreme Court. This initial arrangement soon proved unsuccessful and, in 1857, the Michigan Legislature created a permanent Supreme Court. JAMES V. CAMPBELL and ISAAC P. CHRISTIANCY were elected and joined the first Court in 1858. Six years later, in 1864, THOMAS M. COOLEY was appointed to the Supreme Court and, at the time when COOLEY became Chief Justice in 1868, BENJAMIN F. GRAVES won election and joined the Court. Thus, the beginning of the tenure of the Big Four.

JAMES V. CAMPBELL was born in 1823 in Buffalo, New York. While an infant his family relocated to Detroit, where he remained a lifelong resident. He was admitted to the bar in 1844 and practiced law until becoming a member of the Supreme Court thirteen years later. In 1859, he was chosen as Marshall Professor of Law at the University of Michigan law department, where he influenced young lawyers for over twenty-five years. He greatly respected the rights of the people secured to them by the Constitution and was quick to resent any invasion of its protections. Justice CAMPBELL served on the Supreme Court for thirty-two years until his death in 1890 at the age of sixty-seven.

ISAAC P. CHRISTIANCY was born in 1812 in Johnstown, New York. At the age of thirteen, CHRISTIANCY taught school in order to support his family. He began the

study of law in 1835 and moved to Monroe, Michigan, in 1836, where he established a law practice. He practiced law in the area of Monroe for nineteen years while also maintaining a career as a public servant. He was the prosecuting attorney for Monroe County and was also in the state senate. CHRISTIANCY was elected and joined the new Supreme Court in 1858. He was unanimously re-elected in 1865 by all parties and continued to serve on the Court until 1875, when he resigned to become a United States Senator. Throughout his adult life, he was vehemently opposed to slavery and was instrumental in the formation of the Republican Party in Michigan.

THOMAS M. COOLEY, perhaps a name more familiar to most of us, was born in 1825 in Attica, New York. He was one of fifteen children. He began teaching school at the age of seventeen to earn money for his education. He began the study of law at the age of nineteen, which was then the custom, and decided he was going to continue his studies of law in Chicago, but, as luck would have it for those of us in Michigan, money ran out so he ended up staying in Adrian, Michigan, and at the age of twenty-two he was admitted to the Michigan bar. Besides practicing law, he edited the local newspaper. He served as a circuit court commissioner and recorder for the city of Adrian and cultivated his one-hundred-acre farm. In 1857, he compiled the general statutes of the Legislature, and in the following year was appointed the official reporter for the new Supreme Court. One year later, COOLEY became a professor in the newly organized law department at the University of Michigan and taught law there for the next twenty-five years. In 1864, at the age of forty, while serving as the first dean of the University of Michigan law school, he was appointed to the Supreme Court and was elected three times before his resignation in 1885.

BENJAMIN GRAVES was the final member of the Big Four and he was born in 1817 in Rochester, New York. All the Big Four were born in New York, so here they came to Michigan. And he studied law, after he was admitted in New York, came to Michigan, was actually going to travel to Kentucky, went there for a while, came back to Michigan, where he settled in Battle Creek, and lived the life of a country lawyer. In 1857, at the age of forty, he was elected judge of the Fifth Circuit Court and later that year appointed to the Michigan Supreme Court to fill a vacancy. That was under the old rules before the Legislature changed it. So in addition to his duties as circuit court judge, he was required, as Supreme Court judge, to travel to Detroit, Kalamazoo, Adrian, Pontiac, and Lansing. I guess his salary made up for it because he got $1,500 a year and his travel expenses. It only lasted for a year and, of course, the Legislature created the new Court. So Justice GRAVES went back to being a circuit judge and for the next ten years remained a circuit judge until, at the age of fifty-one, in 1868, he was elected to the Supreme Court. He was re-nominated in 1875 by both the Republican and Democratic conventions. I think I'll say that again. He was re-nominated in 1875 by both the Republican and Democratic conventions and was therefore unanimously elected to a second term. However, in 1884 he declined re-nomination and returned to private life for health reasons.

The four justices were broken up in 1875 when Justice CHRISTIANCY resigned to become a United States Senator.

CAMPBELL, CHRISTIANCY, COOLEY, and GRAVES, by way of compliment, came to be called the Big Four. They raised the standing of Michigan jurisprudence to a high level. Because of these four jurists, our Supreme Court came

to be esteemed by the courts of other jurisdictions as one of the strongest and one of the best. Today, it is fitting that this portrait of four of our state's greatest justices should hang in the Michigan Hall of Justice, where the Supreme Court's history is preserved, while the work of the Court continues in good order. Thank you very much.

[At which time the portrait was unveiled.]

JUSTICE CAVANAGH: Boy, that's nice. We thank all of you. The Court will certainly treasure that. It will complement this Hall of Justice.

You know, all of us, I believe, would agree that we live in different times than those of the men we memorialize today. Back then, Michigan's population was under 500,000 people. And, in perusing the handwritten Supreme Court journal of 1897 this morning, I noted that there were fifty-four Supreme Court rules, forty-nine circuit court rules, and thirty-six chancery rules. Now you can compare that to this year, 2005 volume of the Michigan Court Rules, which constitute 458 pages. I'm pretty certain those justices did not have to wade through 230 applications for leave every month with the attendant commissioners' reports. And I know a third of their time was not taken up by attorney grievance, judicial tenure, or enumerable other administrative matters. However, the gist of the work they performed has remained with this Court throughout the years.

There have been 103 justices of the Michigan Supreme Court and we gather today to take special heed of numbers 19, 23, 24, and 25. The last of them left the Court in 1890 and none lived past 1906. So this foursome is almost 100 years dead. So, why are we here? Well, because they are the Big Four and because we are receiving this beautiful portrait. But, why are they called the Big Four?

Since I came here in 1983, I have had the privilege of serving with sixteen justices and among them have been some outstanding judges. So what makes these four special? The basic outline biographies of Justices CAMPBELL, CHRISTIANCY, COOLEY, and GRAVES are familiar to each of us and have been alluded to here earlier in this session. And, through the good work of the Michigan Supreme Court Historical Society, this material is now readily available for students and anyone who is curious. And even more information is available in the earlier volumes of the *Michigan Reports*, where the memorial services for each of these four were transcribed at length. As you would expect, that material is written in the somewhat overwrought style of the day. There are places where the praise makes one think we are reading the eulogies of Abraham, Isaac, Jacob, and Moses. But, if we shave back the excess verbiage, I think there are two or three things that explain what made this foursome special.

The first is that they lived fully the adventure of life. And they brought to the bench what they had gained in doing so. Most of us are aware, as Nancy Diehl just reminded us, that none of the four were born in Michigan. Each was a native of New York State. One came as a toddler, but the other three came west, seeking a newer and better life, and each remained throughout his life open to the possibilities.

Justice CAMPBELL, not content with a thirty-two-year career on this Court, served at the same time as professor of the newly created law department at the University of Michigan.

Justice CHRISTIANCY, as was mentioned, was politically active as an opponent of slavery, had a long career on this Court, then moved to the United States Senate, then was minister of Peru.

And where would one begin with Justice COOLEY. Newspaper editor, circuit court commissioner, recorder, which was second in command in the city of Adrian, political candidate in Toledo. Kind of an interesting twist. He ran for circuit court and was defeated. First compiler of the laws of the state of Michigan, Supreme Court reporter, Supreme Court justice, University of Michigan law professor, receiver of the Wabash Railroad, appointed by the president as chair of the newly created Interstate Commerce Commission, student of history, author of the leading treatise on torts, virtual creator of constitutional law as a separate area of specialization, respected lecturer on all sorts of topics, not all of which pertained to law.

And as was mentioned, even Justice GRAVES, forced by health to leave the circuit bench and later the Supreme Court, was a tireless figure.

As one reads more about these individuals, other similarities become evident. In the elegiac remarks offered at their passing, these men were consistently praised for the simplicity of their personal lives, for their efficient, unadorned writing styles, and for their fierce commitment to freedom. The simplicity and virtue with which each lived is illustrated with very specific tales of occasions when, faced with the opportunity to take advantage of their position, these men instead responded with kindness.

With regard to their commitment to freedom, as the Chief Justice mentioned, remember that they lived in the 1800s, when the Civil War was a very recent memory and the newly created state of Michigan was still forming its identity. Freedom was an unwavering principle for these four.

I remember a bitterly cold February morning in 1988 when we gathered in a Detroit church to mourn Chief

Justice G. MENNEN WILLIAMS. And that morning we sang the hymn "Let Us Praise Great Men." Again today we praise great men, and again today we ask what made them great.

Sometimes we let ourselves off the hook a bit as we think about those who have done very well in life. We like to imagine that they had some special gift that we lack. But there is a very striking element in the remarks that were made upon the deaths of each of the Big Four. As speaker after speaker rose to offer extravagant praise, many still made a very specific point of saying these men were not geniuses, that they were not unusually brilliant or gifted men. They were four hard-working fellows brought together by circumstance and history and asked to help a fledgling state begin to form its laws and traditions. They became heroes by doing the ordinary parts of their job with integrity and with energy. So we are pleased to accept this portrait today so that every now and then we will be reminded that that is really what made them the Big Four. Thank you.

JUSTICE TAYLOR: Thank you all again for coming together to mark this occasion. We are adjourned.

PRESENTATION OF THE PORTRAIT OF THE HONORABLE THEODORE SOURIS

MAY 26, 2005

CHIEF JUSTICE TAYLOR: Good morning. I'd like to welcome all of you to this special session of the Supreme Court in which we will dedicate the portrait of the late Justice THEODORE SOURIS. In particular the Court welcomes his wife, Karla Scherer, and we also welcome Christopher Souris, Stephen Souris, Susan Souris Wilson, Allison Scherer Thomas, their spouses, and their children. In a moment we will hear from Wallace Riley, president of the Supreme Court Historical Society, who will serve as our Master of Ceremonies for this event, and we will have the privilege of listening to Ms. Scherer and to Richard Reed's reminiscences of Justice SOURIS.

The French writer, Honoré de Balzac said that adversity tempers the human heart to discover its real worth. Those words could easily have been written about Justice SOURIS, who at age ten lost his five-year-old sister, his only sibling, and then at age fourteen suffered the loss of his father. As Justice SOURIS was later to recall to court historian Roger Lane, the mother and son left behind were devastated. In addition to the terrible sorrow of losing a husband and father, there was great financial strain. Justice SOURIS told Roger Lane that shortly before his death, his father had invested everything he owned in the new business. All of that was lost upon his father's death. There was no

extended family to offer support. Thanks to the kindness of a family friend who was a physician, his mother found work, but young THEODORE SOURIS quickly became self-supporting.

Entering the University of Michigan at age seventeen, he worked hard at a variety of jobs ranging from moving freight from the railroad station in Ann Arbor to waiting tables. He joined the Air Force and was called to active duty in January 1944 with a year and a half of college credits to that point. Anxious to complete his education when he returned to the University of Michigan in November 1945, he finished his undergraduate work and law school on an accelerated basis, getting his law degree in August of 1949 while still working a variety of jobs to support himself.

We who now look back in his life are struck by how that trajectory continued. He was a very young and eager lawyer involved in the highest levels of the state Democratic Party, and then a young and extremely hard-working judge of the Wayne County Circuit Court to which he was appointed in an effort to resolve that court's backlog. He became a Michigan Supreme Court justice at age thirty-three, the youngest in this Court's history and the first of Greek descent.

Almost immediately, he revitalized the Court's work habits by insisting on getting briefs and records in all the cases, not just those that would be assigned to him for opinions, as was the custom at the time. Before long, all the other justices followed suit but the Court's improved work habits were not his only contribution. Indeed, far from it, Justice SOURIS felt strongly that the Court had in the past clung to an illusion of infallibility, rigidly adhering to its prior decisions in the name of stare decisis without considering whether it was in fact perpetuating an error. In that regard, he often cited

Parker v Port Huron Hospital, in which Justice SOURIS joined the majority in overruling the Supreme Court's very longstanding rule that a charity was immune from suit for the negligence of its employees or agents. Discussing the case later with historian Lane, he said, "Yes, I thought with absolute conviction that if the Court concluded that its prior judgments were wrong in the development of the common law—you know, I emphasized the importance of the common law to a state Supreme Court because that's the one area of the law in which the Court legitimately can be creative. It is the writer of the law. It is the origin of the law. It has the obligation to declare the law and to modify those declarations of law when it is persuaded that it has been wrong in the past." For that reason, he was sometimes accused of being a radical justice. He resented that label—indeed he felt that he took a conservative view of his role as a justice. As he said to Roger Lane, "That seems to be a popular misconception of my attitudes as a justice of the Court. I wasn't a radical member of the Court. I was one of the most conservative members of the Court in the sense that I insisted that the Court go back to first principles whenever we had a controversy. For example, involving statutory interpretation. What was our function? Our function was to determine what the Legislature intended by the language it used. When we started substituting our own notions of what the Legislature intended, then we were overstepping our bounds and I was frequently critical of the Court for doing that."

When Justice SOURIS left the Court in 1968 it was to resume private practice with the same work ethic and sheer intellectual joy that characterized his life from high school on. I found a particularly illuminating passage from his interview with Mr. Lane. He is speaking of how he became active in politics following the

war. "I think it was a deeply felt need to participate in the business of government. Remember we had just gone through a terrible war. We had returned to campus with idealistic views of our own role in society. The opportunities were there and there was a feeling of participation in a great activity—a very important thing at that time, and it was very exciting." That excitement animated a long, imminently successful, and profoundly influential career. Perhaps, as Balzac said, the early and terrible adversity he suffered helped make THEODORE SOURIS the great man we honor today. Whatever influences may have combined to produce THEODORE SOURIS, this Court is richer for his presence on our bench. I now turn over the proceedings to our Master of Ceremonies, Wallace Riley, who will introduce the speakers. Mr. Riley.

MR. RILEY: Good morning. Thank you Mr. Chief Justice. On behalf of the Board of Directors of the Michigan Supreme Court Historical Society, we welcome all the participants to today's special session to unveil and dedicate the portrait of Justice THEODORE SOURIS. As many of you already know, the tradition of dedicating official court portraits of former justices is one that has carried on for well over one hundred years. The Court's collection of historical portraits will number eighty-five after today. Each of the portraits hangs in one of the Court's office buildings and offers a glimpse into the rich history and heritage of the Michigan Supreme Court. The Historical Society is pleased to participate in today's presentation ceremony and, without further ado, to unveil the portrait of the Court's 77th justice are the justice's grandchildren and they are listed in your program and I'd like to introduce them to you now and call upon them to come up to the portrait. Aleah Stewart-Souris, Damon Stewart-Souris, Elena

Souris, Alexander Souris, Keller Wilson, Claire Wilson, and Erin Wilson. Do your duty.

[Portrait is unveiled.]

While we're taking these pictures I would like to comment on the fact that there is a write-up in the program about the artist, Susanne Hay, and it's very, very interesting. It gives her background and tells about what her skills and talents were in constructing and doing this portrait. So you might want to read about that. I think you guys are done. Thanks. Good job.

Justice SOURIS was on the Court, as you know, for a full eight-year term and he had several clerks. One of them will speak to you today, but there are others that I'd like to mention and, if any of those are present, I wish they would stand so you can identify them. Lloyd Fell, I know he's here. George Ward. Frank Knox. Sheldon Otis. Some of these are familiar names, I know. Dominic Carnivelli, who if he isn't here is probably at Tiger Stadium. And James Robinson.

Our first speaker today is Mr. Richard Reed. Mr. Reed earned his law degree from Detroit College of Law in '61. He became Justice SOURIS's second law clerk, serving during portions of 1961 and 1962. Entering the private practice of law in Kalamazoo, Michigan, in 1962, Mr. Reed maintained contact with THEODORE SOURIS during his lifetime and served with him as a member of the Scope and Correlation Committee of the State Bar of Michigan. While serving on the Attorney Grievance Commission, Mr. Reed was one of those responsible for alerting the Supreme Court to the problems that were existing on the commission, which led to the Michigan Supreme Court appointing former Justice SOURIS as special counsel to conduct investigations of the Attorney Grievance Commission. Mr. Reed is a fellow of the State Bar of Michigan, and most important to us, he is

a member of the Board of Directors of the Michigan Supreme Court Historical Society. Mr. Reed.

MR. REED: Thank you, Mr. Riley. Mr. Chief Justice, Associate Justices, distinguished citizens and particularly distinguished grandchildren, on behalf of the Michigan Supreme Court Historical Society, let me express our sincere appreciation for what you have done today. You probably don't know the great anxiety which has attended board meetings in the past over when this portrait will be available for dedication. You have caused a certain calm and contentment in the society by your actions today.

A brief word about the fact that a mere clerk is addressing the Court on such an auspicious occasion. I have attended several portrait presentations and read the transcript of several others and I can identify no occasion in which a mere clerk has been asked to speak. It's a rather bold move if one thinks about it because those with whom we work closely and daily are in the best position to know us quite fully and to tell it like it was without the base alloy of varnish. So it is, however, in keeping with Justice SOURIS's temperament and view of life that it should be told as it is without varnish. But everyone in this room probably for a short period, and many people perhaps or some people perhaps for a long period, will regard this portrait as unusual. It has none of the trappings of office, and the judge is obviously in good humor. But it conveys the essence and soul of the man better than any portrait of him that I have observed.

He was—notwithstanding his genius, capacity for tremendous work, and brilliance in writing—basically a very decent, warm, loving human being. That side of him is not too frequently observed by persons who discuss his propensity to tell it like it is, irrespective of

the listener. Let me give you a personal reference, if you'll excuse it, that I think typifies something about the man. He discovered shortly after I began working for him that his law clerk had a one hour ride each way back and forth from home to the Detroit College of Law where his office was located. The school was very generous in donating two offices, one for him and one for his secretary, who was his lifelong secretary, and his clerks. And after about two weeks he said, "You have this very long ride and we don't live that far apart. Why don't I pick you up in the morning and bring you home at night." Now here is a high-powered lawyer, member of the Supreme Court, extremely busy. He wrote more than 350 opinions during his 8½ years on the bench, in demand as a speaker, and he wrote prolifically. But he took time to pick up his law clerk to save him the one-hour bus ride each way to work. It was that empathy for everyone that was really the essence of his life.

I got to meet his family. Christopher, who is here, and Stephen, who was at that time very young, and Stephen called me Mr. Weed, to which the judge would break out in laughter. And after about the second occasion, I really saw no great humor in the gross mispronunciation of my name but Justice SOURIS, as with many great minds and great men, was a great teacher. And he taught not directly, but indirectly and by example. And the lesson which he was conveying to me at the time and which I understood later was never be afraid to laugh at yourself. He would relate stories of everyday foibles with as much relish as the accomplishments.

He was, as the Chief Justice has indicated, a very successful trial lawyer. He was asked by the Governor to take a seat on the Wayne County bench for one year because there was a large field of candidates running

for the position of Judge Moynihan, who had died shortly before retirement, and the Governor did not want to make the hard choice and so he said would you go and be a circuit judge for one year and help clean up the docket. And he did that. The docket was a great mess at that time. He was known for having two jury trials simultaneously. While the first jury was deliberating, the second jury was being selected. And he was very effective.

He wanted to return to private practice and, as a matter of fact, the firm's announcements were printed and they were being mailed when he received a call from Governor Williams to meet him. And the Governor said to him, "I'm going to appoint you, if you will accept, to a vacancy on the Supreme Court." This occurred shortly before New Year's Day in 1959. The judge protested. He said, "I'm too young." And the Governor responded something to the effect, "You'll get over it."

He agreed to accept the appointment and, after it was announced in the paper and shortly before the first of the year, he called the Chief Justice, Mr. Justice DETHMERS, and he said, "Please send me the briefs and the records from the cases that are up for argument for the first few weeks in January 1960." And the Chief Justice responded, "You mean the records and briefs in your case that will be assigned to you?" And he said, "No, I want all of the records and briefs of all of the cases that are going to be argued in the next two weeks of January." And the Chief Justice said, "Well, we don't do that. We only send a copy of the briefs and records to the judge to whom the opinion is assigned for writing." Now, you will recall, those of you and us who practiced at that time we were required to file nine copies of a printed brief and nine copies of the record on appeal. Frequently, with some rare exceptions, only one copy

ever left the clerk's office except, after the case was over, one would be sent to the law library. The others languished until space requirements mandated they be discarded. Justice SOURIS said, "No, I want all of the briefs," and all of the records and the first week's briefs and records were forwarded to him. He read them over the New Year's holiday and he continued to receive them. And soon other justices were asking for them. They knew he had the briefs and records, he seemed to be up on every case, even those that were not assigned to him, and some very great legal minds—Justice EDWARDS, Justice SMITH, Justice BLACK, Justice KAVANAGH and others—they all had great legal minds but they began to ask—except Justice CARR, he was true to tradition to the end—they began to ask for the briefs and records.

The same was true of window matters. Now I don't know what they are called today, but in 1962 a window matter was an application for leave to appeal or a motion and the reason they were called window matters is that the Court was in the Capitol and the Capitol has very thick walls and the windows have very wide ledges, and, as motions and applications would come in, the clerk would lay them on the window. They were assigned, and by rotation, to the judges. Now at this time there was no Court of Appeals, there was only the Supreme Court, eight justices and eight clerks. Seven. Justice CARR, I think, was the justice who didn't always have a clerk. He resided just a few blocks from the courthouse and apparently considered the ability for quiet reflection on the walks to and from office a suitable substitute, at least agreeable to him. So there were eight justices and seven or eight clerks, and these were assigned in rotation and, again, although nine copies of a complete filed legal size, but this could be typed, application with the appropriate portions of the

record would reach the clerk's office, only one generally ever left and that was to the judge to whom it was assigned. And in those days the report on the window matter, that is yes we should grant leave or no we shouldn't, or yes we should grant rehearing, was delivered orally to the Court by the judge to whom it was assigned. THEODORE SOURIS, age thirty-three, new to the bench, said, "I want all of the window matter applications and I want to study them." And pretty soon he and Justice EDWARDS, and Justice TALBOT SMITH, and Justice BLACK, and Justice KAVANAGH had agreed that they would all review the window matters and that they would write a written report and they would share that report in advance of conference.

Now there is one other incident that occurred when this thirty-three-year-old, brilliant, young lawyer became a Supreme Court justice. He arrived in Lansing in January just before the 5th, the first day of argument, and he was assigned a desk in a room with Justice BLACK. One room and two desks. Space was at a premium then. And Justice BLACK said, "Tomorrow we have a case on the docket, it's *Stoliker v State Board of Canvassers*, and I've written this opinion"—it was more than fifty pages, greatly exceeded today's permissible brief limit, and he said, "I would like you to review this opinion and see if you can sign on to it tomorrow morning." And Justice SOURIS said, "I can't. I was a member of the State Board of Canvassers. As a matter of fact, I recently served as its chairman and I cannot participate in this decision." Justice BLACK responded, "Oh, yes you can, don't let that worry you. It's a great opinion." And he went home that night and he came back the next morning and before he was sworn in he said to Justice BLACK, "I considered what you said to me and I can't." As a matter of fact, Justice SOURIS was so particular about never conveying even a hint of undue

influence that he stayed at the Kellogg Center when he was in Lansing for court sessions so that he would not encounter litigants, litigants' attorneys, and lobbyists, and others in downtown Lansing when he was hearing cases. So a sense of the bench, his first case, the crier, I think it was Clyde Sprague, called the first case, *Stoliker v State Board of Canvassers*. Justice SOURIS got up and went into chambers. He would not even give the appearance of participating in any way, even to the extent of passively listening to the arguments. And when, I think, Clyde Sprague came in and said the argument is over, he came back, took his seat on the bench, Justice EDWARDS leaned over to him and said, "Did you hear what happened?" And he could sense that there was some tension in the courtroom, some feeling of excitement. Justice SOURIS said no, and before Justice EDWARDS could explain it to him, the next case was called. And then during recess he learned that Justice BLACK, as soon as oral arguments were concluded in that case, announced that he had filed his opinion with the court clerk in sufficient copies so that one would be available for each member of the press. Justice SOURIS was flabbergasted. He thought it was an affront to the justices, he thought it was an affront to the Court, because obviously the opinion had been written before the oral argument and had been written without consultation with other members of the Court. He was convinced that it would be dealt with. The conference of the justices concluded that day and Justice BLACK's opinion and its filing with the clerk was never mentioned. He thought well, tomorrow we'll take care of it. The second day, at the conclusion of conference, Justice BLACK's opinion had not been mentioned. They came back for the third day of argument and the third day of conference and at the conclusion, when he was convinced that no one was going to do anything,

Justice SOURIS said, "Excuse me, I have a motion. I move that Justice BLACK's opinion that has been filed with the clerk be stricken from the court records." That motion carried 5-3.

Now understand the significance of your grandfather's position. He's thirty-three years old, he's in his first case and first series of cases as a Supreme Court justice. He is in his first weeks as a Supreme Court justice and he institutes what amounts to a revolution in the Court. Because if one will read the opinions of the Court from the '30s, '40s, and '50s, you will find very few dissents because the Michigan Court at that time did not function as a true collegiate court. It functioned for a lot of years, for decades, as a court of eight individual justices writing opinions with whom other justices concurred unless it was an unusual case that struck them and they asked to see the records and the briefs. That is not an insignificant change. That is a sea change. Justice SOURIS, in a very short period of time after assuming the bench, was able, by example, to convince the Court to become a true collegiate appellate court. The litigants and the citizens of the state received a significant benefit and it is not really given the credence and publicity which it deserves.

Now Justice SOURIS spoke here, not here but in the other chambers, on three different occasions of the portrait presentation of TALBOT SMITH, GEORGE EDWARDS, and EUGENE BLACK. And at GEORGE EDWARDS's presentation, he referred to Justice EDWARDS as one of Plato's army of judges and he quoted Plato's admonition that a judge should not be young and his guide should be knowledge and not experience. THEODORE SOURIS proved that Plato was only half right, or perhaps that G. Mennen Williams was wiser than Plato.

Justice SOURIS was an advocate for the jury system, a real advocate for the jury system. He proposed that juries be impounded to make findings of fact in certain equity cases under certain limited circumstances. When thinking about my remarks today and thinking about Justice SOURIS's attitude toward juries, I was put in mind of something that was written by Richard Feynman, also I think in the 1960s. Professor Feynman was regarded as one of the world's greatest mathematical geniuses and theoretical physicist and Nobel prize winner. He wrote—actually it was in a letter supporting the application for tenure of the first woman professor at Cal Tech to be considered for tenure. He wrote something to this effect, "In physics, rarely is it the case that the truth is not surrounded by doubt. So much so should it be in the humanities where in order to be truth it must be surrounded by doubt." Justice SOURIS had the mind to grasp that profound concept, although I don't know if he ever read it. He knew that in law, under the American system of jurisprudence at least, truth is not some reference point on a cosmic scale. In law under the American system of jurisprudence, truth is best approximated by the careful consideration of the available evidence by a qualified assemblage of ordinary citizens. He deplored the reduction of the number of jurors from twelve to six; he deplored the idea that a verdict could be less than unanimous.

He wrote many cases, one of the most important that he wrote was a concurring opinion in the legislative apportionment decision *Scholle v Secretary of State*. He wrote other important decisions and made a great contribution to the Court in addition to the quiet revolution which he engineered when he began. And he resigned from the Court, he resigned before his term was up. Now there is a lot of folklore as to why he resigned and I have heard various versions of it from persons on the Board of Directors of the Historical

Society whose judgment I otherwise regard and some of the meanest or less charitable is that he thought he might lose the election and didn't want his opponent to win. Before there is anymore currency added to that speculation, and I think Karla will address it more in detail, let me give you my take on it from having spent a great deal of time, and as much as possible, and I picked his brain as often as I could, and I asked interminable questions. As a matter of fact, at one point our car that we traveled in was a stripped down Ford with rubber mats and no radio. He began carrying a portable battery-operated radio mounted on the dashboard. I'm sure it was to shut me up on occasion. And he was a member of the Court when there were only eight justices and seven or eight clerks. No commissioners. The first commissioner didn't come on board until 1965, and he knew that the Court was going to change and it was going to give up the very last vestiges of a territorial court. It was going to become a true appellate court. It was going to select the cases that it wanted to hear that were of significance to the jurisprudence of the state. And he knew that when the Court was cast purely in that role, that the opportunity for a split court, 4-4, or in some cases 3-3, would be devastating, devastating to the law. There was a case in which he participated shortly before he retired, where the Court split evenly. The issue was whether a mandamus should issue and poor Don Winters, the court clerk, had to resolve that issue. He didn't know whether to issue the mandamus because an equal number of justices supported it, or refuse it because an equal number opposed it. And Justice SOURIS knew that that condition, a 4-4 split, would be detrimental to the Court, the jurisprudence of the state, and he wanted the Court to become modern as soon as possible. And he knew that by his resignation that problem would be fixed, and it was so

typical of this warm, generous human being that he would sacrifice in order to establish what he thought was an important principle. I have to confess he also knew he could make a handsome living practicing law, which he succeeded to do. And his clients numbered some of the major corporations in the United States, and he was sought after for some of the most difficult problems, including disputes between upper echelons of management and other upper echelons of management in cases where it was thought that some official had done something detrimental to the interests of the corporation or perhaps even unethical. He was called in on the most difficult, knotty problems and he resolved them just as was referenced before, the issues with the Grievance Commission. He was an outstanding, wonderful, brilliant genius and he has deserved the right to laugh with us. We loved him.

MR. RILEY: Thank you very much, Dick. You can see what a great addition to the Michigan Supreme Court Historical Society it is to have Mr. Reed on our board. He is literally a fountain of information about history. We're going to have to reserve to another time Don Leonard's rebuttal on reducing the Court from eight to seven justices. Today is not the day to do it, but thank you, Dick, for that marvelous presentation and review of all the delightful things about Judge SOURIS. He truly was a great man and a great justice.

Now I would like to introduce to you Mrs. Karla Scherer, Justice SOURIS's wife for nearly ten years from September of '92 until his death in June of 2002. Ms. Scherer funded and founded the Karla Scherer Foundation in 1989. Its purpose is to provide scholarships for women wishing to obtain undergraduate or graduate degrees in economics or finance and she currently serves as Chairperson of the Karla Scherer Foundation.

Ms. Scherer is a frequent speaker on corporate governance matters in her own right and on problems confronting women in management. Karla.

KARLA SCHERER: Thank you, Mr. President. Honored justices of the Michigan Supreme Court, family, and friends of Justice SOURIS, I want to extend my warmest appreciation for your participation this morning.

You should all know, as does certainly Wally Riley, how difficult it was to get Ted to agree to having his portrait painted. Wally's entreaties predated 1997, the date the portrait was begun in Paris by the young German painter, Susanne Hay. Following Ted's resignation from the Court in 1968 until his death in 2002, he practiced law and under no circumstances did he want his portrait to hang in the Michigan Supreme Court during that time, feeling quite correctly that should he be arguing a case before the Court, it could perhaps give him an unfair advantage. Wally concurred, and once Ted made the decision to proceed, he was also quite definite that the portrait not display the usual accoutrements of judicial power—the black robes, the gavel, the law books. Elegant and reserved, admired for his intelligence, he nonetheless possessed warm humor, a wonderful deep laugh, and extraordinary sensitivity for the voiceless, the powerless among us. And so he told Susanne that he wanted to be painted relaxed and smiling, in a business suit standing behind his office desk chair with the vivid Greek blue background to reflect his heritage as a first generation Greek-American. In short, he wanted the portrait to reflect the happiness that he felt at that time in his life.

Ted and I made several trips to Paris for his sittings and those memories for me are tied up in this portrait —climbing the stairs to Susanne's 8th floor atelier on the Rue Affre, Ted holding her newborn son, Gaspard,

while she worked on details. Susanne was initially reluctant to take the commission. She was classically trained at the École Nationale Supérieure des Beaux Arts and preferred greater artistic freedom than portraiture generally allows. However, over the years, Ted and I had collected several oils and drawings, as had our daughter Allison, so she ultimately agreed.

He firmly insisted that rather than raising money for its commission, he pay for this unconventional and very personal portrait himself. In his final letter to me and to the children written one month before he died, Ted in his usual cryptic fashion requested a presentation "without the usual elaborate ceremony customary on such occasions. If you can sneak it through the back door of the Court, so much the better."

I must tell you that it is with sadness and some reluctance that I part with this portrait today. Ted bequeathed me a life interest in it and it has hung in our home and most recently in my office since its completion. However, Ted has eight grandchildren and I felt that they should have as full an understanding of their grandfather and his contribution as can be conveyed by an event such as today's dedication.

Who was this man whose likeness we are celebrating? His formative years were certainly not easy ones. His only sibling, a younger sister, died when he was ten years old. His father died when he was fourteen, quite suddenly, leaving Ted and his mother in financially perilous circumstances. He worked as many jobs as he could in high school—two paper routes a day, in the produce department of the local grocery store (they still remember him there). He was admitted to the University of Michigan at age seventeen with two very modest scholarships. In Ann Arbor it was once again an exhausting schedule balancing academics and work to

support himself, work that included loading railroad freight cars (this was a man who weighed 125 pounds at that time), waiting tables at a sorority house for meals, running blueprints for a professor in the engineering school.

After a year and a half, he was called to active duty in the Army Air Force where he was assigned to the Air Cadet Program, a program for pilots, navigators, and bombardiers. The Air Force had selected what it deemed to be the cream of the crop of available talent, moving them around the country for their training in and out of the classroom. Ted had the opportunity during this time to work during his free time at the Greenville, Mississippi base Courts and Boards office. And it was here that he came face to face with some of the uglier aspects of race relations in the south at that time. A black airman, home on leave from his base in Alaska, was arrested and jailed for months by the sheriff of Greenville, without the Air Force being notified. They simply assumed that he was AWOL. Ted and the young lieutenant in charge managed to free this man, a serviceman they had never before met, at great risk to their personal safety. Both men were transferred away from the base soon thereafter, but the official stated reason had nothing to do with what they had done for this man. It was an experience he never forgot and it had a powerful influence on him as both a lawyer and a judge.

In late 1945 he was released from the service and returned to the University of Michigan where, as Justice TAYLOR has told you, he completed what normally would have been a six-year curriculum, three years of undergraduate study and three years of law school, in $5^{1}/_{4}$ years. With money still tight, he went to school year round without a break. It was in Ann Arbor that he met

Mennen Williams while studying in the basement of the law library late one night. Mennen had come down to use the men's room. This chance meeting was the beginning of a lifelong friendship and a deep mutual respect that ultimately led to Ted's appointment to the Supreme Court by then Governor Williams more than a decade later.

I'd like to speak briefly about those court years, about some of the personal and philosophical highlights for Ted. In 1960 he was a judge on the Wayne County Circuit Court when Justice JOHN VOELKER a/k/a Robert Traver, author of the best seller *Anatomy of a Murder*, resigned and returned to his home in the U.P. to continue writing. Unfortunately, Mr. Traver did not come up with another best seller. When Governor Williams offered him the appointment to the Supreme Court, Ted was as surprised as everyone else. Only thirty-three years old, he would be the first American of Greek heritage to hold this position on any state Supreme Court. When he arrived in Lansing, he found a Court that had been criticized by the noted American jurist and Dean of the Harvard Law School, Roscoe Pound, as "having a bad eminence." Michigan Supreme Court decisions, as Dick has referred to, had been one-man—yes they were all men on the Court at that time—had been one-man decisions. In other words, the workload of the Court was divided among the justices and each justice was assigned on those cases in advance of oral argument. Until 1955 there were very few dissents and even fewer concurrences. According to Ted, everyone signed each other's opinions without bothering to review the records in those opinions. Justice TALBOT SMITH and later Ted, when he joined the Court, began to question this practice. He was frequently referred to as belonging to the so-called liberal wing of the Court along with Justices KAVANAGH, SMITH,

BLACK, and EDWARDS. Ted did not consider himself a radical member of the Court. Indeed, he believed that he was one of the most conservative. He insisted that the Court go back to first principles whenever they had a controversy involving statutory interpretation. Listen to his words on the subject. "What was our function? Our function was to determine what the Legislature intended by the language it used. When we started substituting our own notions of what the Legislature intended, then we were overstepping our bounds, and I was frequently critical of the Court for doing that."

In no sense, however, did Ted view the law as static. When I was a graduate student at the University of Chicago, I wrote a paper on the famous *MacPherson v Buick* case, a liability case heard in the New York Court of Appeals in 1916 before Judge Benjamin Cardozo. I assiduously avoided all discussion with Ted about this project. In fact, I didn't even know of his admiration for Judge Cardozo. What Judge Cardozo did in that case was to reconcile existing legal principles in a new way, citing, case by case, previous decisions that had supported an interpretation that was consistent with modern technology, in this instance the automobile. In the area of common law, Ted felt it was incumbent on the Court to modify or change its prior judgments if underlying social facts had changed. He felt that was the one area in which the Court could legitimately be creative and it was undoubtedly this belief that inflamed his critics, giving rise to charges of radicalism. He told Roger Lane in a 1990 interview and I quote, "When we dealt with the common law I felt that our role was much less restricted than it was when we were simply interpreting statutory law. When we were applying common law, we were in the arena of judge-made law and we had the obligation, in other words the power, to change that law when we were convinced that injustice was being

done by perpetuation of the rule the court itself had announced earlier in time."

Ted resigned from the Court in 1968 when he had to make a decision to run again for another full term. A change in Michigan's Constitution allowed him to do so without upsetting the balance of the Court. He was forty-two years old and wanted to get off the Court as early as 1963 to return to the practice of law. It was as a practicing lawyer that I met him. I had the opportunity to see him in action, to observe the intense dedication that he gave to the cases that he agreed to take. He loved the heat of battle and frequently told me that a successful lawyer is a warrior at heart. He was a totally loyal, trusted counselor to his long list of clients, and his aura of reasoned calm was reassuring to those whose future literally hung in balance. I remember telling him early on in my case that a certain conclusive point had to be self-evident in a court of law because it was manifestly just. He smiled and very patiently answered that there is no such thing as obvious justice. Only good lawyers make it so.

On behalf of my husband and our family, I would like to thank you for honoring him with this dedication. I think I can speak for them when I say that we are glad that we could openly and with enormous pride bring his portrait through the front door of this Court today. Thank you.

MR. RILEY: Karla, I'm sure that Ted would have been very proud of your personal tribute and your tribute on behalf of the family to him.

It is true that shortly after the society was formed and we took an inventory of our portraits, we discovered that one of those that we wanted to acquire at the earliest possible date was that of Justice SOURIS. I respected his decision not to have it painted and cer-

tainly not to have it hung while he was still practicing, but he later amended that to not have it hung while he was alive. I respected that. I never agreed and would not agree that it should come in the back door. It belongs and is entitled to the tributes that it received today because tributes are really tributes to him which he would have rejected but which he is entitled and those who loved him are entitled to hear. So, with that in mind, I am very happy that the society was finally able to acquire the portrait of Justice SOURIS and I'm equally pleased that he is smiling about what we did. So thank you very much.

That concludes our part of the proceedings. I understand that there is a reception that will be held on the ground floor of this building and that everyone who is present is invited. I understand also that the Court has scheduled, and is going to hold, public hearings, so the Court won't be able to attend, but we thank you for giving us this time this morning for allowing us to schedule and to schedule it at a time and place when not only Karla and Dick Reed were available, but also the grandchildren. Thank you.

CHIEF JUSTICE TAYLOR: Thank you, Mr. Riley. On behalf of the Court, I thank you for this portrait of Justice SOURIS. I also thank Ms. Scherer and Mr. Reed, who have shared with us their own portrait of memories, tributes to an extraordinary life. This portrait will now become not only a part of this Court's gallery of historic portraits, but a reminder of one of the most distinguished members of the Michigan bench and bar.

As a final matter, I would like to recognize two of our former colleagues who have joined us today, Justice JOHN FITZGERALD and Justice CHARLES LEVIN. We thank

them for joining us, and I also want to recognize our great friend, former Attorney General Frank Kelly. We are now adjourned.

SUPREME COURT CASES

In re NOECKER

Docket No. 124477. Argued October 6, 2004 (Calendar No. 9). Decided February 1, 2005.

The Judicial Tenure Commission (JTC) filed a complaint with the Supreme Court against James P. Noecker, a judge of the 45th Circuit Court, alleging judicial misconduct and conduct prejudicial to the administration of justice. A master found that the allegations of misconduct were credible. The JTC adopted the master's report and unanimously recommended that the Supreme Court remove the respondent from the bench. The JTC, in a split decision, recommended that the respondent be required to pay the costs that the JTC incurred in prosecuting the matter. Three members concurred and stated that the respondent should additionally be required to pay the costs incurred for visiting judges to hear the respondent's docket during his interim suspension. Three members concurred with the recommendation of removal but not with assessment of any costs.

In an opinion by Justice KELLY, joined by Chief Justice TAYLOR, Justice WEAVER in parts I through VI, and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

There is ample support for the master's findings of fact and conclusions of law. There was sufficient evidence to find the respondent guilty of judicial misconduct. The respondent left the scene of an automobile accident, was under the influence of alcohol when he drove his car into a store, attempted to deceive the police about the accident in an effort to avoid criminal prosecution, and misrepresented the cause of the accident to the Judicial Tenure Commission and the master to avoid professional discipline. Respondent's significant misrepresentations of the truth made in testimony and to the public, and the publicity surrounding the incident, have seriously eroded the public's confidence in him and in the judiciary. The respondent's conduct warrants his removal from the bench.

The master did not err in allowing an expert witness to testify regarding conduct typical of an alcoholic and the expert's personal interaction with the respondent.

The determination whether the assessment of costs is an appropriate sanction under the Michigan Constitution must be left

for another case. In this case, the respondent should not be required to pay costs because he had no notice of the standards for imposing them.

Justice YOUNG, joined by Chief Justice TAYLOR and Justice CORRIGAN, concurring, wrote separately to explain why he believes that removal from office is the appropriate sanction in this case. The respondent is unfit for judicial office because he initially lied to avoid responsibility for his action and, more damaging, continued to lie under oath before the Judicial Tenure Commission. This Court's primary concern in determining an appropriate sanction is to restore and maintain the dignity of the judiciary and to protect the public. The respondent lied under oath during the course of the Judicial Tenure Commission investigation. When a judge lies under oath, the judge has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others. Lying under oath by a judge goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.

Justice WEAVER, concurring in the removal of Judge Noecker from the bench, wrote separately to state that rather than rely on a lack of notice or standards, costs should not be assessed in this matter because it appears that the Court has no constitutional authority to assess a judge the costs of a Judicial Tenure Commission proceeding against the judge.

Justice MARKMAN, concurring, stated that he concurred with the results of the majority opinion and much of its analysis. The Supreme Court's power of review de novo does not prevent the Court from according proper deference to the processes of the Judicial Tenure Commission and its recommendation of a sanction. The commission has conscientiously considered the factors set forth in *In re Brown*, 461 Mich 1291 (2000), for determining an appropriate sanction and adequately articulated the bases for its findings. The commission identified a reasonable relationship between its findings and the recommended discipline and, therefore, is entitled to deference by the Supreme Court.

Justice CAVANAGH, dissenting, stated that the evidence does not support the decision by the majority to permanently remove the respondent from office. There is no proof that the respondent lied about the accident. There is inadequate support for the finding of the Judicial Tenure Commission that the respondent's admitted alcoholism caused his perceived administrative failures. The respondent should be suspended, without pay, for fifteen months. Costs should not be imposed on the respondent in light of the

commission's admission that its request for reimbursement is unprecedented and unsupported by the court rules.

Paul J. Fischer and *Thomas L. Prowse* for the Judicial Tenure Commission.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Peter D. Houk* and *Brian P. Morley*), for James P. Noecker.

KELLY, J. This appeal is from the recommendation of the Judicial Tenure Commission (JTC) that respondent 45th Circuit Judge James P. Noecker be removed from office and required to pay the costs of his prosecution. We determine that respondent should be removed from office but that costs should not be assessed against him.

I. FACTUAL BACKGROUND

On March 12, 2003, respondent was involved in a motor vehicle accident in Sturgis, Michigan. The vehicle he was driving turned from a road into the parking lot of a store, the Klinger Lake Trading Post. According to witnesses, respondent's vehicle neither accelerated nor decelerated. Rather, it maintained a speed of approximately three to five miles an hour. The vehicle hit the corner of the store, causing significant damage to the building and to the inventory in the store.

Respondent emerged from the vehicle, entered the store, and asked if anyone had been injured. The store's proprietor, Mrs. Pankey, was upset and repeatedly stated that she wanted someone to find her husband, who was ice fishing on a local lake. Although respondent lacked any information to assist him in the search for Mr. Pankey beyond the name of the lake, respondent left the scene of the accident. He claimed that he did so to help Mrs. Pankey.

No one indicated where on the lake Mr. Pankey was fishing. Respondent believed that he was near a fishing access, but was unsure where the access was located. Mrs. Pankey testified that respondent did not know what her husband looked like. He did not know what vehicle Mr. Pankey was driving. He did not even know the color of the coat Mr. Pankey was wearing.

Respondent testified that, in the course of his search, he first drove to the lake. He got out of the car to look around and saw two objects he presumed were people on the far side of the lake. He then spent several minutes considering whether he could walk across the ice. Deciding that it was unsafe, he returned to his vehicle.

Respondent said that he then stopped at another point along the lake, walked down to the water's edge, and tried unsuccessfully to find an access point. He saw five or six people in a cove and again considered whether it was safe to walk out on the ice. Deciding that it was unsafe, he drove farther around the lake to a gated area known as Camp Fort Hill. Unable to enter, he started back to the store, but decided instead to drive to his residence.

On arriving home, respondent told his wife about the accident, then called Mrs. Pankey. He testified that he wanted to ask Mrs. Pankey if she had heard from her husband, and, if not, he wanted to know the location of the lake's access point. He testified that he never got a chance to ask those questions, because as soon as he identified himself, Mrs. Pankey began screaming hysterically. She kept repeating, "You get back here." He told her he would return.

Respondent then learned that the state police were en route to his house to speak with him. He decided not to return to the store. He testified that his wife took his

blood pressure. The systolic reading was 220. Respondent did not call his doctor or the emergency room. Rather, he testified, he poured and drank three to five ounces of vodka. He testified that he knew that the police were coming to speak with him about the accident. But he stated that the effect that his consumption of alcohol would have on the officers' investigation of his car accident did not trouble him at the time.

When the police arrived at his home, respondent told them that he had consumed three to five ounces of vodka after returning from the search for Mr. Pankey. Respondent agreed to take a preliminary breath test. The breath test was administered approximately two hours after the accident. The reading was 0.10.[1]

A state trooper who investigated the accident at the scene, Craig Wheeler, testified that he was concerned that alcohol may have been a factor. Sergeant Steven Barker testified that there are generally three reasons people leave the scene of an accident: their license has been suspended, there is an outstanding arrest warrant for them, or they drank alcohol before the accident.

Sergeant Barker accompanied Trooper Wheeler to respondent's home on the night of the accident. He testified that respondent appeared to move away from him whenever he got close. One of the officers testified that, when he confronted respondent about an apparent inconsistency in his statement, respondent commented, "I know you are in a position to fry me." In addition to the testimony of Trooper Wheeler and Sergeant Barker,

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[1] This value refers to the amount of alcohol in an individual's system. At the time of the accident, Michigan law made it unlawful for someone to operate a vehicle where "[t]he person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine." MCL 257.625(1)(b).

several witnesses to the accident testified that it appeared that respondent had been drinking at the time of the accident.

Respondent gave conflicting stories about how the accident had occurred. One explanation was that he intended to depress the brake pedal, but accidentally pushed the accelerator when his shoe slipped. Another explanation was that, as he approached the building, he intended to brake, but he forgot that his foot was not on the brake pedal. Instead, he depressed the accelerator, which caused the vehicle to shoot forward and strike the building.

II. PROCEEDINGS BELOW

The events occurring after the March 12 accident, including respondent's conflicting explanations to the media, caused the JTC to issue a formal complaint against respondent.

The complaint may be summarized as alleging the following misconduct:

> 1. Persistent use of alcohol leading to a variety of violations of the Michigan Constitution, the Michigan Court Rules, and the Canons of Judicial Conduct.
>
> 2. Violations of the law and making false statements to the police regarding the events surrounding a motor vehicle accident on March 12, 2003.
>
> 3. Making false statements to the JTC.

The complaint may be summarized as alleging that respondent's conduct constituted:

> 1. Misconduct in office, as defined by Const 1963, art 6, § 30, as amended, and MCR 9.205;

2. Conduct clearly prejudicial to the administration of justice, as defined by Const 1963, art 6, § 30, as amended, and MCR 9.205;

3. Habitual intemperance, as defined by Const 1963, art 6, § 30, as amended, and MCR 9.205;

4. Persistent failure to perform judicial duties, as defined by Const 1963, art 6, § 30, as amended, and MCR 9.205;

5. Persistent neglect in the timely performance of judicial duties, contrary to MCR 9.205(B)(1)(b);

6. Irresponsible or improper conduct that erodes public confidence in the judiciary, contrary to the Code of Judicial Conduct, Canon 2(A);

7. Conduct involving impropriety and the appearance of impropriety, contrary to the Code of Judicial Conduct, Canon 2(A);

8. Failure to respect and observe the law, contrary to the Code of Judicial Conduct, Canon 2(B);

9. Conduct violative of MCR 9.104(A)(1), (2), and (3) in that such conduct,

(i) is prejudicial to the proper administration of justice,

(ii) exposes the legal profession or the court to obloquy, contempt, censure, or reproach, and

(iii) is contrary to justice, ethics, honesty, or good morals.

Retired Circuit Judge John N. Fields was appointed master in the case, heard evidence, and made forty specific findings of fact. On reviewing all the evidence, he concluded that respondent violated the court rules and canons listed above.

The JTC adopted the master's report and unanimously recommended that this Court remove respondent from the bench. In addition, in a split decision, it recommended that respondent be required to pay the costs that the JTC incurred in prosecuting the matter.

Three JTC members concurred. They thought that respondent should also be required to pay the costs incurred for visiting judges to hear respondent's docket during his interim suspension. A separate JTC concurrence/dissent agreed with the recommendation for removal, but argued that costs should not be assessed against respondent.[2]

III. ISSUES ON APPEAL

Respondent asks this Court to reject the JTC's recommendation. He asserts that there is insufficient evidence to find him guilty of judicial misconduct. He also argues that the master erred in allowing the introduction of improper expert evidence. Finally, respondent contests the recommendation that he be required to pay the costs of his prosecution.

IV. RELEVANT STANDARDS

We review the JTC's factual findings and its disciplinary recommendations de novo. *In re Chrzanowski*, 465 Mich 468, 478-479; 636 NW2d 758 (2001). The standard of proof in a judicial discipline proceeding is a preponderance of the evidence. *In re Loyd*, 424 Mich 514, 521-522; 384 NW2d 9 (1986).

V. THE COMMISSION'S RECOMMENDATION

In making its recommendation, the JTC applied the factors enunciated in *In re Brown*, 461 Mich 1291, 1292-1293 (2000). It listed each factor, relating it to the circumstances of the case. It explained how it weighed

[2] We shall refer to these opinions as they are titled. The concurring opinion will be referred to as the "JTC concurrence." The opinion objecting to requiring respondent to pay the costs of his prosecution will be referred to as the "JTC concurrence/dissent."

each factor for or against respondent. Furthermore, the JTC considered the fact that respondent has extensive prior involvement with the judicial disciplinary system, having been admonished on various occasions for failing to timely complete court work.

The JTC concluded that respondent's failure to be truthful regarding the automobile accident and its aftermath justifies his removal from office. It found that respondent misled the police and later provided inconsistent accounts of the events. Also, it found that he failed to offer credible testimony when under oath in the public hearing.

Furthermore, the JTC indicated that docket delays caused by respondent had a deleterious effect on the administration of justice in St. Joseph County. The JTC acknowledged that a number of attorneys testified in respondent's favor. But it noted that their testimony did not alter the fact that the court docket and the public suffered because of respondent's conduct. The JTC concluded that respondent is guilty of repeated serious misconduct that requires his removal from office.[3]

A. THE SUFFICIENCY OF THE EVIDENCE

The power to discipline a judge resides exclusively in this Court, but it is exercised on recommendation of the JTC. Const 1963, art 6, § 30. Respondent's complaints with regard to the master's factual findings amount to a disagreement about the weight and credibility that should be afforded to the various witnesses. The master, as trier of fact, was in the best position to assess the credibility of the witnesses. "Our power of review de

[3] The examiner indicated at oral argument that "[I]t's fair to say that if the crash had never taken place we would not necessarily be making a recommendation for removal . . . . I think the gravamen of this is the lying, and that truly should be the focus . . . ." We agree.

novo does not prevent us from according proper deference to the master's ability to observe the witnesses' demeanor and comment on their credibility." *In re Loyd*, *supra* at 535.

On review of the entire record, we agree with the master's findings of fact and conclusions of law. Respondent left the scene of an automobile accident. Eyewitnesses testified that respondent appeared intoxicated at the time of the accident. As a former prosecutor and a judge, respondent knew that he should have stayed at the scene of the accident. It is not credible that, after being made aware that the police were on their way to question him about his accident, he consumed alcohol.

We conclude that respondent was under the influence of alcohol when he ran his car into the store. We conclude that he attempted to deceive the police about this fact because he was motivated by a desire to avoid criminal prosecution. We conclude that he continued to misrepresent the cause of the accident to the JTC and the master, motivated in addition by a desire to avoid professional discipline.[4]

The preponderance of the evidence justifies a finding that respondent was guilty of judicial misconduct, notwithstanding the exculpatory evidence on which he relies. Nothing in the record suggests that Judge Fields erred in his findings and conclusions in any manner that would change the outcome of the proceedings. To the contrary, we believe that Judge Fields fairly and objectively presided over this case. Therefore, we agree

[4] One of respondent's more peculiar explanations for the cause of the accident occurred during his testimony before the master. There, respondent testified that he entered his vehicle through the passenger door and operated the vehicle while straddling the console because he had "mud on his shoes." Respondent indicated to the master that he "used his left foot to accelerate and brake because his right foot remained straddled over the center console."

with the JTC that respondent's significant misrepresentations of the truth made in testimony and to the public warrant disciplinary action.

B. THE QUALIFICATIONS OF THE EXPERT WITNESS

Respondent argues that the examiner's expert, Harvey Ager, M.D., was not qualified to testify. Dr. Ager is a psychiatrist who testified about the conduct typical of an alcoholic.

MRE 702 provides the rule for expert testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Respondent argues that Dr. Ager's failure to publish, present, or conduct peer review on the topic of alcoholism in the recent past disqualifies him from testifying as an expert. He is mistaken.

The master noted that, although Dr. Ager had not recently published or made presentations on the topic, there was evidence that he

> is a graduate of Wayne State University. That he is a board certified psychiatrist. That he is a former codirector of the alcoholism unit at Detroit Memorial Hospital. . . . [T]hat he has treated hundreds of individuals with respect to alcoholism. . . . I do find that his experience in this area in addition to his general medical training is such that he is qualified as an expert to testify and render an opinion regarding conduct consistent with alcoholism.

The master ruled that Dr. Ager could testify as long as his testimony conformed with the requirements of MRE 702. He noted that "there has been nothing here to suggest that this sort of testimony would not be based upon reliable principals [sic] and methods."

Dr. Ager's testimony conformed with the requirements of MRE 702. On the basis of his experience, he testified about what conduct is consistent with that of an alcoholic. He also testified about his personal interaction with respondent in a ninety-minute interview.

Contrary to respondent's assertions, Dr. Ager did not testify outside the bounds of his knowledge. He did not state that respondent's alcoholism caused his docket delays. He testified simply about the behavior one could expect from an alcoholic.

Dr. Ager did not view respondent's work product and did not comment on the quality of respondent's work. Nor was Dr. Ager introduced to testify regarding respondent's work product. The fact that Dr. Ager was unfamiliar with the work of respondent and the extent of Dr. Ager's experience with alcoholics go to the weight to be given his testimony. They are not determinative of whether his testimony conformed with the requirements of MRE 702.

We find that Dr. Ager qualified as an expert witness. His testimony complied with MRE 702 and, therefore, was admissible.

VI. APPROPRIATE DISCIPLINE

Having determined that the JTC proved the charges by a preponderance of the evidence, we must assess whether the recommended discipline is appropriate to the offense. "Our primary concern in determining the appropriate sanction is to restore and maintain the

dignity and impartiality of the judiciary and to protect the public." *In re Ferrara*, 458 Mich 350, 372; 582 NW2d 817 (1998).

Central to our decision to remove respondent is our conclusion that respondent misled the police, the public, and the JTC about his drinking on March 12, 2003. Respondent's insistence that he was sober at the time of the accident is not credible. His misrepresentations about being sober when he caused an automobile accident that carried civil and criminal consequences are antithetical to his judicial obligation to uphold the integrity of the judiciary. Respondent's repeated deception and the publicity surrounding the incident have seriously eroded the public's confidence in him and in the judiciary.

Unfortunately, we have on other occasions dealt with a judge's dishonesty. In *In re Ferrara*, *supra*, this Court determined that Judge Andrea J. Ferrara's conduct in misleading the master after her original alleged misconduct surfaced justified her removal from office. During the hearing on the complaint, Judge Ferrara twice attempted to introduce a fraudulent letter into evidence. We determined that her misrepresentations and deception eroded the public's trust and confidence in the judiciary. We found it necessary to remove Judge Ferrara from the bench in order to restore public trust and confidence. *Id.* at 373.

Likewise, the nature of respondent's lies, and the apparent motives behind them, have seriously harmed the integrity of the judiciary. Respondent's continued deception before the JTC has seriously undermined the public's faith that judges are as subject to the law as those who appear before them. His continued dishonesty with regard to the events of March 12, 2003, justifies his removal from office.

Furthermore, respondent's persistent docket problems, for which he was admonished on several occasions, violate the standards of judicial conduct. Were this proceeding solely about his docket problems, we would not find removal an appropriate form of discipline. However, respondent's deception surrounding the March 12 accident described herein warrants the harsh sanction of removal from office.

VII. THE ASSESSMENT OF COSTS

The Michigan Constitution created the Judicial Tenure Commission and outlines the power of the Michigan Supreme Court to discipline judges:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings. [Const 1963, art 6, § 30(2).]

Pursuant to this constitutional provision, the Court has promulgated court rules governing judicial discipline proceedings. As the JTC noted, no specific court rule or statute provides for imposing costs in judicial disciplinary matters.

We have imposed costs in several cases in the past. The JTC majority relies on those cases in support of its assessment of costs here. But those cases are not on point. In *In re Thompson,*[5] costs were recommended and ordered, but the judge did not contest them. Likewise,

[5] 470 Mich 1347 (2004).

in *In re Trudel*,[6] costs were ordered. By then, however, Judge Trudel had resigned from the bench. In *In re Cooley*,[7] Judge Cooley consented to the commission's decision and recommendation, including the assessment of costs. In the present action, respondent did not consent to the JTC's recommendation, nor has he resigned. Rather, he has challenged the JTC's findings and its recommendation that costs be assessed.

We agree with the JTC concurrence/dissent that a respondent is entitled to notice of what conduct will subject the respondent to the assessment of costs. Past decisions of this Court have not provided notice because they were issued without explanation of the standards used in assessing costs.

We agree with the JTC concurrence/dissent's observation:

> Respondent Noecker cannot be said to have been given notice of the standards to be applied and the type of expenses that could be assessed in this case. . . . The imposition of actual costs has been extremely rare in the history of reported cases. The commission has not set standards for the imposition of costs until today. Therefore, imposition of costs in this case, if the Supreme Court believes they are authorized by law, would violate the spirit of *In re Brown*.

Where a judge has been given no notice of the standards for imposing costs, the judge should not be made to pay them. We leave for another time the determination whether the assessment of costs is consistent with the Michigan Constitution. In this case, respondent should not be required to pay the costs of his prosecution because he had no notice of the standards for imposing them.

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[6] 468 Mich 1243 (2003).

[7] 454 Mich 1215 (1997).

We have opened an administrative file to consider the constitutional issue and the standards to be applied in the event costs can be assessed in these matters. ADM 2004-60.

VIII. CONCLUSION

After a careful examination of the evidence and an evaluation of the findings of fact, we conclude that removal of respondent from the bench is warranted.

We hereby order respondent removed from office. Pursuant to MCR 7.317(C)(3), the clerk is directed immediately to issue an order to that effect. No costs will be assessed.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with KELLY, J.

WEAVER, J., joined in parts I through VI.

YOUNG, J. (*concurring*). I fully concur in the majority opinion. I write separately, however, to explain why I believe removal to be the appropriate sanction in this case.

The purpose of Judicial Tenure Commission proceedings is not the punishment of the judge, but to maintain the integrity of the judicial process and to protect the citizenry from corruption and abuse. As such, this Court's primary concern in determining the appropriate sanction is to restore and maintain the dignity and impartiality of the judiciary and to protect the public.[1]

After reviewing the evidence in this case, I believe that the evidence establishes respondent was intoxi-

[1] *In re Jenkins*, 437 Mich 15; 465 NW2d 317 (1991); *In re Ferrara*, 458 Mich 350; 582 NW2d 817 (1998).

cated at the time of the collision. Respondent left the scene of the accident and constructed several inconsistent explanations in order to avoid criminal responsibility for his intoxicated driving. More egregious, respondent also lied *under oath* during the course of the Judicial Tenure Commission investigation, presumably in order to avoid judicial disciplinary consequences.

Our judicial system has long recognized the sanctity and importance of the oath.[2] An oath is a significant act, establishing that the oath taker promises to be truthful. As the "focal point of the administration of justice,"[3] a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others.

Certainly, Judicial Tenure Commission proceedings are intended to be remedial, not penal.[4] The vast majority of misconduct found by the Judicial Tenure Commission is not fatal; rather, it reflects oversight or poor judgment on the part of a fallible human being who is a judge. However, some misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege.

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[2] See *June v School Dist No 11*, 283 Mich 533, 537; 278 NW 676 (1938) (An oath is " '[a]n external pledge or asseveration, made in verification of statements made, or to be made, coupled with an appeal to a sacred or venerated object, in evidence of the serious and reverent state of mind of the party, or with an invocation to a supreme being to witness the words of the party, and to visit him with punishment if they be false.' ") (citation omitted).

[3] *In re Callanan*, 419 Mich 376, 386; 355 NW2d 69 (1984).

[4] *In re Probert*, 411 Mich 210; 308 NW2d 773 (1981).

Where a respondent judge readily acknowledges his shortcomings and is completely honest and forthcoming during the course of the Judicial Tenure Commission investigation, I believe that the sanction correspondingly can be less severe. However, where a respondent is not repentant, but engages in deceitful behavior during the course of a Judicial Tenure Commission disciplinary investigation, the sanction must be measurably greater. Lying under oath, as the respondent has been adjudged to have done, makes him unfit for judicial office.

It is for these reasons that I support respondent's removal from office.

TAYLOR, C.J., and CORRIGAN, J., concurred with YOUNG, J.

WEAVER, J. (*concurring*). I agree that Judge Noecker should be removed from the bench and join parts I-VI of the majority opinion. The accident, Judge Noecker's conduct following the accident, and his attempts to deceive the public and the police with incredible explanations of the accident are clearly prejudicial to the administration of justice and undermine the public's trust and confidence in the judiciary. Therefore, removal is the appropriate discipline.

I also concur in the result that Judge Noecker should not be assessed costs, but for different reasons. Rather than rely on a lack of notice or standards as the reason not to assess costs, I would not assess costs because it appears to me that this Court has no constitutional authority to assess the judge for the costs of the proceedings. Const 1963, art 6, § 30 provides that "the supreme court may censure, suspend with or without salary, retire or remove a judge . . . ." Nothing in this constitutional provision gives this Court any authority

to discipline the judge by assessing the judge the costs of the Judicial Tenure Commission proceedings against him or her.

MARKMAN, J. (*concurring*). I concur with the results of the majority opinion, as well as with much of its analysis. Had I been a member of the Judicial Tenure Commission (JTC), I might possibly have reached a different conclusion in terms of an appropriate sanction, for there is much with which I agree in the dissenting opinion. In particular, I agree with the dissenting opinion that more egregious behavior on the part of judges has, in the past, been met with less sanction than permanent removal. *Post* at 21. Further, I believe that the thirty-five years of honorable public service on the respondent's part deserve more consideration in the formulation of a sanction than, to my eye, has been given here.

Nonetheless, I concur with the majority opinion because, as it correctly notes, " '[o]ur power of review de novo does not prevent us from according proper deference' " to the processes of the JTC. *Ante* at 9-10 (citation omitted). While the majority emphasizes the deference due the " 'master's ability to observe the witnesses' demeanor and comment on their credibility,' "[1] *id*., I would also emphasize the deference due the commission in its recommendation of a sanction. In *In re Brown*, 461 Mich 1291 (2000), this Court directed the commission to more clearly articulate its standards in determining an appropriate judicial sanction, and we set forth a number of non-exclusive factors to be considered in this process. We stated in this regard:

[1] I concur with the majority in its conclusion that the master "fairly and objectively" presided over this case.

> As a constitutionally created state agency charged with making recommendations to this Court concerning matters of judicial discipline, the JTC is entitled, on the basis of its expertise, to deference both with respect to its findings of fact and its recommendations of sanction. However, such deference cannot be a matter of blind faith, but rather is a function of the JTC adequately articulating the bases for its findings and demonstrating that there is a reasonable relationship between such findings and the recommended discipline.
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> * * *
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> . . . Where standards of this sort have been promulgated and reasonably applied to individual cases, this Court owes considerable deference to the JTC. [461 Mich at 1292-1293.]

The commission here, in my judgment, has conscientiously evaluated the factors set forth in *Brown*, as well as additional factors, and has "adequately articulated the bases for its findings." Although personal consideration of these factors might have led me in the direction of the sanction set forth in the dissenting opinion, I cannot say that there is no "reasonable relationship between [the commission's] findings and the recommended discipline." Rather, I believe that the commission has identified such a relationship and therefore is entitled to deference by this Court.

It was proper for this Court to promulgate the *Brown* factors so that we could derive the "additional information necessary to perform [our] constitutional function of judicial discipline under Const 1963, art 6, § 30(2)." *Brown, supra* at 1291. Having promulgated these factors, and the commission having reasonably considered them, "proper deference" is now required on our part. While such deference is that which is owed to any executive or administrative agency, the constitutional

status of the commission, Const 1963, art 6, § 30, underscores the necessity of such deference in matters of judicial discipline. On the basis of such deference, I concur with the conclusions of the majority opinion.

CAVANAGH, J. (*dissenting*). Viewing all the alleged conduct at issue here, I cannot conclude that respondent's removal is warranted. Much more egregious behavior on the part of judges has been met with far less sanction than permanent removal. See *In re Hathaway*, 464 Mich 672; 630 NW2d 850 (2001) (suspending the judge for six months without pay for the judge's gross mishandling of three cases and overall "lack of industry"); *In re Brown (After Remand)*, 464 Mich 135; 626 NW2d 403 (2001) (suspending the judge for fifteen days without pay after finding that the judge misused the prestige of his office in addition to having four previous instances of misconduct); *In re Moore*, 464 Mich 98, 132-133; 626 NW2d 374 (2001)[1] (characterizing the judge's "pattern of persistent interference in and frequent interruption of the trial of cases; impatient, discourteous, critical, and sometimes severe attitudes toward jurors, witnesses, counsel, and others present in the courtroom; and use of a controversial tone and manner in addressing litigants, jurors, witnesses, and counsel" as warranting a six-month suspension without pay); and *In re Bennett*, 403 Mich 178; 267 NW2d 914 (1978) (refusing to remove the judge from the bench, despite finding that he engaged in "demonstrably serious" intemperance, instead imposing a one-year suspension without pay).

In *In re Seitz*, 441 Mich 590; 495 NW2d 559 (1993), on which the Judicial Tenure Commission (JTC) relies,

[1] I concurred, writing that I would have imposed the sanction of nine months without pay recommended by the Judicial Tenure Commission.

this Court removed the judge from office at the JTC's recommendation. I find that case easily distinguishable. Judge Seitz exhibited such unfathomable conduct toward his colleagues and staff for over ten years that it took this Court twenty-seven pages to delineate it. *Id.* at 594-621. He also engaged in felonious conduct by installing a wiretap on his phone. *Id.* at 597-599. Moreover, he abused his contempt power by deliberately ordering a person to ignore an administrative order of the chief judge and follow Judge Seitz's contradictory order instead. When the person refused to do so, Judge Seitz had him arrested and brought to the courtroom. There, the judge performed a mock hearing devoid of due process and had the person jailed. *Id.* at 599-604. Judge Seitz also had unprofessional personal relationships with his staff. *Id.* at 604-611.

The JTC points to one paragraph in *Seitz*, *supra* at 622, that pertained to the judge's failure to file reports with the State Court Administrative Office as support for its removal recommendation. But Judge Seitz's failures in that regard paled in comparison to his other conduct, and it is impossible to believe that his failure to file several reports alone would have resulted in his removal from the bench. Similarly here, where the two allegations are that respondent lied about the accident and failed to properly manage his docket, the JTC's removal request is extremely harsh.

The JTC relies on two cases, *In re Ferrara*, 458 Mich 350; 582 NW2d 817 (1998), and *In re Ryman*, 394 Mich 637; 232 NW2d 178 (1975), for the proposition that lying, by itself, is sufficient to remove respondent from the bench. But in both cited cases, more was at issue. For instance, in *Ferrara*, the misconduct charges stemmed from the revelation of eleven tapes on which the judge was recorded lashing horrific racial and ethnic

slurs at or about people in both her personal and professional life. This Court found that irrespective of the tapes, Judge Ferrara's conduct surrounding the investigation was grounds for removal. For instance, Judge Ferrara told the media and the JTC that the tapes were fabricated, and she attempted to admit a fraudulent letter twice, the second time after her first attempt was rejected. Additionally, the judge's conduct during the formal hearing was so " 'inappropriate, unprofessional, and demonstrat[ive of] a lack of respect for the judicial discipline proceedings,' " that this Court found the incidents too numerous to recount. *Ferrara, supra* at 370 (citation omitted).

Because of the severe and obvious nature of the judge's lies and her continuing disrespect for the judiciary, this Court concluded that removal was warranted, stating:

> We adopt the commission's recommendation and find respondent's untruthful and misleading statements to the public and press, her attempt to commit a fraud on the Court by twice attempting to introduce the Avela Smith letters, and her unprofessional and disrespectful conduct during each stage of the proceedings to constitute misconduct in violation of the court rules and judicial canons. [*Id.* at 372.]

Similarly, *Ryman*, *supra*, involved issues of backdating and improper signing of deeds, false testimony, allowing a court clerk to perform a magistrate's duties, and continuing the practice of law after becoming a judge. *Ryman, supra* at 642-643. In my opinion, neither *Ferrara* nor *Ryman* supports the JTC's assertion that a *suspected* lie is sufficient to remove a judge from office.

In sum, I do not believe there is support for permanently removing respondent from office. It seems that where a judge has been removed from office at least in

part for lying, the fact that the suspected lies were indeed lies was uncontroverted. Here, though, while respondent's story about the accident is undeniably suspicious, there is no proof that respondent lied. Without more than speculation that respondent was being untruthful in denying that he drank before he drove, the most severe punishment hardly seems fitting.

Additionally, I do not think that the JTC adequately supported a finding that respondent's admitted alcoholism caused his perceived administrative failures. The logic behind the asserted causal connection was flawed: even though respondent admits abusing alcohol, it does not necessarily follow that his shortcomings on the job are related to that abuse. The expert testimony did nothing to assist in establishing the link between alcohol abuse and work performance. If anything, Dr. Miller's testimony blurred the connection by pointing to a possible obsessive-compulsive disorder as the cause of respondent's work-related problems.

In any event, respondent had plausible explanations for at least some of his work-related behavior. And no one has ever seen respondent drinking or drunk on the job, including his long-time clerk. No attorney testified negatively about respondent's behavior in court, and some offered reasons for case delays that were totally unrelated to respondent. And notably, the JTC admitted at oral argument that its inclusion of these work-related shortcomings were but "a footnote" to the gravamen of its investigation, the accident.

I, therefore, cannot accept the JTC's recommendation of removal. Although I believe that its finding that the crash was alcohol-related is supported on the record, a much lesser sanction is warranted, and the sanction should be tailored to that particular event. As

such, I would suspend respondent, without pay, for a period of fifteen months, until May 1, 2006.

In light of my conclusions, I do not see grounds for imposing the costs of the JTC's prosecution on respondent, particularly in light of its admission that its request for reimbursement is unprecedented and unsupported by the court rules.

PEOPLE v JENKINS

Docket No. 125141. Decided February 1, 2005. On application by the prosecution for leave to appeal, the Supreme Court, in lieu of granting leave, reversed the decision of the Court of Appeals and remanded the case to the circuit court.

Shawn L. Jenkins was charged in the Washtenaw Circuit Court with several felonies. The court, Donald E. Shelton, J., after an evidentiary hearing, determined that certain evidence was obtained while the defendant was seized for purposes of the Fourth Amendment before a reasonable suspicion to support an investigative stop had formed, suppressed the evidence, and dismissed the case. The Court of Appeals, BANDSTRA, P.J., and BORRELLO, J. (HOEKSTRA, J., dissenting), in an unpublished opinion per curiam, issued November 18, 2003, and on the specific facts of this case, affirmed the suppression and the consequent dismissal after concluding that the seizure of the defendant occurred when the police officer asked the defendant for identification (Docket No. 240947). The prosecution sought leave to appeal.

In an opinion per curiam, signed by Chief Justice TAYLOR, and Justices WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The police officer did not seize the defendant by requesting and receiving his identification in a consensual meeting. The Fourth Amendment was not implicated until the officer seized the defendant by hindering his attempt to leave while a check on the Law Enforcement Information Network (LEIN) was ongoing. By that time, the officer had a reasonable suspicion to make an investigatory stop because the defendant was in an area known for crime and illicit drugs, a woman had challenged the defendant's unconsented-to presence on the front steps of her dwelling, the defendant appeared to be nervous about the LEIN check and attempted to walk away from the officer, and various persons invited the defendant into their homes to offer him protection from further police questioning. Considering the totality of the circumstances, the officer had a reasonable suspicion sufficient to warrant transforming the consensual encounter into an investiga-

tory stop and briefly detaining the defendant until the completion of the LEIN check that disclosed an outstanding warrant for the defendant's arrest.

Reversed and remanded to the circuit court for reinstatement of the charges and for further proceedings.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that the defendant was detained at the point when the LEIN check was initiated. At that point, the officers did not have a reasonable suspicion of criminal activity. By confiscating the defendant's identification card and beginning an investigation without the defendant's consent, the officers turned the otherwise voluntary encounter into a detention. By their conduct the officers effectively conveyed to the defendant that he was not free to leave. The defendant was illegally seized without reasonable suspicion or probable cause. The judgment of the Court of Appeals should be affirmed.

SEARCHES AND SEIZURES — FOURTH AMENDMENT — CONSENSUAL STOP — INVESTIGATORY STOP — REASONABLE SUSPICION.

The Fourth Amendment is not implicated when an officer, in the ordinary course of his duties, asks a person to provide identification; therefore, a police officer is not required to have a reasonable suspicion of criminal activity before requesting identification (US Const, Am IV; Const 1963, art 1, § 11).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Brian L. Mackie*, Prosecuting Attorney, and *Mark Kneisel*, Assistant Prosecuting Attorney, for the people.

Lloyd E. Powell, Chief Public Defender, and *Timothy R. Niemann*, First Assistant Public Defender, for the defendant.

PER CURIAM. This case requires us to consider when defendant's consensual encounter with a police officer was transformed into an investigatory stop, which gives rise to Fourth Amendment protections and must be supported by reasonable suspicion. Defendant argues that the officer seized him without reasonable suspicion to do so. The trial court agreed, granting defendant's

motion to suppress the incriminating evidence later found by the officer and dismissing the pending charges. The Court of Appeals affirmed.

We conclude that defendant was not "seized" within the meaning of the Fourth Amendment until after the totality of the circumstances gave the officer a reasonable suspicion that defendant had been engaged in criminal behavior. Accordingly, the trial court erred when it granted defendant's motion. We reverse the judgment of the Court of Appeals and remand this case to the trial court for reinstatement of the charges brought against defendant and for further proceedings.

I. BACKGROUND

During the evening of August 23, 2001, the Ann Arbor Police Department received a complaint regarding a party in progress in the common area of a housing complex on North Maple Road. Officers Geoffrey Spickard and Jeff Lind were dispatched to the housing complex, which was known to the police as a high crime and drug area. Upon their arrival, they found a gathering of fifteen to twenty people drinking and talking loudly. Defendant and another man were seated on stairs leading to one of the housing units.

Officer Spickard approached defendant, and the two engaged in a general conversation about the party. At that point, a woman emerged from the attached housing unit and, using profane language, asked defendant who he was and why he was seated on her porch. After hearing this, Officer Spickard asked defendant if he lived in the housing complex. Defendant said that he did not, and Officer Spickard asked to see defendant's identification. When defendant handed over his state identification card, Officer Spickard pulled out his personal radio and started to place a call to the Law Enforcement Information Network (LEIN).

Defendant's behavior immediately changed.[1] He became obviously nervous and made furtive gestures toward a large pocket on the side of his pants. He began to walk away, despite the fact that Officer Spickard still held his identification card and was speaking to him.[2] Several residents of the housing complex called out invitations for defendant to enter their homes.

At that point, Officer Spickard and his partner walked alongside defendant, encouraging him to wait for the results of the LEIN inquiry. When defendant did not stop, Officer Spickard placed a hand on defendant's back and told him that he was not free to leave.

The LEIN inquiry revealed an outstanding warrant for defendant's arrest. As Officer Spickard was placing defendant in handcuffs, a gun fell from defendant's waistband to the ground.

II. PROCEDURAL HISTORY

Defendant was charged with carrying a concealed weapon, MCL 750.227; possession of a firearm by a

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[1] The dissent fails to note these changes in defendant's behavior. *Post* at 38. The dissent may view these facts as irrelevant but, when the governing Fourth Amendment principles are correctly applied, these changes in defendant's behavior support the officers' ultimate decision to seize the defendant.

[2] This fact is also omitted from the dissent's analysis. Thus, while the dissent concludes that no reasonable person would walk away under the circumstances, *post* at 41, this view was obviously not shared by the defendant, who walked away "under those circumstances."

That Justice CAVANAGH finds our reference to the record "enigmatic[]" and "befuddl[ing]," *post* at 41 n 9, demonstrates the dissent's belief that we are entitled to rewrite the events underlying this appeal with an unrealistic legal formalism. It is only with a lawyer's armchair detachment that the dissent can hypothesize about what a "reasonable person" would do while ignoring the actions of the individual who *actually* observed the officers' conduct and whose liberty was *actually* at stake.

felon, MCL 750.224f; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He moved to suppress the evidence on Fourth Amendment grounds and sought dismissal of the charges.

The trial court held an evidentiary hearing at which both Officer Spickard and defendant testified. The trial court considered Officer Spickard's testimony and determined that, for purposes of the Fourth Amendment, defendant was "seized" when he was asked for identification. In reaching this conclusion, the trial court relied on Officer Spickard's testimony that he believed that defendant was not free to leave at that point. The trial court concluded that the officer did not have a reasonable suspicion to support such an investigative stop. It granted defendant's motion to suppress evidence and dismissed the case.

A divided Court of Appeals panel affirmed.[3] The majority agreed with the trial court that Officer Spickard seized defendant when he asked defendant for identification.[4] It concluded that the seizure was not supported by a reasonable suspicion because defendant was seated in a public area, was not engaged in the conduct for which the officers were summoned, and "forthrightly" answered the officer's questions. As a result, the majority held that defendant's Fourth Amendment rights were violated and that the trial court properly granted defendant's motion to suppress the evidence.

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[3] Unpublished opinion per curiam, issued November 18, 2003 (Docket No. 240947).

[4] The majority criticized the trial court's reliance on Officer Spickard's subjective belief that defendant was not free to leave once he had been asked to produce identification, but concluded that there was objective evidence as well to support this conclusion. We disagree.

The dissenting judge, on the other hand, determined that the initial encounter, including Officer Spickard's request for defendant's identification, did not constitute an investigatory stop. The dissent further concluded that subsequent events gave rise to a reasonable suspicion of possible criminal activity and entitled Officer Spickard to transform the encounter into an investigatory stop.

The prosecutor seeks leave to appeal in this Court. After hearing oral argument from both parties on the prosecution's application for leave to appeal, we have determined that the judgment of the Court of Appeals must be reversed and that this matter must be remanded to the trial court for reinstatement of the charges against defendant and further proceedings.

III. STANDARD OF REVIEW

This Court reviews a trial court's factual findings in a suppression hearing for clear error. *People v Custer*, 465 Mich 319, 325-326; 630 NW2d 870 (2001). But the "[a]pplication of constitutional standards by the trial court is not entitled to the same deference as factual findings." *People v Nelson*, 443 Mich 626, 631 n 7; 505 NW2d 266 (1993). Application of the exclusionary rule to a Fourth Amendment violation is a question of law that is reviewed de novo. *Custer, supra* at 326.

IV. ANALYSIS

The United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11.[5]

[5] Cf. *Harvey v Michigan*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003).

Under certain circumstances, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest. *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). A brief detention does not violate the Fourth Amendment if the officer has a reasonably articulable suspicion that criminal activity is afoot. *Custer*, *supra* at 327; *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001); *Terry*, *supra* at 30-31. Whether an officer has a reasonable suspicion to make such an investigatory stop is determined case by case, on the basis of an analysis of the totality of the facts and circumstances. *Oliver*, *supra* at 192. A determination regarding whether a reasonable suspicion exists " 'must be based on commonsense judgments and inferences about human behavior.' " *Id*. at 197 (citation omitted).

Of course, not every encounter between a police officer and a citizen requires this level of constitutional justification. A "seizure" within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave.[6] *People v Mamon*, 435

[6] Justice CAVANAGH recognizes that this inquiry is an objective one, but asserts that "an officer's subjective intent *is* relevant to the extent that it may have been conveyed to the defendant by the words or actions of the officer." *Post* at 41. Justice CAVANAGH relies on a proposition that secured only two votes in *United States v Mendenhall,* 446 US 544, 554 n 6; 100 S Ct 1870; 64 L Ed 2d 497 (1980). Also, he appears to misunderstand the meaning of this passage. *Mendenhall* simply recognizes that an officer's subjective intent may be relevant if it is *objectively* manifested. In other words, it restates the principle that only *objective* conduct and circumstances are relevant for Fourth Amendment purposes.

The dissent errs, therefore, by asserting that Officer Spickard's subjective beliefs are relevant without determining whether those subjective beliefs were, in fact, objectively manifested. Instead, the dissent "presume[s]" that the officer's beliefs were apparent to defendant.

Mich 1, 11; 457 NW2d 623 (1990). When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized. *Florida v Royer*, 460 US 491, 497-498; 103 S Ct 1319; 75 L Ed 2d 229 (1983) (plurality opinion).

Here, Officer Spickard's initial encounter with defendant was consensual. Officer Spickard did not seize defendant when he asked whether defendant lived in the housing complex, nor did he seize defendant when he asked for identification. No evidence indicated that Officer Spickard told defendant at this juncture to remain where he was or that defendant was required to answer the officer's questions.

Asking such questions to elicit voluntary information from private citizens is an essential part of police investigations. *Hiibel v Sixth Judicial Dist Court of Nevada*, 542 US 177; 124 S Ct 2451; 159 L Ed 2d 292 (2004). "In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment." 542 US ___; 124 S Ct 2458; 159 L Ed 2d 302; see also *Royer, supra* at 501. As the United States Supreme Court has recognized, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response." *Immigration & Naturalization Service v Delgado*, 466 US 210, 216; 104 S Ct 1758; 80 L Ed 2d 247 (1984).

This summary of governing Fourth Amendment principles demonstrates that the Court of Appeals ma-

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Post at 42. Assuming arguendo that we are entitled to insert our presumptions into the record, Justice CAVANAGH's presumption is disproved by the fact that defendant *himself* walked away from the officers during the LEIN check.

jority erred when it analyzed the initial conversation between Officer Spickard and defendant, and Officer Spickard's request for identification, as if the protections of the Fourth Amendment were implicated. The Fourth Amendment was not implicated until Officer Spickard actually hindered defendant's attempt to leave the scene, thereby "seizing" him within the meaning of the Fourth Amendment. Specifically, this "seizure" occurred when Officer Spickard followed defendant as he tried to walk away, orally discouraged him from leaving, and, finally, put a hand on his back and told him to wait for the results of the LEIN inquiry. This point—when Officer Spickard physically hindered defendant's departure and instructed him to stay in the officer's presence—is the earliest at which a reasonable person might have concluded that he was not free to leave.

By this point, however, Officer Spickard had a reasonable suspicion to make an investigatory stop. First, the officer knew that a female resident had challenged defendant's unconsented-to presence on her front porch. Second, when defendant saw that Officer Spickard was initiating a LEIN inquiry, he immediately began to act nervously and reached toward his pocket.[7] Third, defendant attempted to walk away from the officer, apparently so intent on leaving that he was willing to lose possession of his identification card.[8] Fourth, although defendant did not live in the area, various people invited him into their homes, offering

[7] This Court and the United States Supreme Court agree that " 'nervous, evasive behavior is a pertinent factor in determining reasonable suspicion.' " *Oliver*, *supra* at 197, quoting *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000).

[8] Presence in a high crime area coupled with unprovoked flight can also give rise to a reasonable suspicion to support an investigatory stop. *Oliver*, *supra* at 197.

him protection from further police questioning.[9] Considering the totality of these circumstances, Officer Spickard had a reasonable suspicion sufficient to warrant transforming the consensual encounter into an investigatory stop and briefly detaining defendant until the LEIN inquiry could be completed.

V. CONCLUSION

The Court of Appeals erred when it affirmed the trial court's conclusion that defendant's Fourth Amendment rights were violated and that the incriminating evidence produced by the investigative stop in this case should be suppressed. We reverse the judgment of the Court of Appeals and remand this case to the trial court for reinstatement of the charges against defendant and for further proceedings consistent with this opinion.

TAYLOR, C.J., and WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

CAVANAGH, J. (*dissenting*). Despite recognizing that a police officer must have a reasonably articulable suspicion that criminal activity is afoot before detaining a person, today's majority incorrectly identifies the point at which defendant was seized to justify a detention based on suspicions formed after the detention occurred. Because defendant was seized without reasonable suspicion, and because the Fourth Amendment expressly prohibits using after-acquired suspicions to justify a seizure, *Florida v JL*, 529 US 266, 271-272; 120 S Ct 1375; 146 L Ed 2d 254 (2000), I respectfully dissent.

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[9] An experienced officer could infer that these bystanders had reason to know that defendant desired to avoid further police scrutiny. This inference adds to the quantum of evidence supporting the conclusion that Officer Spickard had reasonable suspicion to detain defendant.

The Search and Seizure Clause of both the United States Constitution and the Michigan Constitution[1] protects individuals against unreasonable searches and seizures conducted by governmental actors. *Whren v United States*, 517 US 806, 809-810; 116 S Ct 1769; 135 L Ed 2d 89 (1996); *People v Shabaz*, 424 Mich 42, 52; 378 NW2d 451 (1985). Before detaining an individual, a police officer must have a particularized and objective basis for suspecting criminal activity by the particular person detained. *Shabaz, supra* at 59. An "inchoate and unparticularized suspicion or 'hunch' " is an insufficient basis for seizing a person. *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Rather, the officer must have at least "a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to be engaged in criminal wrongdoing." *Shabaz*, *supra* at 59. "As long as the person to whom questions are put remains free to disregard the questions and walk away," there has been no Fourth Amendment violation. *United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980). But at the moment that person is restrained, he is seized. *Terry*, *supra* at 16.

Generally, " 'a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' " *California v Hodari D*, 499 US 621, 627-628; 111 S Ct 1547; 113 L Ed 2d 690 (1991), quoting *Mendenhall*, *supra* at 554. Where a seizure by show of authority is alleged, rather than a seizure by physical force, the test "is an objective one: not whether the citizen perceived that he was being ordered to restrict

[1] US Const, Am IV; Const 1963, art 1, § 11.

his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Hodari D*, *supra* at 628.

Interestingly, the majority concludes that defendant was not seized until the officers *physically* restrained defendant after he tried to walk away. But the majority ignores that a seizure can also occur by a police officer's show of authority. The majority states, "When an officer approaches a person and seeks voluntary cooperation through noncoercive questioning, there is no restraint on that person's liberty, and the person is not seized." *Ante* at 33, citing *Florida v Royer*, 460 US 491, 497-498; 103 S Ct 1319; 75 L Ed 2d 229 (1983). I agree that the initial questioning and the officers' request to see defendant's identification were part of a consensual citizen-police encounter. But the majority fails to address the next critical event—the LEIN[2] check—and instead jumps to events that occurred while the LEIN check was in progress.

On the evening in question, Officer Geoffrey Spickard and his partner responded to an Ann Arbor housing complex after receiving a complaint about a large group of people drinking and being loud in the complex's courtyard. When the officers arrived, they observed fifteen to twenty people engaged in those activities. Nonetheless, they bypassed those people and approached defendant and another gentleman who were sitting quietly on some steps and who were not drinking. According to Officer Spickard's preliminary examination testimony, he approached these particular two gentlemen because he did not recognize them. At the suppression hearing, however, he testified that he approached them because he believed

[2] Law Enforcement Information Network.

defendant's companion resided at the apartment connected to the steps on which he was sitting, and the officer wanted to ask him some questions about the gathering. Officer Spickard testified that while he was talking to the gentlemen, a woman opened the adjacent door, asked defendant who he was and why he was on her porch, and retreated inside.

Thus, according to Officer Spickard, he initially asked for defendant's identification because he suspected that defendant might not belong at the complex, and he wanted to determine where defendant lived. Defendant voluntarily informed him that he did not live in the complex, and he voluntarily gave him his facially valid identification card. At that point, any suspicions the officers had about where defendant lived were resolved, and there was no need to detain defendant.[3] Of course, the officers were free to continue the consensual encounter by asking defendant additional questions, such as why he was there, but, instead, they confiscated the identification card and, without requesting permission, initiated a LEIN check.[4]

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[3] The majority apparently does not contest that there was no need to detain defendant because it does not find that the officers had reasonable suspicion to detain defendant at the time of the LEIN check. See *ante* at 34. And at the suppression hearing, Officer Spickard offered no rationale whatsoever that would indicate that he or his partner had a reasonable suspicion that any other sort of criminal activity was afoot.

[4] The majority claims that I "fail[] to note" changes in defendant's behavior that occurred after the officers began the LEIN check, and that I thus erroneously fail to properly assess the facts supporting reasonable suspicion. *Ante* at 29 n 1. Apparently, the majority misses my point that at the time those subsequent behaviors occurred, defendant had already been seized. Thus, not only do those behaviors add nothing to the analysis whether the officers had reasonable suspicion at the time of the seizure, but considering subsequent behavior violates the United States Supreme Court's clear prohibition on using after-acquired suspicions in a totality of the circumstances analysis. See *Florida v JL, supra* at 271-272.

The LEIN check in this case was not only nonconsensual, but it was more than a momentary detention.[5] A person " 'may not be detained even momentarily without reasonable, objective grounds for doing so . . . .' " *Shabaz*, *supra* at 57, quoting *Royer*, *supra* at 498. When the trespass theory is discounted, as it should be,[6] even the majority can find no facts that support a finding that the officers had reasonable suspicion of criminal activity when the LEIN check was initiated.[7]

The situation that occurs when an officer asks for identification and a person produces it involves a question and a response, an exchange that can be fairly

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[5] In fact, in this case, the wait for the LEIN check results was unusually long because the police dispatcher was busy.

[6] MCL 750.552, in relevant part, defines trespass as follows:

> Any person who shall wilfully enter, upon the lands or premises of another without lawful authority, after having been forbidden so to do by the owner or occupant, agent or servant of the owner or occupant, or any person being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, the agent or servant of either, who without lawful authority neglects or refuses to depart therefrom, shall be guilty of a misdemeanor . . . .

Of course, a LEIN check would not assist the officers in determining whether the putative occupant had previously asked defendant to leave, and the officers had not seen the putative occupant ask defendant to leave. Thus, any alleged suspicion of trespass was unrelated to the LEIN check and the subsequent detention.

[7] The officers would find out later that defendant was there visiting his two daughters, who did live in the complex. While that fact has no direct bearing on this analysis, Officer Spickard claimed that he continued speaking with defendant because he suspected him of trespassing. But the fact that the officers did not elicit this information from defendant, which could have been obtained by asking the simple question, "Why are you here?", but instead chose to run a LEIN check, which would not answer the question, supports defendant's theory that the officers were acting on inchoate suspicions unrelated to trespass.

characterized as a "consensual encounter" as that term is used in Fourth Amendment context. But here the officers' next action did not involve a question to which defendant had the opportunity to choose to respond. The exchange had ceased. By confiscating defendant's identification card and beginning an investigation, the officers turned the otherwise voluntary encounter into a detention. By skirting that issue entirely, the majority fails to correctly identify the point at which defendant was seized.

Using the objective test set forth in *Hodari D*, *supra* at 628, the focus must be on whether, when the LEIN check began, "the officer's words and actions would have conveyed" to a reasonable person that he was being seized. "[T]he threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled" are some circumstances that suggest that a seizure has occurred. *Mendenhall*, *supra* at 554.

Here, two uniformed, armed police officers, who had already resolved their initial concern about defendant's residence, nonetheless retained defendant's identification card and initiated a LEIN check with no particularized, articulable basis for doing so.[8] The officers' actions would have objectively conveyed to a reasonable

[8] This particular situation differs from those in which our courts have considered LEIN checks run in the course of lawful vehicle stops. See, e.g., *People v Davis*, 250 Mich App 357, 367-368; 649 NW2d 94 (2002), and *People v Walker*, 58 Mich App 519, 523-524; 228 NW2d 443 (1975). In those cases, the officers already had reasonable suspicion and conducted LEIN checks in furtherance of their initial stop. Here, the officers conducted the LEIN check without first having reasonable suspicion to make the detention.

person that the person was not free to leave, and I cannot conceive of a reasonable person who would feel free to walk away under those circumstances.[9] The critical distinction between this and a consensual encounter is that defendant was no longer being asked questions he could refuse to answer.

Moreover, an officer's subjective intent *is* relevant to the extent that it may have been conveyed to the defendant by the words or actions of the officer. *Mendenhall*, *supra* at 554 n 6. In the following testimony, Officer Spickard confirmed that defendant was not free to leave once he initiated the LEIN check:

> *Q.* [*Defense counsel*]: At the point that you approached Mr. Jenkins and asked him for his I.D., he was not free to leave at that point, correct?
>
> *A.* [*Officer Spickard*]: That would be correct.
>
> *Q.* And if he would have tried to run away, you would have run after him, correct?
>
> *A.* That would be correct.
>
> *Q.* And if he would have tried to run away, you would have stopped him?
>
> *A.* That would be correct.
>
> *Q.* And, in fact, as you testified on direct, you encouraged him throughout this whole encounter to stick around?
>
> *A.* Correct.

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[9] The majority enigmatically states that while I "conclude[] that no reasonable person would walk away under the circumstances, this view was obviously not shared by the defendant, who walked away 'under those circumstances.' " *Ante* at 29 n 2. Not only am I befuddled at what this lends to the majority's analysis, it seems to assume that I state that defendant was a reasonable person. I do not. Moreover, the test to determine when a person was seized does not consider the defendant's subjective feelings or actions; rather, it asks whether a reasonable person in defendant's position would feel free to leave. *Hodari D, supra* at 627-628.

Q. Because you wanted to see what the results were of the LEIN check?

A. Correct.

Q. And he was never free to leave throughout that entire encounter?

A. I would characterize that as correct.

Q. And he was never able to get his I.D. back from you, correct?

A. I believe we maintained possession of his identification, yes.

* * *

Q. And if he had asked you for the I.D. back at that point, you would have said no?

A. Pending the results of the LEIN check, yes.

Officer Spickard was an experienced officer with a ten-year history with the Ann Arbor Police Department. It is reasonable to presume that these officers, by their conduct and by withholding defendant's identification card, were effectively conveying to defendant that he was not free to leave.[10]

The officers could have easily avoided offending the Fourth Amendment. They could have extended the exchange by asking defendant if he had any warrants, thereby giving defendant an opportunity to answer "yes" or "no" or refuse to answer altogether. They could have then asked him if he minded if they checked. Again, defendant could have answered or refused to

[10] The majority misreads my analysis by concluding that I find the officers' subjective beliefs, without more, material. But what I conclude is that the officers' show of authority, actions, words, and conduct were objective manifestations of their clearly held subjective belief that defendant was not free to leave. Such a conclusion is perfectly within the confines of the rules governing the consideration of subjective beliefs. See *Mendenhall, supra* at 555 n 6.

answer. But despite the simplicity and legitimacy of this method, and the well-settled recognition that the police may approach people and ask noncoercive questions without needing constitutional justifications, today's majority contravenes well-settled constitutional law by installing a rule by which an officer can approach a person, ask for identification, and run a warrant check without reasonable suspicion that criminal activity is afoot merely because that person is in a high-crime area. Indeed, it cannot be clearer that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000), citing *Brown v Texas*, 443 US 47; 99 S Ct 2637; 61 L Ed 2d 357 (1979).

Thus, like each court that has heard the matter until now, I would hold that defendant was illegally seized without reasonable suspicion or probable cause. The officers retained defendant's identification card and initiated a LEIN check without defendant's permission and after having already resolved their initial stated concern. The officers did not identify, nor do the facts show, any circumstances that suggested that the officers had a reasonable, articulable suspicion based on objective observations that defendant had been, was, or was about to engage in criminal wrongdoing at that point. *Shabaz*, *supra* at 59. Moreover, I believe that the officers' conduct and the circumstances surrounding the detention would have persuaded any reasonable person to conclude that he was not free to leave. As such, I would affirm the decision of the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

GERLING KONZERN ALLGEMEINE VERSICHERUNGS AG v LAWSON

Docket No. 122938. Argued October 5, 2004 (Calendar No. 1). Decided March 8, 2005.

Gerling Konzern Allgemeine Versicherungs AG, as insurer and subrogee of the Regents of the University of Michigan, brought an action in the Washtenaw Circuit Court against Cecil R. Lawson and American Beauty Turf Nurseries, Inc., seeking contribution pursuant to MCL 600.2925a through 600.2925d toward amounts paid by the plaintiff in settlement of personal injury claims by persons injured in an automobile accident involving a vehicle driven by a university employee and a vehicle driven by Lawson, an American Beauty employee. The defendants moved for summary disposition on the basis that the tort reform acts of 1995, 1995 PA 161 and 1995 PA 249, by eliminating joint and several liability in a variety of tort actions, including the underlying tort action relevant to this case, abrogated the plaintiff's action for contribution. The circuit court, Timothy P. Connors, J., denied the motion. The Court of Appeals, COOPER, P.J., and JANSEN and R. J. DANHOF, JJ., granted leave to appeal and reversed the order of the circuit court and remanded for entry of judgment in favor of the defendants, holding that the contribution action was barred. 254 Mich 241 (2002). The Supreme Court granted the plaintiff leave to appeal to determine whether the plaintiff may proceed on its contribution action based on the allegation that Lawson was a concurrent tortfeasor whose negligence was a proximate cause of the injured parties' injuries. 469 Mich 954 (2003). The Supreme Court subsequently ordered that the case be reargued and resubmitted. 471 Mich 855 (2004).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR, and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

The plaintiff may proceed on its contribution action notwithstanding that, as a result of the 1995 tort reform legislation, liability among joint tortfeasors in a variety of tort actions, including the underlying action relevant to this matter, is several only and that, in tort actions in which liability is several, the jury

or judge must allocate fault among all tortfeasors and each tortfeasor is required to pay only for his allocated percentage of fault. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the circuit court for further proceedings.

1. Although the 1995 tort reform legislation may have rendered unnecessary most contribution claims, this does not mean that it precludes the specific type of contribution claim at issue in this matter. There is no basis in MCL 600.2956, 600.2957, or 600.6304 for concluding that a right to seek contribution following a settlement is precluded in cases in which liability among multiple tortfeasors is now several only rather than joint and several.

2. Because two or more persons became severally liable in tort for the same injury, there is a right of contribution among them even though judgment has not been recovered against all or any of them. The plaintiff's right to seek contribution exists because the plaintiff allegedly paid more than its pro rata share of the common liability, although the plaintiff's total recovery is limited to the amount paid in excess of its pro rata share.

3. A common liability exists in situations in which multiple tortfeasors are liable for the same injury or wrongful death. The 1995 tort reform legislation does not negate the existence of a common liability among such multiple tortfeasors. Section 6304 applies specifically to those cases in which there is a common liability among multiple tortfeasors.

4. That a tortfeasor is never *required*, in an action to which § 6304 applies, to pay more than its allocated share of fault is not relevant in determining whether the tortfeasor may exercise its statutory right to settle with the injured party and then exercise its statutory right to seek contribution from other tortfeasors on the basis of each tortfeasor's relative degree of fault.

Justice WEAVER, concurring, noted that the contribution statute, MCL 600.2925a, has not been repealed and must be applied in the present case. Common liability is that which exists in situations in which multiple tortfeasors are liable for the same injury to a person or property or for the same wrongful death. Multiple tortfeasors are responsible for an accident that produced a single indivisible injury. While a tortfeasor is now required to pay only a percentage of liability proportionate to the tortfeasor's degree of fault, there remains a single injury to the person or property for which multiple tortfeasors may be held liable, according to their degrees of fault. Thus, there is common liability. The dissent's

analysis of common liability would wipe out the contribution statute by equating common liability with joint and several liability.

Reversed and remanded to the circuit court.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that, under MCL 600.2956, tortfeasors' potential liability in a personal injury lawsuit is several and not joint. Therefore, the plaintiff's insured was not liable for the defendants' negligence and could not have been held legally responsible to pay damages to third parties for injuries arising from the defendants' negligence. The amount that the plaintiff paid to settle with the third parties cannot be held to have included any of another party's percentage of fault for the accident. The Court of Appeals correctly decided that any amount that the plaintiff paid in excess of its insured's percentage of fault should be deemed a voluntary payment for which the plaintiff cannot seek contribution.

Before one tortfeasor may recover contribution from other tortfeasors, he must pay the complainant more than his pro rata share of the common liability. In order to enforce contribution, it is necessary that the tortfeasors commonly share a burden of tort liability or that there be a common burden of liability in tort.

MCL 600.2956, 600.2957, and 600.6304, as a result of the tort reform legislation in 1995, replaced the notion of common liability with fair-share liability. Because liability can no longer be joint but is now solely several, under circumstances such as exist in this case, there is no basis for contribution. There is no common liability from which to seek contribution.

Although MCL 600.2925b sets out guidelines for determining the pro rata shares of common liability, the statute does not expose a plaintiff to greater liability than it would otherwise have under §§ 2956, 2957, and 6304.

1. CONTRIBUTION — SETTLEMENTS — SEVERAL LIABILITY.

A right to seek contribution following a settlement is not precluded as a result of the 1995 tort reform legislation in cases in which liability among multiple tortfeasors is now several only rather than joint and several (1995 PA 161, 1995 PA 249).

2. CONTRIBUTION — SETTLEMENTS — MULTIPLE TORTFEASORS.

A tortfeasor who enters into a settlement with an injured party is entitled under MCL 600.2925a(3) to recover contribution from another tortfeasor liable for the same injury where none of the circumstances enumerated in § 2925a(3)(a)-(d) exists; the amount

of contribution that may be recovered is limited to the amount paid in settlement in excess of the settling tortfeasor's pro rata share.

3. TORTS — MULTIPLE TORTFEASORS — COMMON LIABILITY.

The 1995 tort reform legislation does not negate the common liability that exists in situations in which multiple tortfeasors are liable for the same injury or wrongful death (1995 PA 161, 1995 PA 249).

Lacey & Jones (by *Michael T. Reinholm*) for the plaintiff.

G. W. Caravas & Associates, P.C. (by *Gary W. Caravas*), and *Kopla, Landau & Pinkus* (by *Mark L. Dolin*) for the defendants.

Amicus Curiae:

John P. Jacobs, P.C. (by *John P. Jacobs*), for the Detroit Edison Company.

MARKMAN, J. This case requires that we consider whether a plaintiff, who has settled an underlying tort claim with an injured party, may subsequently proceed on a contribution action against a defendant whom the plaintiff alleges was a joint tortfeasor whose negligence constituted a proximate cause of the underlying plaintiff's injuries. Defendants argue that tort reform legislation in 1995, specifically MCL 600.2956, MCL 600.2957, and MCL 600.6304, has abrogated plaintiff's contribution action because, had the underlying tort action proceeded to trial, the jury or judge would have been required to allocate fault among all tortfeasors and each tortfeasor, including plaintiff, would have been required to pay only for its percentage of fault. Further, defendants maintain that, if plaintiff paid more in the settlement than was warranted by its percentage of

fault, it did so as a volunteer and therefore cannot seek contribution from joint tortfeasors.

These arguments are unavailing for the simple reason that the 1995 tort reform legislation preserved the right of a *severally* liable tortfeasor such as plaintiff to bring an action for contribution. Therefore, we reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

This case arose from a three-vehicle accident that occurred in 1997. In one vehicle were Ricki Ash and James Nicastri, the injured parties in the underlying claim; in the second vehicle, owned by the Regents of the University of Michigan (Regents), was employee Barry Maus; and in the third vehicle, owned by American Beauty Turf Nurseries, Inc. (American Beauty), was employee Cecil Lawson. Ash and Nicastri filed suit in the Court of Claims against Maus and the Regents. Gerling Konzern Allgemeine Versicherungs AG (Gerling Konzern), the insurer and subrogee of the Regents, settled with Ash and Nicastri on behalf of Maus and the Regents, and the underlying tort action was accordingly dismissed with prejudice.

In November 1999, plaintiff in this action, Gerling Konzern, filed a contribution action against defendants Lawson and American Beauty pursuant to MCL 600.2925a-600.2925d. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that the tort reform acts of 1995, 1995 PA 161 and 1995 PA 249, by eliminating joint and several liability in certain tort actions, including the underlying action in this case, abrogated plaintiff's contribution cause of action. The trial court denied defendants' motion for summary

disposition. On appeal, the Court of Appeals reversed the order of the trial court and remanded for entry of judgment in favor of defendants, holding that plaintiff's contribution action was barred as a result of the elimination of joint and several liability and the rule that, in tort actions in which liability is several only, each tortfeasor is required to pay only for his percentage of fault. 254 Mich App 241; 657 NW2d 143 (2002). We granted plaintiff's application for leave to appeal, 469 Mich 954 (2003), and subsequently ordered that the case be reargued and resubmitted. 471 Mich 855 (2004).

II. STANDARD OF REVIEW

We review de novo the trial court's decision to grant or deny summary disposition under MCR 2.116(C)(8). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and may be granted only where the claims alleged are " 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.' " *Maiden, supra* at 119 (citation omitted). We also review questions of statutory interpretation de novo. *Oade v Jackson Nat'l Life Ins Co,* 465 Mich 244, 250; 632 NW2d 126 (2001).

III. ANALYSIS

Until the enactment of tort reform legislation in 1995, concurrent tortfeasors in Michigan were "jointly and severally" liable. This meant that where multiple tortfeasors caused a single or indivisible injury, the injured party could either sue all tortfeasors jointly or he could sue any individual tortfeasor severally, and each individual tortfeasor was liable for the entire judgment, although the injured party was entitled to full compensation only once. See *Markley v Oak Health*

Care Investors of Coldwater, Inc, 255 Mich App 245, 251; 660 NW2d 344 (2003); *Maddux v Donaldson*, 362 Mich 425, 433; 108 NW2d 33 (1961). "At common law, contribution was not, as a general rule, recoverable among or between joint wrongdoers or tortfeasors." *O'Dowd v Gen Motors Corp*, 419 Mich 597, 603; 358 NW2d 553 (1984). The right of contribution, although now codified in a majority of states, evolved in equity. See 4 Restatement Torts, 2d, § 886A, comment c.[1] Thus, even though, at law, a "joint and several" tortfeasor was liable for an entire judgment, equity came to allow that tortfeasor to seek contribution from other tortfeasors. A primary purpose underlying "contribution" was to mitigate the unfairness resulting to a jointly and severally liable tortfeasor who had been required to pay an entire judgment in cases in which other tortfeasors also contributed to an injury.

However, as part of the 1995 tort reform legislation, the Legislature enacted MCL 600.2956, which provides in part, "Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint." MCL 600.2957(1) further provides, "In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault." Finally, MCL 600.6304 provides:

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[1] This remains apparent in Michigan's relevant statutory provisions. For example, MCL 600.2925b(c) provides, "[p]rinciples of equity applicable to contribution generally shall apply."

> (1) In an action based on tort . . . seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court . . . shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
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> * * *
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> (b) The percentage of the total fault of all persons that contributed to the death or injury . . . .
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> * * *
>
> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1).

Thus, the 1995 legislation eliminated joint and several liability in certain tort actions, requires that the fact-finder in such actions allocate fault among all responsible tortfeasors, and provides that each tortfeasor need not pay damages in an amount greater than his allocated percentage of fault. As such, in an action in which an injured party has sued only one of multiple tortfeasors and in which §§ 2956, 2957, and 6304 apply, the tortfeasor would have no need to seek contribution from other tortfeasors, either in that same action (by bringing in third-party defendants) or in a separate action, because no "person shall . . . be required to pay damages in an amount greater than his or her percentage of [allocated] fault . . . ." Section 6304(4). Thus, the dissent is correct in observing that the "1995 tort reform legislation has . . . rendered unnecessary most claims for contribution in personal injury accidents." *Post* at 69.

Yet, although the 1995 tort reform legislation may have "rendered unnecessary" most contribution claims,

this does not mean that it precludes every type of contribution claim, in particular that at issue in the instant case. Even before the 1995 legislation, a tortfeasor had a statutory right to seek contribution in the event that he settled a claim, see MCL 600.2925a(3), and this is the type of contribution at issue here. Contribution actions have not always solely been directed toward recovering monies that a "jointly and severally" liable tortfeasor was required to pay as the result of a verdict for which the tortfeasor was fully, although not solely, responsible. Rather, such actions have also been directed toward obtaining contribution from other responsible tortfeasors following a settlement. We find no basis in §§ 2956, 2957, or 6304 to conclude that a right to seek contribution in these circumstances has been precluded in cases in which liability among multiple tortfeasors is now "several" only rather than "joint and several."

MCL 600.2925a provides, in part:

> (1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability.
>
> (3) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor if any of the following circumstances exist:

(a) The liability of the contributee for the injury or wrongful death is not extinguished by the settlement.

(b) A reasonable effort was not made to notify the contributee of the pendency of the settlement negotiations.

(c) The contributee was not given a reasonable opportunity to participate in the settlement negotiations.

(d) The settlement was not made in good faith.

These provisions lead to the conclusion that plaintiff is entitled to seek contribution from defendants, and the tort reform legislation, in our judgment, does not alter this conclusion. The dissent's overreaching analysis notwithstanding, this case is actually one of straightforward statutory interpretation. As a result of the underlying accident in this case, "2 or more persons bec[a]me . . . severally liable in tort for the same injury . . . ." Section 2925a(1). Thus, "there is a right of contribution among them even though," as in this case, "judgment has not been recovered against all or any of them."[2] *Id.* Plaintiff's right to seek contribution exists because plaintiff allegedly has, "paid more than his pro rata share of the common liability . . . ."[3] Section 2925a(2). Plaintiff's "total recovery [in the contribution action] is limited to the amount paid by him in excess of his pro rata share." *Id.*

Moreover, § 2925a(3) provides statutory support for plaintiff's contribution claim resulting from its settle-

[2] Judgment has not been recovered against any tortfeasor in this case because the injured parties instead settled with plaintiff.

[3] Section 2925b(a) provides that, for purposes of contribution, "in determining the pro rata shares of tortfeasors in the entire liability as between themselves only . . . [t]heir relative degrees of fault shall be considered." Thus, in determining whether a severally liable tortfeasor has paid more than his "pro rata" share of the common liability such that he may be entitled to contribution under § 2925a, § 2925b requires considering each tortfeasor's relative degree of fault, just as § 6304 requires the fact-finder to consider the relative degree of fault of each tortfeasor in any action subject to several liability under that provision.

ment. Plaintiff, is a "tort-feasor who enter[ed] into a settlement with [the injured parties]" and, therefore, "is . . . entitled to recover contribution from another tort-feasor" unless one of the circumstances enumerated in § 2925a(3)(a)-(d) exists, which is not alleged here to be the case. Section 2925a(3).[4]

IV. RESPONSE TO DISSENT

The dissent's argument appears to rest on three grounds. First, it observes, correctly, that under § 2925a(2), a plaintiff may seek contribution only if he has paid more than his share of the "common liability." Therefore, unless a severally liable tortfeasor shares a "common liability" with other tortfeasors, he has no right to contribution. The dissent then concludes that, because the 1995 tort reform legislation made tort liability in relevant actions "several" only and not "joint

[4] Moreover, MCL 600.2925c(4) provides:

> If there is *not a judgment* for the injury or wrongful death *against the tort-feasor seeking contribution,* his right to contribution is barred *unless* he has discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment, or unless he has agreed while action is pending against him to discharge the common liability and has, within 1 year after the agreement, paid the liability and commenced his action for contribution. [Emphasis added.]

This provision contemplates situations such as the instant one, in which a tortfeasor is seeking contribution even though there has been no judgment against it because the tortfeasor has settled with the injured parties. As long as the tortfeasor complies with the requirements of this provision, it may proceed on its contribution claim pursuant to sections 2925a(3)(a)-(d). Contrary to the dissent's suggestion, post at 73, a tortfeasor's legal liability is not "governed by the gamesmanship and legal strategies of his fellow tortfeasors." Rather, such liability is governed by the language of § 2925a.

and several," there is no "common liability" among the tortfeasors and, thus, no right to contribution under § 2925a(2). *Post* at 71. Essentially, the dissent equates "common liability" and "joint liability" and concludes that common liability does not exist where liability is several only.

The dissent's position is flawed. Its construction of "common liability" as used in § 2925a(2) is inconsistent with the Legislature's express statutory directive in § 2925a(1) that contribution may be obtainable where liability is joint *or* several. The dissent's interpretation of "common liability" essentially reads the "joint[] *or* several[]*"* language out of the statute.[5]

Moreover, in *O'Dowd,* this Court specifically addressed whether a tortfeasor who was "severally" liable was entitled to seek contribution under § 2925a. We held that a right to contribution existed because § 2925a specifically refers to liability that is "joint[] *or* several[]":

> [A]ll that is necessary to enforce contribution [under § 2925a] is that the tortfeasors commonly share a burden of tort liability or, as it is sometimes put, there is a common burden of liability in tort. . . . If the defendants are jointly or severally liable in tort for "the same injury to a person" or for "the same injury to . . . property" or for "the same wrongful death", contribution pursuant to [§ 2925a] is obtainable. [*O'Dowd, supra* at 604-606.][6]

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[5] In discerning legislative intent, a court must "give effect to every word, phrase, and clause in a statute . . . ." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

[6] *O'Dowd* further asserted:

> The Legislature partially abrogated the common-law bar [to contribution] by adopting the 1939 Uniform Contribution Among Tortfeasors Act which provided for contribution in respect of a judgment obtained against two or more persons *jointly*. . . .

In *Salim v LaGuire,* 138 Mich App 334, 341; 361 NW2d 9 (1984), the Court of Appeals similarly observed, "(1) the former bar against contribution among nonjoint tortfeasors is abolished; (2) the right of contribution exists among nonintentional wrongdoers who share a common liability; and (3) *common liability exists among individuals who are responsible for an accident which produces a single indivisible injury.*" (Emphasis added.)

Accordingly, a "common liability" exists in situations in which multiple tortfeasors are liable for the same injury to a person or property or for the same wrongful death. Common liability exists in such cases because multiple tortfeasors are alleged to be "responsible for an accident which produce[d] a single indivisible injury." *Id.* The 1995 tort reform legislation does not negate the existence of common liability among such multiple tortfeasors. On the contrary, § 6304(1) provides that the allocation provisions of that section apply to tort actions "for personal injury, property damage, or wrongful death involving fault of more than 1 person," just as the contribution provisions of § 2925a(1) apply "when 2 or more persons become . . . severally liable in tort for the same injury to a person or property or for the same wrongful death . . . ." Section 6304 applies

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> Subsequently, the Legislature . . . substituted the substance of the 1955 Uniform Contribution Among Tortfeasors Act for the 1941 act. Section 1 of the statute now provides:
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> "(1) Except as otherwise provided in this act, when 2 or more persons *become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death,* there is a right of contribution among them . . . ." [Emphasis in *O'Dowd.*]
>
> . . . The revised act by explicitly providing for contribution among tortfeasors "severally" liable in tort extended contribution to [such tortfeasors]. [*O'Dowd, supra* at 603-604 (citations omitted; emphasis added unless otherwise noted).]

specifically in those cases in which there is common liability among multiple tortfeasors, and it is inaccurate to interpret it as meaning that there is no longer any common liability among responsible tortfeasors. Rather, the common liability remains; what differ merely are the terms and conditions by which that liability must be satisfied. That is, by virtue of § 6304, in cases in which there has been a judgment, a tortfeasor need only pay a percentage of the common liability that is proportionate to his fault. Previously, where there had been a judgment, a tortfeasor could have been required to pay the entire amount of common liability and then seek contribution from other tortfeasors according to their degrees of fault.

Second, the dissent relies on Restatement Torts, 3d, Apportionment of Liability, § 11, comment c, which states:

> When, under applicable law, a person is severally liable to an injured person for an indivisible injury, the injured person may recover only the severally liable person's comparative-responsibility share of the injured person's damages.
>
> * * *
>
> *c. Contribution by severally liable defendant*. When all defendants are severally liable, each one is separately liable for that portion of the plaintiff's damages. Since overlapping liability cannot occur, severally liable defendants will not have any right to assert a contribution claim. See § 23, Comment *f*. [Emphasis in original.]

We note that the duty of this Court is to construe the language of Michigan's statutes before turning to secondary sources such as the Restatements. The specific statute at issue, § 2925a, allows for contribution after a settlement in cases in which liability is joint *or* several. Moreover, the above Restatement section refers, specifi-

cally, to those situations, already discussed above, in which an injured party has sued only one of multiple tortfeasors and the court, as it is obligated to do, has applied § 6304. The dissent is correct in observing that in such situations, the 1995 tort reform legislation, because it provides that liability is now several only, has "rendered unnecessary most claims for contribution in personal injury accidents." *Post* at 69. "[Because] overlapping liability cannot occur, severally liable defendants [need] not have any right to assert a contribution claim." Restatement Torts, 3d, § 11, comment c.

However, more relevant to the specific issue raised in the instant case is the Restatement Torts, 3d, Apportionment of Liability, § 23, which provides in part:

> (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another by settlement or discharge of judgment, the person discharging the liability is entitled to recover contribution from the other, unless the other previously had a valid settlement and release from the plaintiff.
>
> (b) A person entitled to recover contribution may recover no more than the amount paid to the plaintiff in excess of the person's comparative share of responsibility.

There is nothing in the language of § 23 or its comments to suggest that it does not apply in those cases in which the settling tortfeasor was only severally liable. The pertinent question is not whether liability is joint and several, or several only, but rather whether the settlement released the contributee. See note 10 later in this opinion.

Finally, the dissent asserts, despite the fact that § 2925a provides that it applies to cases in which liability is "joint[] *or* several[]," that contribution is barred in cases in which liability is several because a severally liable tortfeasor, pursuant to § 6304, is never

required to pay more than his allocated share of fault. Thus, the dissent surmises, " 'plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured's negligence.' " *Post* at 74 (citation omitted). The dissent's analysis is defective. That a tortfeasor is never *required,* "in an action" to which § 6304 applies, to pay more than its allocated share of fault is simply not relevant in determining whether the tortfeasor *may* exercise its statutory right to settle with the injured party and then exercise its statutory right to seek contribution from other tortfeasors on the basis of each tortfeasor's relative degree of fault.

This is illustrated by the fact that, even before the 1995 tort reform legislation, a tortfeasor whose liability was "joint and several" was never *required*, in a settlement, to pay more than what it deemed to be its fair share of the common liability burden. Yet, even though not *required,* the statute specifically gave (and continues to give) a tortfeasor who *chose* to settle for more than its fair share a right to seek contribution from other tortfeasors.[7] Indeed, the dissent would retain that

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[7] The important consideration in determining whether a settling tortfeasor may seek contribution from other tortfeasors has always been, and continues to be, not whether the tortfeasor settled for what it considered to be its fair share of the common liability or, alternatively, for the entire amount of the common liability, but whether the settling party complied with the conditions set forth in § 2925a(3)(a)-(d), including releasing through the settlement the contributee from further liability to the injured party. Thus, even if a settling tortfeasor settles for only what it presumes to be its fair share of the common liability, if the settlement releases another tortfeasor, that settling tortfeasor, if it complies with the remainder of the statutory settlement conditions, may seek contribution from the released contributee.

For the same reason, we find no merit in the dissent's suggestion, *post* at 75, 76, that the majority's decision will place parties in an "untenable position" during settlement negotiations, because they must "pretend . . .

right for tortfeasors whose liability remained joint and several. Because *no* tortfeasor, including one whose liability is "joint and several," is or has ever been *required* to settle for more than his fair share of the common liability and yet § 2925a provides a right to contribution even after settling, it is evident that the dissent's analysis on this point is defective and cannot be sustained.[8]

Not only is the dissent's position ungrounded in the relevant statutes, it raises an unnecessary disincentive to voluntary settlements, potentially harming both willing plaintiffs and willing defendants.[9] The dissent states that, "while settlements are generally favored, neither MCL 600.2925a nor MCL 600.6304 makes clear that the Legislature's goal was to promote voluntary

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that each is potentially liable for the whole of a plaintiff's injuries." Because a settling party may still seek contribution under MCL 600.2925a for payments made in excess of its fair share of the common liability, there is no need to "pretend" to the contrary.

[8] The dissent has a point, as noted above, that the 1995 tort reform legislation renders unnecessary contribution actions that, in the absence of §§ 2956, 2957, and 6304, would have otherwise resulted after a "jointly and severally" liable tortfeasor has been required to pay an entire judgment to an injured party. Nonetheless, that these provisions also prohibit contribution actions resulting from a settlement is a concept, as also noted above, that has no apparent source in Michigan law.

[9] A tortfeasor might rationally conclude, after all, that it is in his interest to settle for an amount greater than his estimated pro rata liability as determined by a trier of fact. Taking a case to trial and leaving the allocation of responsibility to the trier of fact can involve a number of transactional costs. There are, for example, fees for attorneys, retained experts and other litigation costs, possible fiscal losses because of negative publicity, and opportunity costs incurred by those required to divert their time and energy from more productive matters to litigation.

A severally liable tortfeasor might prefer to settle for more than his pro rata share in order to avoid these costs. This incentive may be especially powerful when the tortfeasor believes that he may be found liable for noneconomic damages that defy accurate estimation.

settlement. Instead, their provisions place the risk of, and burden for, payment upon a party only to the extent that it is actually responsible for the injury." *Post* at 75. The dissent may be correct in these assertions, but they are irrelevant. Section 2925a may not "clearly" reflect a legislative intent of encouraging settlements, but neither does it reflect, clearly or otherwise, any intent to disfavor settlements, which is what the dissent's construction would produce. Moreover, to construe § 2925a as affording a settling party a right to seek contribution from other responsible tortfeasors in cases in which liability is several only does not countermand the legislative intent of placing the "risk of, and burden for, payment upon a party only to the extent that it is actually responsible for an injury." *Post* at 75. On the contrary, such a construction of § 2925a works affirmatively to effect that intent.[10]

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[10] See *CSX Transportation, Inc v Union Tank Car Co,* 173 F Supp 2d 696, 699-700 (ED Mich, 2001), in which the United States District Court for the Eastern District of Michigan, in a contribution claim filed after a settlement by the settling party against other responsible tortfeasors, noted that while § 6304 renders contribution claims unnecessary, § 2925a still allows such claims after a settlement, thus furthering the legislative goals of encouraging settlements and properly allocating fault:

> Plaintiff CSXT is seeking an allocation of fault between the tortfeasors in this case. It is seeking neither "joint liability," nor "joint and several liability." Plaintiff CSXT is entitled, under Michigan law, to show that the Defendants and Plaintiff CSXT were/are severally liable (with an appropriate allocation of the percentages of fault) for the rail tank car accident in January of 2000.
>
> Because currently, in the usual case [i.e., the cases that proceed to trial], the allocation of fault is mandated, there will usually not be a circumstance where a tortfeasor has paid more than his pro-rata share of the common liability. Thus, there would be no need for a claim for contribution. This is what *Kokx v. Bylenga,* 241 Mich. App. 655, 617 N.W.2d 368 (2000) explained. . . .

V. CONCLUSION

MCL 600.2925a-600.2925d provide plaintiff a statutory right to seek contribution from other responsible tortfeasors after having settled with the injured parties in the underlying tort action, and tort reform legislation

> In the instant case, [because] Plaintiff CSXT . . . has settled numerous lawsuits, paying the full share of each, CSXT can assert that it has paid more than its pro-rata share of the liability. Thus, under Michigan law, it has a claim for contribution.
>
> If the purposes behind the Michigan tort reform legislation were speedy settlement of suits, and allocation of fault, thwarting CSXT's ability to seek contribution defies both of those objectives. First, without the possibility of seeking "reimbursement" from other tortfeasors, CSXT would have no interest in seeking a speedy settlement of claims. Further, allowing CSXT to bring a claim for contribution furthers the purpose of holding tortfeasors responsible for their share of the liability.
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> A brief example explains a possible misunderstanding of the effect of the tort reform legislation. Assume two tortfeasors are equally responsible for an injury. Prior to the tort reform legislation, they could each be held liable for 100% of the injury. If one defendant paid the entire balance, he could sue the second defendant for contribution. However, after the tort reform legislation abolished joint and several liability (in nearly all cases, and the exceptions are irrelevant here), each could only be held for 50% of the injury. Therefore, there would be no need for an action for contribution.
>
> This does not mean that a cause of action for contribution was completely extinguished by the legislation; it simply means that in the usual case [i.e., those that proceed to trial], it would not be needed. This is bolstered by the fact that the legislature did not repeal the contribution statute.
>
> In the instant case, the claims have been settled without an allocation of fault. One tortfeasor has paid 100%, although there are likely other tortfeasors which can be allocated some of the fault. The statute permits a claim for contribution in this situation — Plaintiff CSXT can allege that it has paid more than its pro-rata share of the liability. The tort reform legislation did not erase this right.

in 1995 does not alter this right. Accordingly, we hold that plaintiff may proceed on its contribution action against defendants. We reverse the judgment of the Court of Appeals and remand this case to the trial court for further proceedings consistent with this opinion.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

WEAVER, J. *(concurring).* I concur in the majority's conclusion that plaintiff may proceed with its contribution action against defendants. As both the majority and the dissent note, tort reform has rendered many contribution actions unnecessary.[1] Nonetheless, the contribution statute, MCL 600.2925a, has not been repealed by the Legislature and remains in effect. Therefore, we must apply it to the present case.

Further, I agree with the majority's analysis of "common liability," as that which "exists in situations in which multiple tortfeasors are liable for the same injury to a person or property or for the same wrongful death." *Ante* at 56. Multiple tortfeasors are " 'responsible for an accident which produce[d] a single indivisible injury.' " *Id.* (citation omitted). While a tortfeasor is now required to pay only a percentage of liability proportionate to the tortfeasor's degree of fault, there remains a single injury to the person or property for which multiple tortfeasors may be held liable, according to their degrees of fault. Thus, there is "common liability."

The dissent's analysis of "common liability" would, in essence, wipe out the contribution statute by equating "common liability" with "joint and several liability."

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[1] *Ante* at 51; *post* at 69.

Post at 69-73. While there may be good policy reasons to reconsider how the contribution statute should operate in light of recent tort reform, these questions are properly resolved by the Legislature, which may repeal or amend the statute as it sees fit.

In the present case, it is alleged that there are multiple tortfeasors responsible for "a single injury" to Ricki Ash and James Nicastri. Thus, there is "common liability" under the statute, and plaintiff may proceed with its contribution action.[2] For these reasons, I concur in the result of the majority opinion.

KELLY, J. (*dissenting*). Plaintiff seeks contribution from defendants for a portion of settlement monies paid to two third parties following a traffic accident involving three vehicles. We are asked to decide whether a contribution action is possible under the facts of this case and in light of tort reform legislation enacted in 1995.

The majority finds that such an action is viable, even considering that Michigan has adopted a comparative negligence scheme for personal injury actions. Under it, plaintiff would not have been liable for defendants' percentage of fault had this case proceeded to trial. Because I believe that the majority misreads this tort reform legislation, I disagree with its conclusions.

According to MCL 600.2956, part of the 1995 tort reform legislation, tortfeasors' potential liability in a personal injury lawsuit is several and not joint. Applied to this case, it follows that plaintiff's insured was not

[2] Note that just because plaintiff may proceed with a contribution action, this does not mean that plaintiff will prevail. Plaintiff must establish that defendants are at fault in the accident, the degree of defendants' fault, and that it paid more than its pro rata share of the entire liability.

liable for defendants' negligence. Hence, it could not have been held legally responsible to pay damages to third parties for injuries arising from defendants' negligence. When plaintiff settled with the third parties, the amount it agreed to pay could not be held to have included any of another party's percentage of fault for the accident.

Consequently, I would find that plaintiff cannot now seek contribution from the defendants for monies it paid in settlement of the third parties' claim. Thus, I would affirm the decision of the Court of Appeals that any amount that plaintiff paid in excess of its insured's percentage of fault should be deemed a voluntary payment.

FACTS AND LOWER COURT PROCEEDINGS

This case is a secondary proceeding that arose from a three-vehicle traffic accident on October 21, 1997. One vehicle was occupied by Ricki Ash and James Nicastri. Another was driven by Barry Maus, who was employed by the University of Michigan Board of Regents. Plaintiff is the insurer of Maus and of the regents. The third vehicle was a semitrailer driven by defendant Cecil R. Lawson, who was employed by defendant American Beauty Turf Nurseries, Inc.

Ash and Nicastri sued Maus and the regents for damages for their injuries. In a separate proceeding, Lawson sued Maus and the regents for his injuries. Plaintiff settled both lawsuits against Maus and the regents, paying on their behalf approximately $2.2 million to Ash and Nicastri and $85,000 to Lawson.

In November 1999, plaintiff filed a separate complaint seeking statutory contribution under MCL 600.2925a from Lawson and American Beauty Turf for a portion of the amount it had paid to Ash and Nicastri.

Defendants moved for summary disposition in their favor, alleging that plaintiff and the regents had not complied with the notice requirements of the contribution statute. See MCL 600.2925a(3) through (5). The trial court denied the motion and found that plaintiff had given defendants sufficient notice of its settlement negotiations with Ash and Nicastri. These claims are not at issue in this appeal.

After the trial court's motion cutoff date passed, defendants moved to dismiss pursuant to MCR 2.116(C)(8). They argued that the 1995 tort reform legislation, specifically MCL 600.2956, 600.2957(1), and 600.6304(1), abrogated plaintiff's cause of action for contribution. Without addressing the substantive issue, the trial court denied the motion as untimely.

On appeal, the Court of Appeals reversed the decision and remanded for entry of judgment in defendants' favor. It held that, under the express language of the statutes at issue, contribution was not available to plaintiff. 254 Mich App 241, 248; 657 NW2d 143 (2002). We granted plaintiff's application for leave to appeal, 469 Mich 954 (2003), and subsequently ordered that the case be reargued and resubmitted. 471 Mich 855 (2004).

STATUTORY LANGUAGE

This Court reviews de novo a decision on a motion for summary disposition. Questions regarding the interpretation and construction of statutes are questions of law that are also reviewed de novo. *Northville Charter Twp v Northville Pub Schools,* 469 Mich 285, 289; 666 NW2d 213 (2003). When construing a statute, our goal is to ascertain and give effect to the intent of the Legislature in writing it. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995). The best measure of intent is

the words that the Legislature used. *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 398; 572 NW2d 210 (1998).

As the Court of Appeals correctly noted, at issue here is the interplay between the provisions in the 1995 amendments of the Revised Judicature Act[1] and the preexisting contribution provisions contained in MCL 600.2925a, 600.2925b, and 600.2925c.

The pertinent subsections of MCL 600.2925a state:

> (1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.
>
> (2) The right of contribution exists only in favor of a tort-feasor *who has paid more than his pro rata share of the common liability* and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability. [Emphasis added.]

One tortfeasor can seek contribution from another regardless of whether a judgment has been entered against either. MCL 600.2925c(1). However:

> If there is not a judgment for the injury or wrongful death against the tort-feasor seeking contribution, *his right to contribution is barred unless he has discharged by payment the common liability* within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment, or *unless he has agreed while action is pending against him to discharge the common liability* and has, within 1 year after the agreement, paid the

[1] 1995 PA 161 and 1995 PA 249.

liability and commenced his action for contribution. [MCL 600.2925c(4) (emphasis added).]

MCL 600.2925b addresses the expression "pro rata share" and includes considerations of fault and equity:

> Except as otherwise provided by law, in determining the pro rata shares of tortfeasors in the entire liability as between themselves only and without affecting the rights of the injured party to a joint and several judgment:
>
> (a) Their relative degrees of fault shall be considered.
>
> (b) If equity requires, the collective liability of some as a group shall constitute a single share.
>
> (c) Principles of equity applicable to contribution generally shall apply.

It is against this statutory backdrop that the Court is asked to address plaintiff's right to contribution under the 1995 tort reform legislation. MCL 600.2956 states:

> Except as provided in [MCL 600.6304], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

MCL 600.2957(1) similarly states:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

In connection with the above, the relevant portion of MCL 600.6304 provides:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under section 2925d, regardless of whether the person was or could have been named as a party to the action.

* * *

(4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1).

ANALYSIS

After reviewing the statutory provisions cited above, I agree with much of the rationale used by the Court of Appeals in this case and in its previous opinion in *Kokx v Bylenga*, 241 Mich App 655; 617 NW2d 368 (2000). The essence of these opinions is that the 1995 tort reform legislation has prevented and rendered unnecessary most claims for contribution in personal injury accidents.

Contribution remains a useful tool for fault and liability allocation in certain other circumstances. The Court of Appeals in *Kokx* opined:

[U]nder the plain and mandatory language of the revised statutes, a defendant cannot be held liable for dam-

> ages beyond the defendant's pro-rata share, except in certain specified circumstances. Accordingly, in actions based on tort or another legal theory seeking damages for personal injury . . . there would be no basis for a claim of contribution. Moreover, because joint liability remains in certain circumstances, the Legislature would have no reason to repeal § 2925a, which provides for a right of contribution . . . . [*Id.* at 663.]

I agree with these observations. For example, MCL 600.2956 continues to recognize that common or joint liability exists in claims involving "an employer's vicarious liability . . . ." And MCL 600.6304(6) specifically provides for joint liability in medical malpractice cases.

However, the statutory language at issue in this case supports defendants' position. In order for one tortfeasor to recover contribution from others, he must pay the complainant more than his pro rata share of the *common liability.* The amount that he may recover from the others is limited to the amount he paid to the complainant in excess of that for which he was liable. MCL 600.2925a(2). See also MCL 600.2925c(4). In this case, before any such calculation may be entertained, plaintiff must establish that under MCL 600.2957 or MCL 600.6304 there is common liability among the defendants.

This Court has previously discussed the interplay between contribution and "common liability" as follows:

> The general rule of contribution is that one who is compelled to pay or satisfy the whole or to bear more than his aliquot share of the *common burden or obligation*, upon which several persons are equally liable or which they are bound to discharge, is entitled to contribution against the others to obtain from them payment of their respective shares. [*Caldwell v Fox*, 394 Mich 401, 417; 231 NW2d 46 (1975) (emphasis added).]

Thus, in order to enforce contribution under the revised act, it is necessary that the tortfeasors "commonly share a burden of tort liability or, as it is sometimes put, there is a common burden of liability in tort." *O'Dowd v Gen Motors Corp*, 419 Mich 597, 604-605; 358 NW2d 553 (1984). See also *Caldwell*, *supra* at 420 n 5.

However, although these older cases are useful to a point, they do not take into account the sweeping changes the Legislature made in tort reform in 1995. Sections 2956, 2957, and 6304 replaced the notion of common liability, which also has been referred to as joint and several liability, with "fair-share liability." See *Smiley v Corrigan*, 248 Mich App 51, 53 n 6; 638 NW2d 151 (2001), citing House Legislative Analysis, HB 4508 (Substitute H-6), April 27, 1995, p 3. Thus, because liability can no longer be joint but is now solely several under circumstances such as exist in this case, there is no basis for contribution. There is no "common liability" from which to seek it. See Restatement Torts, Apportionment of Liability, 3d, § B19, comment k, p 183.

The majority adopts plaintiff's argument that § 2925a(1), because it refers to persons who become "jointly *or severally* liable," may apply to cases in which tortfeasors are severally liable under MCL 600.2956. However, plaintiff fails to evaluate § 2925a(1) in conjunction with the limitation in § 2925a(2). That subsection expressly restricts the right of contribution to circumstances where there has been a payment of greater than one's pro rata share of "*common liability.*" See also § 2925c(4).

Thus, it is not enough that tortfeasors are "jointly or severally liable." Before contribution can be sought, they must share a "common liability." This does not

occur when the liability of tortfeasors is several. As stated in Restatement Torts, Apportionment of Liability, 3d, § 11, p 108:

> When, under applicable law, a person is severally liable to an injured person for an indivisible injury, the injured person may recover only the severally liable person's comparative-responsibility share of the injured person's damages.

I also find comment c of the same provision persuasive:

> *c. Contribution by severally liable defendant*. When all defendants are severally liable, each one is separately liable for that portion of the plaintiff's damages. Since overlapping liability cannot occur, severally liable defendants will not have any right to assert a contribution claim. [*Id*., p 109.]

Therefore, the conclusion in *Salim v LaGuire,*[2] that common liability could exist among individuals responsible for an accident causing a single indivisible injury, may have been correct before the enactment of tort reform. However, the injury involved in this case is no longer an "indivisible injury" under MCL 600.2925a. The Legislature has indicated its intention that these "indivisible injuries" now be divided.

In essence, what the majority appears to argue is that we should continue our notions of what, in the past, constituted an indivisible injury. In so doing, it ignores the intent of the Legislature in passing tort reform. The majority realizes that, had this case proceeded to trial, plaintiff could not have been held responsible for defendants' negligence. (*Ante* at 57-58.) Yet, because plaintiff chose to settle before trial, the majority maintains that the injury remains indivisible and thus plaintiff's contribution action is viable.

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[2] 138 Mich App 334, 340; 361 NW2d 9 (1984).

I conclude that the Legislature did not intend that a tortfeasor's legal liability for personal injury be governed by the gamesmanship and legal strategies of his fellow tortfeasors.[3] Implicit in the majority's opinion is the premise that an injury only becomes divisible when a jury divides it. I cannot accept this position. It would allow the parties to circumvent the tort reform statutes during settlement. Rather, the Legislature has based tortfeasors' potential liability on the cause of action involved, and what cause is involved is determined at the commencement of litigation.

The majority's analysis relies on case law decided before the existence of tort reform. It uses this law to frustrate the Legislature's recognition that injuries may now share a common origin or cause, yet result in no common liability or burden in tort.

Similarly, a plaintiff should not rely on the language of MCL 600.2925b merely because it sets out guidelines for determining the "pro rata shares" of common liability. The statute does not expose a plaintiff to greater liability than it would otherwise have under § 2956, § 2957, and § 6304. Where common liability exists, a review could be made of the measure of pro rata shares under MCL 600.2925b, possibly subjecting a tortfeasor to more liability than his actual percentage of fault. However, § 2925b does not apply where there is no common liability.

Thus, I think it clear that a pro rata division can be made only when tortfeasors actually share a common tort burden or liability. Because this case is a personal injury action, it is governed by MCL 600.2956 and, pursuant to that statute, there is no common liability.

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[3] I note that the majority omits the fact that plaintiff had already entered into a separate settlement agreement *with defendant* Lawson before it brought this contribution action.

Hence, plaintiff's insured was responsible only for its own separate liability to Ash and Nicastri. This fact did not change simply because plaintiff chose to settle instead of proceeding to a jury determination of the actual percentages of fault of plaintiff's insured and defendants.

Even if plaintiff deliberately paid more than its pro rata share of the total liability, it cannot recover any of that excess from defendants. As the Court of Appeals aptly stated, "plaintiff's decision to voluntarily pay pursuant to a settlement must be attributed to its own assessment of liability based on its insured's negligence." 254 Mich App 247-248. This view is certainly not unusual:

> In a several liability system, the nonsettling tortfeasor is held only for his comparative fault share. In determining the percentage responsibility of the nonsettling tortfeasor, jurors must determine the comparative share of every tortfeasor, including those who have settled. However, a determination that A's fault was 50% and B's fault was 50% does not affect A's settlement or his liability. It merely means that B is liable for 50%, no more, no less. If A paid more than 50% of the damages, that was his decision. If he paid less, the plaintiff made a bad bargain, but none of this matters to B's liability. [2 Dobbs, The Law of Torts, Practitioner Treatise Series (2001), § 390, p 1088.]

The majority opinion discusses at length how my reading of these statutes creates a disincentive to voluntary settlement (*Ante* at 60-63 to conclusion.) However, it also acknowledges that "[a] primary purpose underlying 'contribution' was to mitigate the unfairness resulting to a jointly and severally liable tortfeasor who had been required to pay an entire judgment in cases in which other tortfeasors also contributed to an injury." (*Ante* at 50.) Allowing a contribution action in

this case does not serve the Legislature's purpose in enacting tort reform, which changed the scheme to fair-share liability.

Moreover, while settlements are generally favored, neither MCL 600.2925a nor MCL 600.6304 makes clear that the Legislature's goal was to promote voluntary settlement.[4] Instead, their provisions are designed to allocate liability. They place the risk of, and burden for, payment upon a party only to the extent that it is actually responsible for an injury. This applies even if the injury traditionally would be viewed as indivisible.

The logic of the majority's position that its interpretation encourages settlement and mine hinders it is shaky. Once parties know the rules involving their negotiations, settlement will be facilitated. Clarifying the statute's meaning so that the parties know the extent of their liability aids negotiations. It does not preclude them.

In addition, I find questionable the assertion that allowing contribution actions under these circumstances will foster settlement goals. The majority fails to recognize the untenable position in which parties will be placed during settlement negotiations as a result of its decision. The parties will be left to negotiate portions of claims for which they have no possible liability. The better position is to leave negotiations over those portions to the parties actually responsible.

The parties must recognize that, under tort reform, each tortfeasor cannot be held responsible for more than his fair share of the liability for a plaintiff's injury.

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[4] I recognize that the language of MCL 600.2925a(3) discusses what must be done during settlement negotiations to permit a subsequent contribution action. However, I read this language as barring tortfeasors who do not first seek the inclusion of other potentially liable parties in settlement negotiations, not as a policy statement preferring settlement.

But they must also pretend the contrary, that each is potentially liable for the whole of a plaintiff's injuries. Thus, in deciding whether to settle a claim, tortfeasors must calculate into their settlement decisions certain risks for liability that the Legislature has stated do not exist. The majority's conclusions inject unnecessary confusion into the settlement process involving personal injury actions.

CONCLUSION

The language in MCL 600.2925a(2) and 600.2925c(4) allows recovery in a contribution action based on "common liability" only. MCL 600.2956 precludes common liability in a personal injury lawsuit. Because the lawsuit underlying this action was for personal injury, plaintiff's insured could not be held liable for contribution. It is liable only for its "fair share" of the damages incurred by Ash and Nicastri based on its percentage of fault.

Accordingly, plaintiff cannot justifiably state that when it settled with Ash and Nicastri it was at risk of shouldering more than its fair share of a common burden. It cannot now recover contribution from defendants on the theory that it paid more than its pro rata share of such liability.

Therefore, I respectfully dissent from the majority's decision that contribution is possible here. I would instead affirm the decision of the Court of Appeals.

CAVANAGH, J., concurred with KELLY, J.

WARD v CONSOLIDATED RAIL CORPORATION

Docket No. 124533. Decided March 8, 2005. On application by the defendant for leave to appeal, the Supreme Court, after hearing oral argument on whether the application should be granted and in lieu of granting leave to appeal, reversed in part the judgment of the Court of Appeals and remanded the matter to the circuit court for a new trial with regard to the plaintiff's claim under the Federal Safety Appliance Act, 49 USC 20302.

William F. Ward brought an action in the Wayne Circuit Court against Consolidated Rail Corporation, seeking damages for a work-related injury allegedly caused by a defective brake mechanism on one of the defendant's locomotives. The court, Amy P. Hathaway, J., instructed the jury that, because the defendant failed to produce the allegedly defective mechanism, the handbrake was presumed to be defective and that the jury could infer that the missing evidence was unfavorable to the defendant. The jury was not instructed that no adverse inference should be drawn if it found that the defendant had a reasonable explanation for its failure to produce the evidence. The jury returned a verdict in favor of the plaintiff with respect to his claim under the Federal Safety Appliance Act, 49 USC 20302, and a judgment was entered thereon. The defendant appealed. The Court of Appeals, SAWYER, P.J., and METER and SCHUETTE, JJ., in an unpublished opinion per curiam, issued August 7, 2003 (Docket No. 234619), affirmed in part and remanded the matter to the trial court. The defendant sought leave to appeal to the Supreme Court.

In an opinion per curiam, signed by Chief Justice TAYLOR, and Justices WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The trial court erred in instructing the jury that the brake was presumed to be defective. Missing evidence gives rise to an adverse presumption when the complaining party can establish intentional conduct indicating fraud and a desire to destroy evidence and thereby suppress the truth. The evidence here does not warrant such a presumption. The trial court also erred when it instructed the jury regarding the possibility of drawing an adverse inference. A jury may draw an adverse inference against a party that has failed to produce evidence when: the evidence was under the

party's control and could have been produced; the party lacks a reasonable excuse for its failure to produce the evidence; and the evidence is material, not merely cumulative, and not equally available to the other party. The trial court's instruction in this case did not explain that no adverse inference ultimately remains if the defendant had a reasonable explanation for its failure to produce the missing evidence.

Although the trial court's error was harmless with regard to the plaintiff's claims on which the jury returned a verdict of no cause of action in favor of the defendant and that part of the Court of Appeals judgment need not be disturbed, the error requires reversal of the part of the judgment concerning the Federal Safety Appliance Act claim under 49 USC 20302 and a new trial on that claim before a properly instructed jury. Instructional error warrants reversal if it resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice. The trial court's erroneous ruling on the adverse presumption and the numerous references by the plaintiff's counsel to the ruling during trial fundamentally prejudiced the defendant with respect to the Federal Safety Appliance Act claim because it significantly interfered with the jury's ability to decide the case intelligently, fairly, and impartially. Accordingly, failure to vacate this aspect of the judgment and to grant the defendant a new trial on this claim would be inconsistent with substantial justice.

Reversed in part and remanded.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that, although he agrees with the majority that the trial court initially erred when it concluded that the plaintiff was entitled to an adverse presumption, it is not clear that the trial court ultimately erred in instructing the jury that it could infer that the missing evidence was unfavorable to the defendant. If the court did err, the error was harmless. The perceived error did not result in such unfair prejudice to the defendant that permitting the jury's verdict to stand would be inconsistent with substantial justice.

1. EVIDENCE — PRESUMPTIONS — REBUTTAL.

A presumption is a procedural device that entitles the person relying on it to a directed verdict if the opposing party fails to introduce evidence rebutting the presumption; the presumption dissolves if rebuttal evidence is introduced but the underlying inferences remain to be considered by the jury.

2. EVIDENCE — MISSING EVIDENCE — PRESUMPTIONS.

Missing evidence gives rise to an adverse presumption only when the complaining party can establish intentional conduct indicating fraud and a desire to destroy evidence and thereby suppress the truth.

3. EVIDENCE — MISSING EVIDENCE — ADVERSE INFERENCES.

A jury may draw an adverse inference against a party that has failed to produce evidence only when the evidence was under the party's control and could have been produced, the party lacks a reasonable excuse for its failure to produce the evidence, and the evidence is material, not merely cumulative, and not equally available to the other party (M Civ JI 6.01).

4. JURY — JURY INSTRUCTIONS — APPEAL.

Instructional error warrants reversal if it resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be inconsistent with substantial justice; instructional error is unfairly prejudicial where it significantly interfered with the jury's ability to decide the case intelligently, fairly, and impartially.

Best & Flanagan, L.L.P. (by *Roger R. Roe, Jr.*), and *Sinas, Dramis, Brake, Boughton & McIntyre, P.C.* (by *Brian J. Waldman*) (*Bendure & Thomas*, by *Mark R. Bendure*, of counsel), for the plaintiff.

Durkin, McDonnell, Clifton & O'Donnell, P.C. (by *Gregory A. Clifton* and *Joseph J. McDonnell*), for the defendant.

PER CURIAM. The issue before us concerns the consequence, if any, of defendant's inability to produce an allegedly defective locomotive handbrake at trial.

In this case, the trial court instructed the jury that because defendant disposed of the handbrake, it was presumed to be defective and the jury could infer that the missing evidence was unfavorable to defendant. This instruction was given despite the fact that defendant produced evidence that it discarded the handbrake

in the regular course of business, for reasons unrelated to plaintiff's claim. The jury returned a verdict for plaintiff. The Court of Appeals affirmed, in part, and remanded.[1]

We conclude that the jury instructions were flawed in two respects. First, the trial court erred when it instructed the jury that the handbrake was presumed to be defective. Such a presumption is not supported by the evidence. Second, the trial court erred when it instructed the jury that it could draw an adverse inference, but failed to explain that no inference should be drawn if defendant had a reasonable excuse for its failure to produce the evidence. Because these errors were not harmless, we reverse the part of the Court of Appeals judgment concerning the Federal Safety Appliance Act, 49 USC 20302, and remand this case for a new trial on that claim before a properly instructed jury.

I. BACKGROUND

Plaintiff, a railroad engineer, claimed that he was injured by a faulty handbrake that he was using to secure one of defendant's locomotives. The braking system employs two control levers. The brake is engaged by moving the application lever in an up-and-down arc; each upward stroke tightens a chain that runs from the lever to the brake. The brake is disengaged through a separate release lever. Plaintiff claimed that his back was injured when the application lever unexpectedly stopped while he was in the middle of an upward stroke.[2]

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[1] Unpublished opinion per curiam, issued August 7, 2003 (Docket No. 234619).

[2] Defendant's trainmaster had once before experienced difficulty engaging the handbrake; the evidence showed that this is a fairly common occurrence and is not considered a defect in the brake.

Plaintiff reported his injury to his employer the next day. Defendant had inspected the locomotive four days before plaintiff's accident and the handbrake was working properly at that time. In response to plaintiff's injury report, the entire handbrake assembly was inspected again, this time by defendant's trainmaster and a locomotive machinist. They took apart and examined the assembly, including the levers, brake chain, and gear mechanism. They determined that the handbrake was functioning properly and returned the locomotive to service.

Defendant's employees then operated the locomotive regularly for more than two weeks, successfully using the application lever to engage the brake. Nineteen days after plaintiff's injury, one of defendant's employees reported that the release lever jammed and that the handbrake could not be disengaged. The locomotive was moved to a repair facility in Elkhart, Indiana, where it was examined by defendant's maintenance supervisor. He removed and discarded the entire handbrake assembly and installed a new one. The Elkhart maintenance supervisor was unaware of plaintiff's earlier report of a malfunction in the application lever.

Plaintiff filed this lawsuit more than ten months later. He theorized that the application lever stopped in mid-stroke because of the presence of a repair link, or clevis, in the brake chain. He alleged that defendant was negligent under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq.*, and that defendant violated both the Federal Locomotive Inspection Act (FLIA), 49 US 20701 *et seq.*,[3] and the Federal Safety

[3] The FLIA states, in relevant part, that a railroad carrier may "use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances . . . [a]re in proper condition and safe to operate without unnecessary danger of personal injury . . . ." 49 USC 20701(1).

Appliance Act (FSAA), 49 USC 20302.[4]

In a motion for partial summary disposition, plaintiff informed the trial court that defendant discarded the entire handbrake assembly and argued that he was entitled to a presumption that the handbrake was defective. Defendant argued that no adverse presumption should be made because the handbrake was discarded in the ordinary course of business following a malfunction in the release lever—a mechanism different from the one plaintiff theorized caused his injury. Defendant supported its position with an affidavit from its Elkhart maintenance supervisor. The trial court resolved this issue in plaintiff's favor and reaffirmed its ruling before the start of trial.

The jury was made aware of the presumption. Plaintiff's counsel said, during opening statement:

> And even though they knew about the injury, they knew about these claims, the defect in this hardware, they destroyed the evidence. The railroad destroyed the evidence. They threw away the chain, they threw away the clevis, they threw away the entire handbrake even though they had this knowledge. And it is for this reason that this Court has concluded there is a presumption in this case that this handbrake was defective when Mr. Ward went to use it and got hurt on the evening of February 19, 1998.

This theme was repeated during jury voir dire and closing arguments.

After the close of evidence, the trial court reminded the jury of the presumption and instructed it that it could infer that the missing evidence would have been unfavorable to defendant:

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[4] The FSAA states, in relevant part, that a railroad carrier may "use or allow to be used on any of its railroad lines . . . a vehicle only if it is equipped with . . . efficient hand brakes . . . ." 49 USC 20302(a)(1)(B).

> The Court made a determination that there was a presumption that the handbrake at issue was defective due to the fact that the handbrake clevis and chain were discarded by defendant. The defendant railroad has come forward with some evidence to rebut this presumption. Accordingly, the law requires that I instruct you as follows:
>
> Certain evidence relevant to this case, namely the handbrake, the clevis and chain, were not available at trial because they were destroyed while in the possession or control of the defendant. The Rules of Evidence provide that you, the jury, may infer that this evidence was unfavorable to the defendant.

The jury returned a verdict for plaintiff. It found that defendant was not negligent under the FELA and that the handbrake was "in proper condition and safe to operate without unnecessary danger of personal injury" as required by the FLIA. The jury concluded, however, that the handbrake was not "efficient" as required by the FSAA and awarded plaintiff damages on this basis.

Defendant appealed. The Court of Appeals held that the trial court properly granted plaintiff a presumption of defect and properly instructed the jury.[5]

Defendant now seeks leave to appeal with this Court.[6]

II. STANDARD OF REVIEW

We review claims of instructional error de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). Jury instructions should not omit material

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[5] Defendant raised a total of thirteen issues in the Court of Appeals. It obtained relief on one issue relating to the calculation of case-evaluation sanctions.

[6] We consider here only defendant's claim that the trial court erred when it granted plaintiff a presumption that the missing handbrake was defective and when it instructed the jury on this issue. In all other respects, defendant's application for leave to appeal is denied.

issues, defenses, or theories that are supported by the evidence. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Instructional error warrants reversal if it "resulted in such unfair prejudice to the complaining party that the failure to vacate the jury verdict would be 'inconsistent with substantial justice.' " *Johnson v Corbet*, 423 Mich 304, 327; 377 NW2d 713 (1985); MCR 2.613(A).

III. DISCUSSION

The trial court's instructions to the jury blurred the distinction between presumptions and inferences and were not tailored to the evidence submitted by the parties.

In *Widmayer* v *Leonard*, 422 Mich 280, 289-290; 373 NW2d 538 (1985), we explained that a presumption is a "procedural device" that entitles the person relying on it to a directed verdict if the opposing party fails to introduce evidence rebutting the presumption. If rebuttal evidence is introduced, the presumption dissolves, but the underlying inferences remain to be considered by the jury:

> Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. But always it is the inference and not the presumption that must be weighed against the rebutting evidence. [*Id*. at 289.]

It is well settled that missing evidence gives rise to an adverse presumption only when the complaining party can establish " 'intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth.' " *Trupiano v Cully*, 349 Mich 568, 570; 84

NW2d 747 (1957), quoting 20 Am Jur, Evidence, § 185, p 191; *see also Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 520; 592 NW2d 786 (1999).

The evidence here does not warrant a presumption that the application lever of the handbrake was defective. When plaintiff requested the presumption, he established only that he gave defendant notice that the application lever had malfunctioned and that defendant discarded the entire handbrake assembly approximately three weeks later. This falls short of establishing that defendant committed " 'intentional conduct indicating fraud and a desire to destroy [evidence] and thereby suppress the truth.' " *Trupiano, supra* at 570, quoting 20 Am Jur, Evidence, § 185, p 191.

Moreover, even if plaintiff's initial evidentiary showing had been sufficient, no presumption would ultimately remain because defendant came forward with rebuttal evidence that provided a nonfraudulent explanation for its decision to discard the handbrake. *See Widmayer*, *supra* at 289. Once defendant presented this evidence, the initial presumption dissolved and, at best, the fact-finder was left with the possibility of considering the underlying inferences. *Id.* As a result, the trial court erred when it granted plaintiff an unrebuttable, adverse presumption that the handbrake was defective and allowed the jury to be informed of its ruling.

The trial court compounded this error when it read the jury a modified version of M Civ JI 6.01 and instructed the jury that it could infer that the evidence would have been unfavorable to defendant.[7] A jury may draw an adverse inference against a party that has failed to produce evidence only when: (1) the evidence

[7] M Civ JI 6.01(c) addresses the situation, like this one, where a party admits that it had control of evidence but cannot produce it and seeks to offer a reasonable excuse:

was under the party's control and could have been produced; (2) the party lacks a reasonable excuse for its failure to produce the evidence; and (3) the evidence is material, not merely cumulative, and not equally available to the other party. *Lagalo, supra* at 520; M Civ JI 6.01. In this case, the trial court's instruction omitted the critical language in M Civ JI 6.01 explaining that no adverse inference arises if defendant has a reasonable explanation for its failure to produce the missing evidence. We conclude, therefore, that the trial court erred both in regard to the adverse presumption ruling and the modified M Civ JI 6.01(c) instruction.

Having determined that the trial court erred, we turn to the issue whether the error was harmless.[8]

(The *[plaintiff* / *defendant]* in this case has not offered *[the testimony of* [name] / [identify exhibit]*]*. As this evidence was under the control of the *[plaintiff* / *defendant]* and could have been produced by *[him* / *her]*, you may infer that the evidence would have been adverse to the *[plaintiff* / *defendant]*, if you believe that no reasonable excuse for *[plaintiff's* / *defendant's]* failure to produce the evidence has been shown.)

[8] As an initial matter, before a "harmless error" inquiry is performed by the reviewing court, the party challenging the instruction must preserve the issue for appeal. MCR 2.516(C). To preserve the issue, the party must timely object to the instruction on the record, "stating specifically the matter to which the party objects and the grounds for the objection." *Id*.

At oral argument, counsel for plaintiff stipulated the timeliness of defendant's objection. Plaintiff's counsel only challenged the specificity of the objection. At trial, defense counsel objected to the instruction given by the trial court by stating, "The defendant objects to the presumption instruction or the revised presumption instruction that was given today. We object to the fact that the requested instruction by the defendant regarding inference that the prior and post condition of the brake should have been considered."

While we acknowledge that defense counsel's objection is not a model of clarity, we conclude that defense counsel satisfied the specificity requirements of MCR 2.516(C). Counsel stated specifically the matter to which defendant objected (i.e., the revised presumption instruction given

Instructional error is harmless unless a failure by the reviewing court to correct the error would be "inconsistent with substantial justice." MCR 2.613(A). The error in this case was harmless with regard to the FELA and FLIA claims because the jury returned a verdict of no cause of action in favor of defendant. We do not disturb this aspect of the judgment. *Id*. The error was not harmless, however, with regard to the jury's finding that the handbrake was "inefficient" and that defendant violated the FSAA.

During trial, plaintiff's counsel made repeated references to the erroneous adverse presumption ruling. Counsel for plaintiff told the jury during voir dire, opening arguments, and closing arguments that the handbrake could be "presumed defective." The trial court itself reminded the jury of the adverse presumption when it instructed the jury before deliberations. The trial court's erroneous ruling on the adverse presumption and the numerous references by plaintiff's counsel to the ruling during trial fundamentally prejudiced defendant with respect to the FSAA claim because it significantly interfered with the jury's ability to " 'decide the case intelligently, fairly, and impartially.' " *Cox*, *supra* at 15 (quoting *Johnson*, *supra* at 327). Accordingly, failure to vacate this aspect of the judgment and to grant defendant a new trial on the FSAA claim would be "inconsistent with substantial justice." MCR 2.613(A).

We are not persuaded by plaintiff's argument that the trial court cured its erroneous adverse presumption ruling when it later read the jury a modified version of the adverse inference instruction contained in M Civ JI

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by the trial court) and the grounds for the objection (i.e., that the trial court did not give the full inference instruction requested by defendant). Accordingly, defense counsel preserved the issue for appeal.

6.01(c). To the contrary, the trial court's truncated version of M Civ JI 6.01(c) only compounded its prior error. The modified version of M Civ JI 6.01(c) omitted the critical language informing the jury that no adverse interference arises if the jury believes that a reasonable excuse for defendant's failure to produce the missing evidence has been shown.

At trial, defendant presented evidence that its maintenance supervisor, unaware of plaintiff's earlier injury report, discarded the handbrake assembly during the normal course of business. Specifically, defendant offered evidence that its maintenance supervisor discarded the handbrake assembly in response to a separate complaint about the handbrake's *release* lever—a lever different from the *application* lever, which plaintiff theorized caused his injury. Accordingly, because defendant presented a reasonable excuse for its failure to produce the handbrake at trial, we conclude that defendant was fundamentally prejudiced by the trial court's modified version of M Civ JI 6.01(c). Defendant was entitled to have the jury hear the entire version of M Civ JI 6.01(c), not an abbreviated version that created an artificial and overwhelming advantage in favor of plaintiff. To hold otherwise would deny defendant a fair trial and would be "inconsistent with substantial justice." MCR 2.613(A); see also *Cox*, *supra* at 15 (holding that the failure to reverse on the basis of the trial court's modified version of SJI2d 30.01, which effectively altered the burden of proof, would be inconsistent with substantial justice).

IV. CONCLUSION

Accordingly, we reverse the part of the Court of Appeals judgment concerning the FSAA claim and remand this case to the trial court for a new trial on

plaintiff's FSAA claim before a properly instructed jury. On remand, the trial court shall instruct the jury that it may infer that the evidence would be unfavorable to defendant, but that no such inference should arise if the jury believes that defendant has a reasonable explanation for its failure to produce the missing evidence. M Civ JI 6.01(c).

TAYLOR, C.J., and WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

CAVANAGH, J. (*dissenting*). While I tend to agree that the trial court initially erred under existing law when it concluded that plaintiff was entitled to an adverse presumption,[1] I am not as convinced as the majority that the trial court ultimately erred when it instructed the jury that it could infer that the missing evidence was unfavorable to defendant.[2] Moreover, even assuming that the trial court erroneously instructed the jury, I would conclude that the error was harmless.

Here, the jury found that defendant was not negligent under the Federal Employers' Liability Act (FELA), 45 USC 51 *et seq*. The jury also concluded that the handbrake in question was in proper condition and safe to operate without unnecessary danger of personal injury as required by the Federal Locomotive Inspection Act (FLIA). See 49 USC 20701(1). However, the jury found that the Federal Safety Appliance Act (FSAA),

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[1] See *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957).

[2] See, e.g., *In re Wood Estate*, 374 Mich 278, 288-290; 132 NW2d 35 (1965). See also W*idmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985); *Brandt v C F Smith & Co*, 242 Mich 217, 222; 218 NW 803 (1928); *Dowagiac Mfg Co v Schneider*, 181 Mich 538, 541; 148 NW 173 (1914); *Vergin v City of Saginaw*, 125 Mich 499, 503; 84 NW 1075 (1901); *Cooley v Foltz*, 85 Mich 47, 49; 48 NW 176 (1891); *Cole v Lake Shore & M S R Co*, 81 Mich 156, 161-162; 45 NW 983 (1890).

specifically 49 USC 20302(a)(1)(B), had been violated because the handbrake was inefficient. On the facts before us, I fail to see how the perceived error in this case resulted in such unfair prejudice to defendant that permitting the jury's verdict to stand would be inconsistent with substantial justice. In my view, the jury could have reached its verdict without the aid of the trial court's arguably erroneous instruction. The jury could have concluded that defendant was not negligent and that the handbrake, even though not unnecessarily dangerous, was nonetheless inefficient.[3] Accordingly, I must respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

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[3] See, e.g., MCR 2.613(A); *Urben v Pub Bank*, 365 Mich 279, 287; 112 NW2d 444 (1961); *Macklem v Warren Constr Co*, 343 Mich 334; 72 NW2d 60 (1955).

ADVOCACY ORGANIZATION FOR PATIENTS & PROVIDERS
v AUTO CLUB INSURANCE ASSOCIATION

Docket No. 124639. Argued November 9, 2004 (Calendar No. 5). Decided March 8, 2005.

The Advocacy Organization for Patients & Providers, an organization of health-care providers and health-care patients, along with others, brought an action in the Eaton Circuit Court against the Auto Club Insurance Association, a no-fault insurance company, and others, seeking declaratory and injunctive relief on an allegation that the defendants were violating the no-fault act, MCL 500.3101 *et seq*., by failing to pay the full amount of their insureds' medical bills as required by MCL 500.3107 and 500.3157 of the act. The plaintiffs asserted that it was unlawful for the defendants to employ review companies to compare the insureds' providers' fees to those of other providers in order to determine a reasonable charge, when the defendants were required by statute to compare their insureds' health-care providers' fees for services with those providers' fees for comparable services provided to an uninsured patient to determine a reasonable charge. The plaintiffs moved for summary disposition, and the defendants filed a cross-motion for summary disposition, arguing that a customary fee of a particular provider is not necessarily a reasonable one, and that the defendants were permitted to evaluate a medical invoice for reasonableness as a matter of law. The court, Calvin E. Osterhaven, J., granted the defendants' motion for summary disposition. The plaintiffs appealed. The Court of Appeals, MARKEY and MURRAY, JJ. (FITZGERALD, P.J., concurring), affirmed. 257 Mich App 365 (2003). The Supreme Court granted leave to appeal. 470 Mich 881 (2004).

In a memorandum opinion, signed by Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN, and in concurring opinions by Justices CAVANAGH (joined by Justice KELLY), WEAVER, and CORRIGAN, the Supreme Court *held*:

MCL 500.3107(1)(a) requires a no-fault insurer to pay all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. MCL 500.3157 provides that a medical provider may charge a reasonable amount for such products,

services, and accommodations but the amount shall not exceed the amount the provider customarily charges for like products, services, and accommodations in cases not involving insurance. In this case the Court of Appeals affirmed the trial court's ruling that the fact that a medical provider's charge does not exceed the amount the provider customarily charges in cases not involving insurance does not establish that the charge is reasonable. The Court of Appeals correctly concluded that it is for the trier of fact to determine whether a medical charge, although customary, is reasonable.

Justice CAVANAGH, joined by Justice KELLY, concurring, stated that given that the question of reasonableness was not before the lower courts and discovery did not center on the question, he would be apprehensive about sanctioning any method without knowing its full details. The Legislature should address this issue and implement some guidelines, as other no-fault states have done.

Justice WEAVER, concurring, fully joined the concurrence of Justice CAVANAGH but wrote separately to stress the need for the Court to address the specific procedures to be followed when a justice decides whether to participate in a case. There is a right and an expectation of the people that a justice will participate in every case unless there is a valid publicly known reason why the justice should not participate in a particular case. Const 1963, art 6, § 6 requires justices to give written reasons, accessible to the public, for their decisions whether to participate in a case. MCR 2.003 governs the procedure for the disqualification of Michigan Supreme Court justices.

Justice CORRIGAN, concurring, wrote separately to note that there is nothing secretive or sinister in the tradition followed by the justices in choosing whether to publish a reason for a decision on recusal. The recusal decisions of the other six members of the Court over the last two years, like Justice WEAVER's 251 pre-2003 recusal decisions, comport with the Constitution and the Michigan Court Rules.

Affirmed.

Justice YOUNG took no part in the decision of this case.

INSURANCE — NO-FAULT — MEDICAL PROVIDERS — REASONABLE CHARGES.

Although a medical provider may charge a reasonable amount for products, services, and accommodations for an injured person's care, recovery, or rehabilitation and that amount may not exceed the amount the provider customarily charges for like products,

> services, and accommodations in cases not involving no-fault insurance, the fact that the provider's charge does not exceed that customary amount does not establish that the charge is reasonable; the determination regarding the reasonableness of the amount charged is a question for the trier of fact (MCL 500.3107[1][a], 500.3157).

Sheldon L. Miller, *Barbara H. Goldman*, and *Linda Fausey* for the plaintiffs.

Barris Sott Denn & Driker, P.C. (by *Stephen E. Glazek*), for Auto Club Insurance Association.

Garan, Lucow, Miller, P.C. (by *David N. Campos*), for Allstate Insurance Company, Wolverine Mutual Insurance Company, and Secura Insurance Company.

Dykema Gossett PLLC (by *Lori McAllister*) for Citizens Insurance Company and Auto-Owners Insurance Company.

Willingham & Cote (by *Raymond J. Foresman*) for Farm Bureau Insurance Company.

Wheeler & Upham, P.C. (by *Gary A Maximiuk* and *Jack L. Hoffman*), for Farmer's Insurance Exchange.

Foster Swift Collins & Smith (by *Scott L. Mandel*) for Frankenmuth Mutual Insurance Company.

Bodman LLP (by *Diane L. Akers* and *James Albert Smith*) for State Farm Mutual Automobile Insurance Company.

Howard & Howard Attorneys, P.C. (by *Eric H. Lipsitt*), for Transamerica Insurance Group.

Bodman LLP (by *Joseph J. Shannon*) for Manageability, Inc.

Lambert, Leser, Cook, Schmidt & Guinta, P.C. (by *Susan M. Cook*), for Medcheck Medical Audit Services.

Nemier, Tolari, Landry, Mazzeo & Johnson P.C. (by *David B. Landry* and *Michelle E. Mathieu*) for Recovery Unlimited, Inc.

Zausmer, Kaufman, August & Caldwell, P.C. (by *Mark J. Zausmer*), for Titan Insurance Company.

Bush, Seyferth & Kethledge, PLLC (by *Cheryl A. Bush*), for Review Works.

Amici Curiae:

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Joseph Erhardt*) for the Michigan Catastrophic Claims Association.

George M. Carr, P.C. (by *George M. Carr*), for the Property Casualty Insurers Association of America.

Honigman Miller Schwartz and Cohn LLP (by *Chris Rossman, Jason Schian Conti*, and *Cynthia F. Reaves*) for the Michigan Health and Hospital Association.

Kerr, Russell and Weber, PLC (by *Richard D. Weber* and *Joanne Geha Swanson*), for the Michigan State Medical Society.

Gross, Nemeth & Silverman, P.L.C. (by *James G. Gross*), for the Michigan Chamber of Commerce.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas* and *L. Page Graves*), for the Coalition Protecting Auto No Fault.

MEMORANDUM OPINION. This declaratory judgment action concerns obligations under the no-fault act, MCL

500.3101 *et seq*., to pay medical expenses. Plaintiffs are individual medical providers, two guardians of catastrophically injured victims of automobile accidents, and an organization of health-care providers and patients that principally seeks to protect the legal rights of both groups. Defendants are either no-fault insurance companies that have issued policies to Michigan motorists or the review companies employed by one or more of those insurers to review medical bills arising from automobile accidents.

MCL 500.3107(1)(a) requires that an insurer pay "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3157 provides that a medical provider "may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance."

After a hearing on the parties' respective motions for summary disposition, the trial court ruled that defendants were entitled to review any medical charges and pay only those determined to be reasonable. The trial court further ruled that even though a medical provider's charge does not exceed the amount that provider customarily charges in cases not involving insurance, that fact alone does not establish that the charge is reasonable.

The Court of Appeals affirmed. 257 Mich App 365; 670 NW2d 569 (2003). It ruled that it is for the trier of fact to determine whether a medical charge, albeit "customary," is also reasonable. 257 Mich App 379.

Because we agree with the Court of Appeals resolution of this issue, and the others presented to it, we affirm. MCL 7.302(G)(1).

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred.

CAVANAGH, J. (*concurring*). At oral argument it became very clear that defendants' methodologies in determining reasonableness were never at issue at the trial court level, which accounts for the dearth of evidence regarding those methodologies. Counsel for plaintiff admitted that the reason discovery was not more directed toward illuminating the methodologies was because no one asked plaintiffs before this Court's leave order to discuss how reasonableness should be assessed. Although I agree with the Court of Appeals conclusion that "reasonable" and "customary" are two separate inquiries, I view its reference to the 80th percentile test, given this record, as dicta. Given that the question of reasonableness was not before the lower courts, and, consequently, discovery did not center on the question, I would be apprehensive about sanctioning any method without knowing its full details. I agree also with the Court of Appeals concurrence that urged our Legislature to address this issue and implement some guidelines in this area, as other no-fault states have done.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*concurring*). I join fully in Justice CAVANAGH's concurrence.

I write separately because this case is further evidence that this Court needs to address and open for public comment the specific procedures to be followed when a justice decides whether or not to participate in a case, and whether Const 1963, art 6, § 6 requires justices to give written reasons for their decisions whether or not to participate in a case.

When this Court entered its order granting leave to appeal on June 25, 2004, Justice YOUNG was shown as not participating; he is also shown as not participating in this memorandum opinion. No public or written explanation for Justice YOUNG's decision not to participate in the case has been given to the Court, the parties, or the public.

A justice's nonparticipation in a case may arise in one of two ways. A justice may decide, on his own initiative, not to participate in a case, and be shown as not participating. Alternatively, a party may request the recusal of a justice from a case. Recusal is defined as "[t]he process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self interest, bias or prejudice." Black's Law Dictionary (6th ed).

It is now clear to me that there is a right and an expectation of the people of Michigan that a justice will participate in every case unless there is a valid publicly known reason why the justice should not participate in a particular case. Traditionally, in this Court a justice's decision on whether to participate or not participate in a case has been a secret matter, and justices have not made public the reasons for that decision.[1] But a

[1] From January 1, 1995, when I began serving on the Michigan Supreme Court, until May 2003, when I first stated that justices should publish in the record of the case the reason(s) for the justice's decision whether to participate or not participate in a case, I was shown as not participating approximately 251 times, with no explanation given. In almost all these cases, I did not participate because I had been on the Court of Appeals panels that earlier decided the cases and I was informed that justices "traditionally" did not participate in such cases. In retrospect, I believe that reasons for my decisions not to participate should have been made part of the Court's orders or opinions.

I filed a detailed explanation of my decision not to participate in *In re JK,* 468 Mich 1239 (2003). In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), reconsideration den 472 Mich 1201 (2005),

justice's decision whether to participate or not participate in a case and the reasons for that decision should not be governed by tradition and secrecy; they should be governed by the law, the Constitution, and the Michigan Court Rules made in conformance with the Constitution; and they should be made publicly and in writing for the record. This Court should set the highest standards for clear, fair, orderly, and public procedures.

The question whether a justice should participate or not participate in a case arises with regularity. Since May 2003, when I proposed opening an administrative file on the recusal procedure in *In re JK,* 468 Mich 1239 (2003), a justice has been shown as not participating, with no reason given, in at least 31 cases.[2]

The questions raised in this and any other case in which a justice's participation or nonparticipation arises are:

> 1) Are individual justices bound by the requirements of art 6, § 6 of the 1963 Michigan Constitution that states, "Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . ."?
>
> 2) Do the procedures regarding the disqualification of judges set forth in Michigan Court Rule 2.003 apply to Supreme Court justices?

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the plaintiff's attorney moved to disqualify then-Chief Justice CORRIGAN and Justices WEAVER, TAYLOR, YOUNG, and MARKMAN. I attached to the order denying that motion a written explanation for my decision to participate in the case. Similarly, in *Graves v Warner Bros,* 669 NW2d 552 (2003), the plaintiff filed a motion for reconsideration, asking that then-Chief Justice CORRIGAN and Justices WEAVER, TAYLOR, YOUNG, and MARKMAN recuse themselves from participating in the case. I filed a statement giving reasons for my decision to participate in the case.

[2] The list of cases in which the various justices were shown as not participating is attached as Appendix A.

Const 1963, art 6, § 6, which states that "Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision" requires that justices give written reasons for each decision.[3] There is no more fundamental purpose for the requirement that the decisions of the Court be in writing than for the decisions to be accessible to the citizens of the state. Because a justice's decision to not participate in a case can, itself, change the outcome of a case, the decision is a matter of public significance and public access and understanding regarding a justice's participation or nonparticipation is vital to the public's ability to assess the performance of the Court and the performance of the Court's individual justices. Thus, the highest and best reading of art 6, § 6 requires that a justice's self-initiated decision not to participate, or a challenged justice's decision to participate or not participate, should be in writing and accessible to the public.

Further, Michigan Court Rule 2.003, which regulates the procedures for the disqualification of judges, applies to Michigan Supreme Court justices.[4] Michigan Court Rule 2.001 provides that the rules in chapter 2, which includes MCR 2.003, apply to all courts established by the Constitution and laws of the state of Michigan.[5] The Michigan Supreme Court is a court established by the Michigan Constitution. Thus, a plain reading of the

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[3] Art 6, § 6 of the 1963 Michigan Constitution states, in full:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[4] The full text of MCR 2.003 is attached as Appendix B.

[5] MCR 2.001 states:

court rule shows that MCR 2.003 governs the procedures for the disqualification of Michigan Supreme Court justices.

Almost two years ago, in May 2003, this Court's longstanding failure to follow and apply MCR 2.003 to itself became apparent to me.[6] As a result, I proposed an amendment of MCR 2.003 that would clarify the applicability of MCR 2.003 and bring MCR 2.003 into conformance with the requirements of Const 1963, art 6, § 6. The amendment I proposed requires a justice to publish in the record of the case the reason(s) for the justice's decision whether to participate or not participate in a case.[7] In response to my recommendation that the Court open an administrative file and take public comments on such a rule, the Court opened an administrative file, ADM 2003-26, on May 20, 2003. But almost two years later, the Court has not yet placed the proposed amendment or the issue on any of the public hearing agendas on administrative matters held during that time. There have been five such public hearings since May 2003: September 23, 2003, January 29, 2004, May 27, 2004, September 15, 2004, and most recently January 27, 2005. Nor has the Court taken any other action regarding a clear, fair, orderly, and public procedure for the participation or nonparticipation of justices of the Supreme Court.

> The rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure.

[6] In *In re JK,* 468 Mich 1239 (2003), my participation in a case became an issue, which led me to research the procedures governing the participation and disqualification of justices.

[7] See *In re JK,* 468 Mich 1239 (2003).

A justice's decision whether to participate or not participate in a case and the reasons for that decision should not be governed by tradition and secrecy; they should be governed by the law, the Constitution, and the Michigan Court Rules made in conformance with the Constitution; and they should be made publicly and in writing for the record. This Court should set the highest standards for clear, fair, orderly, and public procedures.

I continue to urge the Court to recognize, open for public comment, and address this ongoing need to have clear, fair, orderly, and public procedures concerning the participation or nonparticipation of justices.

APPENDIX A

Chief Justice TAYLOR was shown as not participating in two cases. *Booker v Detroit,* 469 Mich 892 (2003), and *Neal v Dep't of Corrections*, 471 Mich 928 (2004).

Justice CAVANAGH was shown as not participating in two cases. *Konieczka v Dep't of Transportation,* 468 Mich 912 (2003), and *Herwig-Tucker v Detroit Entertainment, LLC,* 471 Mich 873 (2004).

Justice KELLY was shown as not participating in seven cases. *Boyle v Gen Motors Corp,* 468 Mich 1249 (2003), *Woodman v Miesel Sysco Food Service Co,* 469 Mich 855 (2003), *Grievance Administrator v Raaflaub,* 668 NW2d 146 (Mich, 2003), *People v Wright*, 469 Mich 880 (2003), *People v White,* 469 Mich 877 (2003), *Sonsynath v Dep't of Transportation,* 668 NW2d 153 (Mich, 2003), and *People v Herbert,* 470 Mich 857 (2004).

Justice CORRIGAN was shown as not participating in one case. *Shaya v Universal Standard Medical Laboratories, Inc,* 469 Mich 994 (2004).

Justice YOUNG was shown as not participating in eight cases. *Bomarko, Inc v Mercy Health Services No 2,* 468 Mich 915 (2003), *Auto Club Ins Ass'n v Juncaj,* 468 Mich 923 (2003), *Brooks v State Farm Mut Automobile Ins Co,* 469 Mich 874 (2003), *Blamer v Guiang,* 469 Mich 899 (2003), *People v Shook,* 469 Mich 911 (2003), *Fournier v Mercy Community Health Care System-Port Huron,* 469 Mich 921 (2003), *Warber v Trinity Health Corp,* 469 Mich 1001 (2004), and *Lawrence v Battle Creek Health Systems,* 469 Mich 1051 (2004).

Justice MARKMAN was shown as not participating in eleven cases. *People v Nevers,* 469 Mich 881 (2003), *People v Bahoda,* 469 Mich 945 (2003), *Shacket Developments, Inc v Labana,* 469 Mich 909 (2003), *Shaya v Universal Standard Medical Laboratories, Inc,* 469 Mich 994 (2004), *Hughes v Hall,* 469 Mich 1016 (2004), *People v Harwell,* 469 Mich 1017 (2004), *Grievance Administrator v Zipser,* 469 Mich 1307 (2004), *People v Zakar,* 470 Mich 854 (2004), *Landes v Equity Resource Environmental,* 470 Mich 864 (2004), *People v Nevers,* 683 NW2d 674 (Mich, 2004), and *American Bumper and Mfg Co v Nat'l Union Fire Ins Co of Pittsburgh,* 471 Mich 948 (2004).

APPENDIX B

MCR 2.003, Disqualification of Judge, provides:

(A) Who May Raise. A party may raise the issue of a judge's disqualification by motion, or the judge may raise it.

(B) Grounds. A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:

(1) The judge is personally biased or prejudiced for or against a party or attorney.

(2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) The judge has been consulted or employed as an attorney in the matter in controversy.

(4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

(6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(d) is to the judge's knowledge likely to be a material witness in the proceeding.

A judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(C) Procedure.

(1) *Time for Filing*. To avoid delaying trial and inconveniencing the witnesses, a motion to disqualify must be filed within 14 days after the moving party discovers the ground for disqualification. If the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness,

including delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to be Included; Affidavit*. In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling*. The challenged judge shall decide the motion. If the challenged judge denies the motion,

(a) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(b) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(4) *Motion Granted*. When a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(D) Remittal of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If, following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.

CORRIGAN, J. (*concurring*). I concur with the lead opinion in this case and write separately to respond to Justice WEAVER's now-familiar views regarding this Court's recusal procedures. (See *In re JK,* 468 Mich 1239 [2003]; *Gilbert v DaimlerChrysler Corp,* 469 Mich 889 [2003].)

All the members of this Court serve with the knowledge that "[t]he Due Process Clause requires an unbiased and impartial decisionmaker." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). It is therefore standard practice for each justice of this Court to voluntarily recuse himself or herself when the justice cannot participate impartially.

In her concurring statement, Justice WEAVER correctly points out that a justice may choose whether to publish his or her reasons for recusal. There is nothing secretive or sinister in this tradition. Indeed, Justice WEAVER acknowledges that over an eight-year period she herself declined to publish reasons for her nonparticipation in approximately 251 cases.[1]

Like justices of the Michigan Supreme Court, the justices of the United States Supreme Court sometimes do and sometimes do not state their reasons for determining whether to participate in a decision. See, e.g., *Cheney v United States Dist Court for the Dist of Columbia*, 541 US 913; 124 S Ct 1391; 158 L Ed 2d 225 (2004); *Intel Corp v Advanced Micro Devices, Inc,* 542 US 241; 124 S Ct 2466; 159 L Ed 2d 355 (2004); *United States v Hatter*, 532 US 557; 121 S Ct 1782; 149 L Ed 2d 820 (2001); *Fed Election Comm v NRA Political Victory Fund*, 513 US 88; 115 S Ct 537; 130 L Ed 2d 439 (1994); *Arizona v United States Dist Court for the Dist of Arizona*, 459 US 1191; 103 S Ct 1173; 75 L Ed 2d 425 (1983); *Laird v Tatum*, 409 US 824; 93 S Ct 7; 34 L Ed 2d 50 (1972). Several of our sister states follow a similar recusal procedure.[2]

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[1] *Ante* at 97.

[2] Much like Michigan, many states have adopted judicial canons informed by the Model Code of Judicial Conduct. See Colorado Code of Judicial Conduct, Ch 24, Canon 3(C) and (E); Iowa Code of Judicial Conduct, Ch 51, Canon 3(C) and (D); Fla Stat Ann Code of Judicial

Like Justice WEAVER's 251 pre-2003 recusal decisions without explanation, the thirty-one recusal decisions by the remaining six members of the Court over the past two years comport with our Constitution[3] and the Michigan Court Rules. Justice WEAVER is, of course, entitled to now disagree with our traditional recusal procedures, and as she notes, ADM 2003-26 was opened on May 20, 2003, in response to her concerns. That file is being considered by this Court. The same is true for its predecessor, ADM 2003-24, which this Court opened on April 30, 2003, to consider the disqualification rule when a justice participated in a case at the Court of Appeals.

In addition, in now-closed administrative files, this Court has already considered local judicial disqualification rules, justices' participation in cases, and amending or interpreting MCR 2.003. See ADM 2002-41 (opened October 1, 2002, and closed April 2, 2003); ADM 1999-60 (opened November 30, 1999, and closed

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Conduct, Canon 3(E) and (F); New York Code of Judicial Conduct, Canon 3(E) and (F); Ohio Code of Judicial Conduct, Canon 3(G) and (H).

[3] The recusal standards that Justice WEAVER advances rest on her interpretation of Const 1963, art 6, § 6. Justice WEAVER's own prior positions are inconsistent in this regard. For instance, in *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003), she chose to not participate with respect to other justices on motions for disqualification because she felt it appropriate to decide only whether she herself should participate, and not whether other justices should do so. Such a posture can *only* be understood as characterizing a denial of a motion for disqualification as an individualized determination made by each justice, and not as a "[d]ecision[] of the supreme court" for purposes of art 6, § 6. Interestingly, in a number of what are *indisputably* "[d]ecisions of the supreme court," Justice WEAVER chose to offer no reasons or explanation for her own positions. See, e.g., *Taylor v Gate Pharmaceuticals,* 468 Mich 1, 19; 658 NW2d 127 (2003) (WEAVER, J., "concurred in the result only"); *People v Yost*, 468 Mich 122, 134; 659 NW2d 604 (2003) ("concurred in the result only"); *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16, 44; 576 NW2d 641 (1998) ("concurred only in the result"); *People v Jendrzejewski*, 455 Mich 495, 521; 566 NW2d 530 (1997) ("concurred only in the result").

October 6, 2000); ADM 1999-28 (opened April 30, 1999, and closed January 4, 2001; reopened May 1, 2001, and closed April 18, 2002); ADM 1992-18 (discussed June 4, 1992, and closed September 1994); ADM 1991-22 (reported November 7, 1991, and closed September 1, 1995). In short, like Justice WEAVER, the rest of this Court is cognizant of the "need to have clear, fair, orderly, and public procedures" in place with respect to the administration of justice.[4]

YOUNG, J., took no part in the decision of this case.

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[4] *Ante* at 101.

MAGEE v DAIMLERCHRYSLER CORPORATION

Docket No. 126219. Decided March 8, 2005. On application by the defendant for leave to appeal, the Supreme Court, after hearing oral argument on whether the application should be granted and in lieu of granting leave, reversed part of the judgment of the Court of Appeals and remanded the case to the circuit court for reinstatement of the order of summary disposition for the defendant.

Jacquelyn V. Magee brought an action in the Macomb Circuit Court against DaimlerChrysler Corporation, alleging sexual harassment, sex and age discrimination, retaliation, and constructive discharge from employment. The defendant moved for summary disposition, arguing that the action was barred by the statute of limitations because it was not brought within three years of any of the alleged acts of discrimination or retaliation. The trial court, James M. Biernat, Sr., J., granted the defendant's motion. The Court of Appeals, SCHUETTE, P.J., and METER and OWENS, JJ., affirmed the grant of summary disposition with regard to the constructive discharge claim and reversed the grant of summary disposition with regard to the other claims. Unpublished memorandum opinion, issued March 2, 2004 (Docket No. 243847). The Court's decision was based on the fact that the action was brought within three years of the date that the plaintiff resigned her employment. The defendant sought leave to appeal.

In an opinion per curiam, signed by Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The Court of Appeals erred in concluding that the plaintiff's claims accrued on the date she terminated her employment as opposed to her last day of work. No discriminatory conduct is alleged to have occurred after the plaintiff's last day of work. The claims were not timely filed within three years of that date. The part of the Court of Appeals judgment that reversed part of the judgment of the trial court must be reversed and the case must be remanded to the trial court for reinstatement of the order granting summary disposition in favor of the defendant with regard to all the claims brought by the plaintiff.

Justice WEAVER, concurring, stated that she concurs in the result of the opinion per curiam because the applicable three-year

period of limitations began to run when the plaintiff went on medical leave on September 12, 1998, and the plaintiff's claims were not filed within three years of that date. The trial court correctly granted summary disposition in favor of the defendant.

Affirmed in part, reversed in part, and remanded to the circuit court.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that the defendant's failure to stop the harassment after the plaintiff made repeated complaints was discriminatory conduct. The conduct occurred during the three years that preceded the filing of the complaint; therefore, the complaint was timely filed.

Tucker & Hughes, P.C. (by *Juanita Gavin Hughes*), for the plaintiff.

Cattel, Tuyn & Rudzewicz, PLLC (by *Tomas A. Cattel* and *Debra A. Colby*), for the defendant.

PER CURIAM. In this case involving the Civil Rights Act, the Court of Appeals held that plaintiff's claims of sexual harassment, sex and age discrimination, and retaliation were timely filed, because the lawsuit was brought within three years of the date she resigned her employment with defendant.[1]

We conclude that plaintiff's claims were not filed within the limitations period because none of the alleged discriminatory or retaliatory conduct occurred within the three years that preceded the filing of the complaint. We therefore reverse that part of the judgment of the Court of Appeals and remand the matter to the trial court for reinstatement of the trial court's grant of summary disposition to defendant.

I

Plaintiff Jacquelyn Magee was an hourly production employee who began work for defendant Daimler-

[1] Unpublished memorandum opinion, issued March 2, 2004 (Docket No. 243847).

Chrysler in 1976. She went on medical leave for emotional distress on September 12, 1998, and, without first returning to work, resigned her job on February 2, 1999.

On February 1, 2002, Magee filed a lawsuit under the Civil Rights Act, MCL 37.2101 *et seq*., claiming that she had been unlawfully discriminated against and harassed during most of her twenty-two years at DaimlerChrysler. Magee's complaint lists separate counts for sex harassment based on hostile work environment, sex harassment based on quid pro quo harassment, retaliation, sex discrimination, and age discrimination.[2]

In her complaint, Magee alleges that she suffered harassment from the 1980s until her last day of work on September 12, 1998, and that her supervisors periodically retaliated against her during this period as a result of her resistance to the harassment. Magee alleges that this constant harassment caused her to leave her job at DaimlerChrysler on September 12, 1998, and that she decided to resign on February 2, 1999, because she anticipated that the harassment would continue if she returned.

DaimlerChrysler moved for summary disposition, asserting that Magee's February 1, 2002, complaint failed to allege any discriminatory acts after September 12, 1998, and that the complaint was therefore not filed within the three-year period of limitations applicable to Civil Rights Act claims, MCL 600.5805(10).

The trial court initially denied DaimlerChrysler's motion without prejudice, allowing Magee to amend her complaint to allege harassment or retaliation occurring

[2] Magee's complaint also includes a separate count alleging constructive discharge. The trial court dismissed this count, and the Court of Appeals affirmed the trial court's ruling. Magee did not appeal, and the dismissal of that claim is not before this Court.

up to her February 2, 1999, resignation. However, because Magee's amended complaint continued to allege only harassment and retaliation through September 12, 1998, her last day of work, the trial court granted DaimlerChrysler's motion and dismissed Magee's complaint.

Magee appealed the trial court's ruling to the Court of Appeals, which relied on this Court's recent decision in *Collins v Comerica Bank*, 468 Mich 628; 664 NW2d 713 (2003), to reverse the lower court's dismissal of the harassment, retaliation, and discrimination claims. The Court of Appeals concluded that these claims were timely, because they were filed within three years of the date of Magee's resignation.

DaimlerChrysler then sought leave to appeal to this Court. After hearing oral argument from both parties on the application, this Court has now determined that the Court of Appeals misapplied *Collins* and erroneously reinstated Magee's Civil Rights Act claims.

II

In the absence of disputed facts, whether a cause of action is barred by the applicable statute of limitations is a question of law, which this Court reviews de novo. *Boyle v Gen Motors Corp*, 468 Mich 226, 229-230; 661 NW2d 557 (2003). Likewise, this Court reviews de novo rulings on summary disposition motions. *Neal v Wilkes,* 470 Mich 661, 664; 685 NW2d 648 (2004).

III

In *Collins*, *supra* at 633, this Court held that a cause of action for discriminatory termination does not accrue until the date of termination. The plaintiff employee, Gwendolyn Collins, was suspended pending an investi-

gation; when the investigation was completed several weeks later, her employment was terminated. Within three years of her termination, Collins filed a complaint alleging that her termination was the result of race and gender discrimination. The Court of Appeals ruled that Collins's suit was not timely under the three-year period of limitations because her causes of action accrued on the last day that she actually performed employment duties (as opposed to her later termination date). This Court disagreed with the Court of Appeals last-day-worked analysis and reversed, holding that a claim for discriminatory discharge cannot arise until a claimant has actually been discharged. *Id*.

Relying on *Collins*, the Court of Appeals in this case reasoned that Magee's claim also accrued on her termination date as opposed to her last day of work. The Court acknowledged that Magee resigned, and was not terminated. But it found significant that "her last day of work was followed by a period in which she was on a medical leave of absence" and that she was employed by DaimlerChrysler while on leave. Accordingly, it concluded that her causes of action, if any, arose on February 2, 1999.

The Court of Appeals reliance on *Collins* to reinstate Magee's claims of sexual harassment, sex and age discrimination, and retaliation is misplaced. Magee was never terminated from her employment and does not allege discriminatory termination. She bases her Civil Rights Act claims on alleged discriminatory conduct that occurred before her leave of absence. Indeed, when given a chance to amend her complaint to plead claims falling within the period of limitations, Magee was unable to do so. *Collins*, a discriminatory termination case, simply does not apply in this situation.

To determine whether Magee's claims were timely filed, we look to MCL 600.5805(10), which establishes that the applicable period of limitations is three years from the date of injury. Because Magee alleged no discriminatory conduct occurring after September 12, 1998, the period of limitations on Magee's claims expired, at the latest, three years from that date, or by September 12, 2001. Accordingly, as the trial court held, Magee's February 1, 2002, complaint was not timely filed.

The dissent argues that the defendant violated the Civil Rights Act within the three years preceding the filing of plaintiff's claim by failing to "prevent future harassment . . . ." *Post* at 115. This interpretation of the Civil Rights Act amounts to a continuing violations doctrine in which an employer is continuously liable from the time it or its agent violates the act until the time that violation is remedied by the employer. Thus, in Justice CAVANAGH's view, a plaintiff subjected to a hostile work environment on December 31, 2005, may file a timely complaint in December 2030 if the employer has failed to remedy the sexual harassment in the ensuing twenty-five years. This theory renders nugatory the period of limitations established by the Legislature in MCL 600.5805(10). It is therefore a theory we must reject.[3]

For these reasons, we reverse the relevant part of the judgment of the Court of Appeals and remand this case to the Macomb Circuit Court for reinstatement of the order granting DaimlerChrysler's motion for summary disposition.

TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

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[3] *Wickens v Oakwood Healthcare Sys,* 465 Mich 53, 60; 631 NW2d 686 (2001).

WEAVER, J. *(concurring).* I concur in the result of the opinion per curiam that reverses the Court of Appeals judgment in part and remands the matter to the trial court for reinstatement of the trial court's grant of summary disposition to defendant. Under the facts pleaded by plaintiff, the three-year period of limitations[1] began to run when plaintiff went on medical leave on September 12, 1998, for emotional distress. Plaintiff's claims were required to be filed within three years of September 12, 1998. Because they were not, the trial court was correct to grant summary disposition to defendant. Therefore, I concur in the result of the opinion per curiam.

CAVANAGH, J. (*dissenting*). I disagree with the majority's contention that defendant engaged in no discriminatory conduct during the three years that preceded the filing of plaintiff's complaint. Therefore, I must respectfully dissent.

Plaintiff began working for defendant in 1976. Over the years, plaintiff complained of various incidents of harassment. Plaintiff complained that her foreman was making sexual advances toward her. When plaintiff was assigned to a different supervisor, her former foreman still worked in the same complex and continued to harass her. Because of the harassment, plaintiff was ordered by her psychiatrist to take an approximately four-month medical leave. When plaintiff returned from her medical leave, her former foreman was still working in the *same complex as plaintiff*.

A subsequent foreman of plaintiff's also made sexual advances toward her, including intentionally touching plaintiff's breast. For an entire year, plaintiff also complained to defendant about a sign in the men's

[1] MCL 600.5805(10).

restroom that referred to plaintiff in a derogatory and sexually suggestive manner. Because of the stress of the harassment she continued to suffer, plaintiff was ordered to take another medical leave of absence.

While she was employed by defendant, plaintiff's union steward also made sexually suggestive comments about plaintiff's "ass" and touched her in an inappropriate manner. Plaintiff's coworkers made sexually suggestive comments about her body and began hitting her with cardboard sticks. When plaintiff asked her union steward to intercede, he just laughed and said, "Yea, hit that ass." Plaintiff repeatedly complained to defendant, yet nothing was done. When plaintiff requested a transfer, her union steward told her that she could transfer if she had sex with him. Once plaintiff was transferred, the union steward told her that she "owed" him and he wanted her to have sex with him. He later stopped plaintiff from training for another position because she was not having sex with him. Plaintiff again complained to a foreman, but he said there was nothing he could do. Because of the stress plaintiff was suffering as a result of the harassment, plaintiff was then ordered to take a *third* medical leave.

Because defendant took no steps to stop the harassment while plaintiff was on her third medical leave, she was forced to decide not to return to the harassing environment. Defendant's discriminatory conduct in failing to take steps to prevent future harassment continued throughout plaintiff's medical leave. Requiring plaintiff to return to the harassing setting to work in the unchanged environment would be unreasonable and possibly dangerous to plaintiff's health, considering that her doctor had ordered *three* medical leaves because of the stress of the harassment. As plaintiff explained, in order to have even been considered for a

possible transfer to another plant after having been out on her third harassment-related medical leave, she would have had to return to the plant she left and hope for a transfer, despite that her multiple complaints had garnered no response before or during her medical leave. Thus, for plaintiff to be able to try and leave the harassing environment, she would have had to return to work with the *same men* who harassed her and whose conduct necessitated that plaintiff take medical leaves in the first place, without any assurance that defendant would protect her.

This case presents a unique set of circumstances because plaintiff's doctor-ordered medical leave was directly related to the harassment. Plaintiff's final medical leave was actually her *third* leave related to the stress of the harassment she suffered. Defendant maintained a hostile work environment despite plaintiff's repeated complaints. Defendant's failure to stop the harassment after these complaints is, under the facts of this case, discriminatory conduct. Because this conduct occurred during the three years that preceded the filing of plaintiff's lawsuit, I find that her complaint was timely filed. Accordingly, I respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

ASSOCIATED BUILDERS AND CONTRACTORS v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES DIRECTOR

Docket No. 124835. Decided March 9, 2005. On application by the plaintiff for leave to appeal, the Supreme Court, after hearing oral argument on whether the application should be granted and in lieu of granting leave, reversed and remanded for reconsideration by the Court of Appeals.

The Associated Builders and Contractors, Saginaw Valley Area Chapter, brought an action in the Midland Circuit Court against the Director of the Department of Consumer and Industry Services, now the Department of Labor and Economic Growth, and the Midland County prosecuting attorney, seeking a declaratory judgment regarding the constitutionality of the prevailing wage act (PWA), MCL 408.551 *et seq*. Several parties were allowed to intervene in the action. The trial court, Thomas L. Ludington, J., denied the defendants' motions for summary disposition that argued that the plaintiff had not met the "actual controversy" requirement of MCR 2.605(A), granted the defendants' motions for summary disposition with regard to the plaintiff's claim that the PWA is unconstitutionally vague, and denied the motions with regard to the plaintiff's claim that the PWA unconstitutionally delegates legislative authority. The defendants appealed to the Court of Appeals by leave granted and the plaintiffs cross-appealed. The Court, WHITBECK, C.J., and WHITE and DONOFRIO, JJ., held that the plaintiffs had alleged no actual controversy under MCR 2.605(A) and reversed the denial of the defendants' motions with regard to the claim of unconstitutional delegation of legislative authority and affirmed the dismissal of the plaintiff's vagueness claim. Unpublished opinion per curiam, issued August 5, 2003 (Docket No. 234037). The plaintiff applied for leave to appeal in the Supreme Court, which entered an order that oral arguments be held with regard to the plaintiff's application for leave to appeal. 471 Mich 877 (2004).

In an opinion by Justice WEAVER, joined by Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The plaintiff presented an "actual controversy" and may seek declaratory relief under MCR 2.605(A). The Court of Appeals erred in holding that the plaintiff could not seek declaratory relief because it had alleged no actual controversy. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the Court of Appeals for reconsideration and resolution of the defendants' appeal and the plaintiff's cross-appeal.

1. An actual controversy exists for purposes of MCR 2.605(A) where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve his future rights. Although the rule precludes a court from deciding hypothetical issues, a court is not precluded from reaching issues before actual injuries or losses have occurred. The essential requirement of the term "actual controversy" under the rule is that the plaintiff plead and prove facts that indicate an adverse interest necessitating the sharpening of the issues raised.

2. A plaintiff regulated by a criminal statute is not required to submit evidence of a threat of imminent prosecution in order to establish standing.

3. The plaintiff's members suffer a concrete, not hypothetical, injury because they either face criminal prosecution for a violation of the statute or must avoid state-funded work entirely. Such evidence establishes the existence of a legally protected interest, causation, and redressibility. There was a justiciable controversy presented in this matter.

Reversed and remanded.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that leave to appeal should be granted in this matter so that the consequences of determining that the plaintiff may bring an action for declaratory judgment may be fully explored after full briefing from the parties and interested amici.

1. ACTIONS — PARTIES — STANDING.

To have standing to bring an action where standing is not expressly conferred by the Constitution or by statute, first, a plaintiff must have suffered an injury in fact, that is an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical, second, there must be a causal connection between the injury and the conduct complained of, the injury must be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party, and third, it must be likely, not merely speculative, that the injury will be redressed by a favorable decision.

2. ACTIONS — DECLARATORY JUDGMENTS — ACTUAL CONTROVERSIES.

An "actual controversy" exists for purposes of the court rule regarding declaratory judgments where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve his future rights; a court, although precluded from deciding hypothetical issues, may reach issues before actual injuries or losses have occurred; the essential requirement is that the plaintiff plead and prove facts that indicate an adverse interest necessitating the sharpening of the issues raised (MCR 2.605[A]).

Masud, Patterson & Schutter, P.C. (by *David John Masud* and *Kraig M. Schutter*), for Associated Builders and Contractors, Saginaw Valley Area Chapter.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Richard P. Gartner*, Assistant Attorney General, for the Consumer and Industry Services Department Director.

Klimist, McKnight, Sale, McClow & Canzano, P.C. (by *John R. Canzano*), for the Michigan State Building & Construction Trades Council.

Schmeltzer, Aptaker & Shepard, P.C. (by *Gary L. Lieber* and *Katherine K. Brewer*), and *Klimist, McKnight, Sale, McClow & Canzano, P.C.* (by *John R. Canzano*), for the Michigan Chapter of the National Electrical Contractors Association, Inc.; the Michigan Mechanical Contractors Association; and the Michigan Chapter of the Sheet Metal Air Conditioning Contractors National Association.

Gilbert, Smith & Borrello, P.C. (by *David M. Gilbert*), for the Saginaw County Prosecuting Attorney.

WEAVER, J. Plaintiff, the Saginaw Valley Area Chapter of Associated Builders and Contractors, brought this action for declaratory and injunctive relief, challenging

the constitutionality of the prevailing wage act (PWA).[1] Plaintiff argues that the PWA is unconstitutionally vague and constitutes an unconstitutional delegation of legislative authority to unions and union contractors.

The circuit court denied defendants' motions for summary disposition regarding the plaintiff's claim that the PWA constitutes an unconstitutional delegation of legislative authority and dismissed plaintiff's vagueness claim. Defendants appealed and plaintiff cross-appealed. The Court of Appeals reversed in part and affirmed in part, holding that plaintiff could not seek declaratory relief because plaintiff had alleged no "actual controversy" under the Michigan court rule governing declaratory judgments, MCR 2.605.

We reverse the decision of the Court of Appeals and hold that plaintiff has presented an "actual controversy" so that plaintiff can seek declaratory relief under MCR 2.605. We do not address the substantive issue regarding the constitutionality of the PWA; instead, we remand to the Court of Appeals for reconsideration and resolution of the defendants' appeal and plaintiff's cross-appeal on the merits.

I

Plaintiff is the Saginaw Valley Area Chapter of Associated Builders and Contractors. Associated Builders and Contractors is a nonunion trade association with over two hundred members in the construction industry in thirteen Michigan counties.

Plaintiff's members—contractors, subcontractors, and builders among others—are required by the PWA to pay their workers not less than the wage and benefits

[1] MCL 408.551 *et seq*.

prevailing in the locality on projects sponsored or financed by the state. The PWA provides in relevant part:

> Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics . . . and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. [MCL 408.552.]

The PWA provides further that "[a]ny person, firm or corporation or combination thereof, including the officers of any contracting agent, violating the provisions of this act is guilty of a misdemeanor." MCL 408.557.

On July 12, 2000, plaintiff brought this declaratory action challenging the constitutionality of the PWA. Plaintiff alleges that the manner in which the prevailing wage is determined under MCL 408.554 of the PWA constitutes an unconstitutional delegation of legislative authority to unions and union contractors.[2] Moreover,

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[2] MCL 408.554 provides:

> The commissioner [the Department of Consumer and Industry Services, now the Department of Labor and Economic Growth] shall establish prevailing wages and fringe benefits at the same rate that prevails on projects of a similar character in the locality under collective agreements or understandings between bona fide organizations of construction mechanics and their employers. Such agreements and understandings, to meet the requirements of this section, shall not be controlled in any way by either an employee or employer organization. If the prevailing rates of wages and fringe benefits cannot reasonably and fairly be applied in any locality because no such agreements or understandings exist, the commissioner shall determine the rates and fringe

plaintiff alleges that the resulting determination is unconstitutionally vague because it does not provide an individual of ordinary intelligence notice of the conduct that, if undertaken, would violate the statute.

Plaintiff named as a defendant, Kathleen Wilbur, former Director of the Department of Consumer and Industry Services (CIS), now the Department of Labor and Economic Growth, which oversees the implementation of the PWA. Because the PWA is a criminal statute, plaintiff also named Midland County's prosecuting attorney, who is charged with the enforcement and prosecution of the PWA in Midland County, Michigan.

The Saginaw County prosecutor and the Michigan State Building & Construction Trades Council (MSBCTC) intervened by stipulation as defendants. Three union contractor associations, the Michigan Chapter of the National Electrical Contractors Association, Inc. (NECA), the Michigan Mechanical Contractors Association (MCA), and the Michigan Chapter of Sheet Metal & Air Conditioning Contractors National Association (SMACNA), also intervened by motion as defendants.

The Midland County prosecutor and defendant-intervenor MSBCTC filed motions under MCR 2.116(C)(4), (8), and (10), arguing that the circuit court lacked jurisdiction under MCR 2.605(A) because plaintiff's complaint did not present an "actual controversy"

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benefits for the same or most similar employment in the nearest and most similar neighboring locality in which such agreements or understandings do exist. The commissioner may hold public hearings in the locality in which the work is to be performed to determine the prevailing wage and fringe benefit rates. All prevailing wage and fringe benefit rates determined under this section shall be filed in the office of the commissioner of labor and made available to the public.

as required by the court rule. The several defendants also moved for summary disposition on the merits.

On December 15, 2000, the circuit court denied the motions for summary disposition that argued that plaintiff had not met the actual controversy requirement of MCR 2.605(A). Then, on March 20, 2001, the circuit court ruled on the motions for summary disposition on the merits. The court granted the motions regarding plaintiff's vagueness challenge to the PWA. However, the circuit court denied the motions regarding plaintiff's challenge to the PWA as an unconstitutional delegation of legislative authority, thus allowing that claim to proceed.

Defendants appealed by leave granted and plaintiffs cross-appealed from the circuit court's orders. The Court of Appeals concluded that plaintiff had alleged no "actual controversy" under MCR 2.605(A). Accordingly, the Court of Appeals reversed the circuit court's denial of defendants' motion for summary disposition of the claim of unconstitutional delegation of legislative authority and, in plaintiff's cross-appeal, affirmed the dismissal of plaintiff's vagueness claim.[3]

This Court ordered that oral argument be held with regard to plaintiff's application for leave to appeal.[4]

II

This case is before us on appeals from orders regarding motions for summary disposition, which we review de novo. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). The interpretation and application of court rules and statutes present a question of law that is also

[3] Unpublished opinion per curiam of the Court of Appeals, issued August 5, 2003 (Docket No. 234037).

[4] 471 Mich 877 (2004).

reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

III

Plaintiff seeks a declaratory judgment regarding the constitutionality of the PWA. A declaratory judgment is "[a] binding adjudication of the rights and status of litigants . . . [which] is conclusive in a subsequent action between the parties as to the matters declared . . . ."[5] Declaratory judgments are procedural remedies. They allow

> parties to avoid multiple litigation by enabling litigants to seek a determination of questions formerly not amenable to judicial determination . . . .[6]

The availability of declaratory judgments in Michigan is governed by MCR 2.605. The court rule provides in pertinent part:

> (A) Power to Enter Declaratory Judgment.
>
> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.

The plain text of the declaratory judgment rule makes clear that the power to enter declaratory judg-

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[5] Black's Law Dictionary (6th ed), p 409.

[6] *Allstate Ins Co v Hayes*, 442 Mich 56, 65; 499 NW2d 743 (1993)(citations omitted).

ments neither limits nor expands the subject-matter jurisdiction of the court.[7] The court must have "jurisdiction of an action on the same claim or claims in which the plaintiff sought relief . . . ."[8] Moreover, the rule requires that there be "a case of actual controversy" and that a party seeking a declaratory judgment be an "interested party," thereby incorporating traditional restrictions on justiciability such as standing, ripeness, and mootness.[9]

This Court has described the "actual controversy" requirement of MCR 2.605(A)(1) as "a summary of justiciability as the necessary condition for judicial relief."[10] Thus,

> if a court would not otherwise have subject matter jurisdiction over the issue before it or, if the issue is not justiciable because it does not involve a genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations, a court may not declare the rights and obligations of the parties before it.[11]

The requirement that a party demonstrate an interest in the outcome that will ensure sincere and vigorous advocacy is expressly subsumed in the declaratory judg-

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[7] *Id.* at 65 n 9.

[8] MCR 2.605(A)(2).

[9] The United States Supreme Court has recognized that

> [j]usticiability is of course not a legal concept with a fixed content or susceptible of scientific verification. Its utilization is the resultant of many subtle pressures, including the appropriateness of the issues for decision by this Court and the actual hardship to the litigants of denying them the relief sought." [*Poe v Ullman*, 367 US 497, 508-509; 81 S Ct 1752; 6 L Ed 2d 989 (1961).]

[10] *Allstate, supra* at 66.

[11] *Id.* (citations omitted).

ment rule, which allows the declaration of rights of an "interested party . . . ."[12]

This Court has held that an "actual controversy" under MCR 2.605(A)(1) exists

> where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights. . . .
>
> This requirement . . . prevents a court from deciding hypothetical issues.[13]

This Court has emphasized that although the actual controversy requirement precludes a court from deciding hypothetical issues, "a court is not precluded from reaching issues before actual injuries or losses have occurred."[14] The essential requirement of the term "actual controversy" under the rule is that plaintiffs "plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised."[15]

The "actual controversy" and the "interested party" requirements of MCR 2.605(A)(1) subsume the limitations on litigants' access to the courts imposed by this Court's standing doctrine. To have standing:

> "First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical." ' Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,'

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[12] *Id.* at 68.

[13] *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978).

[14] *Id.* at 589.

[15] *Id.*

> as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' "[16]

Yet without analysis of plaintiff's standing under *Lee v Macomb Co Bd of Comm'rs,* 464 Mich 726; 629 NW2d 900 (2001), the Court of Appeals panel below concluded that plaintiff was not eligible for declaratory relief because plaintiff had not established "that there was an actual or imminently threatened prosecution of any of its members, nor has plaintiff shown that a declaratory judgment or decree is necessary to guide its future conduct in order to preserve its legal rights with respect to any particular contract or bid." On this basis, the Court of Appeals held that the circuit court lacked jurisdiction to enter a declaratory judgment. The Court of Appeals analysis regarding the availability of declaratory relief under MCR 2.605 was too restrictive.

It has been conceded by the defendant prosecutor that it must enforce the PWA.[17] But regardless, neither *Lee, supra*, nor the plain text of MCR 2.605 requires a plaintiff regulated by a criminal statute to submit evidence of a threat of imminent prosecution in order to establish standing. It is sufficient to establish standing under *Lee, supra,* that the members of plaintiff business association are directly regulated by the PWA and must

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[16] *Lee v Macomb Co Bd of Comm'rs,* 464 Mich 726, 739; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992). This Court has declined to consider whether the Legislature can confer standing more broadly than *Lee's* test. See *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 632; 684 NW2d 800 (2004). Because the PWA does not confer standing by its own terms, plaintiff's standing in this case is governed by the test adopted in *Lee, supra.*

[17] Thus, this case is distinguishable from *Poe, supra* at 508, where the United States Supreme Court held that declaratory relief was improper because there was no realistic fear of prosecution.

conform their pay and benefit practices to that of union contractors on state-funded projects under the statute.[18]

Plaintiff's members suffer a concrete, rather than a hypothetical, injury because they either face criminal prosecution for a violation of the statute or must avoid state-funded work entirely.[19] Such evidence establishes the existence of a legally protected interest, causation, and redressibility as required by *Lee, supra*.

Moreover, as a previous Court of Appeals decision addressing declaratory relief recognized:

> "A declaratory action is a proper remedy to test the validity of a criminal statute where it affects one in his trade, business or occupation." To afford a businessman relief in such a situation without having first to be arrested is one of the functions of the declaratory judgment procedure.[20]

We agree with the circuit court that the affidavits submitted by plaintiff articulate

> concrete risks of violations of the PWA as a result of allegedly random changes to PWA rates, the lack of definition of PWA projects and the absence of PWA statutory definitions for statutory language that may be material to enforcement of the criminal sanctions.

Further, we agree with the circuit court's conclusion that the risks of enforcement of the statute, together with the asserted character of the potential for violations of the PWA, present a justiciable controversy.

Plaintiff's affidavits establish precisely the kind of controversy that the declaratory judgment rule was intended to cover.

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[18] MCL 408.552 and MCL 408.554.

[19] MCL 408.557.

[20] *Strager v Wayne Co Prosecuting Attorney*, 10 Mich App 166, 171; 159 NW2d 175 (1968) (citations omitted).

IV

CONCLUSION

We reverse the Court of Appeals denial of declaratory relief and remand to the Court of Appeals for reconsideration and resolution of defendants' appeal and plaintiff's cross-appeal on the merits.

TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with WEAVER, J.

CAVANAGH, J. (*dissenting*). I prefer to grant leave to appeal in this case; therefore, I must respectfully dissent. Determining that plaintiff may bring an action for declaratory judgment may have ramifications far beyond the prevailing wage act, MCL 408.551 *et seq*., and I believe that deciding this case without full briefing from the parties and interested amici is not prudent. Therefore, I would prefer the opportunity to fully explore the consequences of today's decision before issuing an opinion.

KELLY, J., concurred with CAVANAGH, J.

PEOPLE v YOUNG

Docket No. 124811. Argued November 9, 2004 (Calendar No. 2). Decided March 29, 2005.

Wayne L. Young was convicted by a jury in the Wayne Circuit Court, Patricia Fresard, J., of two counts of second-degree murder, one count of assault with intent to commit armed robbery, one count of possession of a firearm during the commission of a felony, and one count of possession of a firearm by a person convicted of a felony. The Court of Appeals, OWENS, P.J., and GRIFFIN and SCHUETTE, JJ., affirmed after rejecting the defendant's contention that the trial court's failure to provide sua sponte a cautionary instruction to the jury regarding the testimony of accomplices requires a reversal under *People v McCoy*, 392 Mich 231 (1974). Unpublished opinion per curiam, issued September 25, 2003 (Docket No. 240832). The Supreme Court granted the defendant's application for leave to appeal. 470 Mich 869 (2004), mod 471 Mich 862 (2004).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR, and Justices WEAVER, YOUNG, and MARKMAN, the Supreme Court *held*:

The opinion in *People v McCoy*, which announced a rule providing that a trial court's failure to give a cautionary instruction on accomplice testimony upon a defense request requires reversal of a conviction and that reversal may be required even in the absence of a defense request if the issue of guilt is closely drawn, must be overruled and the judgment of the Court of Appeals must be affirmed.

1. The *McCoy* rule has no basis in Michigan law and is inconsistent with MCL 768.29, which provides that the failure to instruct on a point of law is not a ground for setting aside a verdict unless the instruction is requested by the accused, and MCR 2.516(C), which states that a party may assign as error the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict. The first portion of the *McCoy* rule, i.e., that reversal is automatically required when the court fails to give an instruction upon request, conflicts with MCL 769.26, which states that no verdict shall be set aside or reversed on the ground of misdirection of the jury unless in the opinion of

the reviewing court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

2. An unpreserved claim that the court failed to give a cautionary accomplice instruction is reviewed only for plain error that affects substantial rights under the framework set forth in *People v Grant*, 445 Mich 535 (1994), and *People v Carines*, 460 Mich 750 (1999). In considering whether plain error exists, a reviewing court must be mindful of the discretion historically accorded to trial courts in deciding whether to give a cautionary accomplice instruction. No plain error occurred in this case, where it was not clear whether the witnesses claimed to have been accomplices were in fact accomplices and where the prosecution presented evidence of guilt beyond the testimony of the alleged accomplices.

Justice KELLY, joined by Justice CAVANAGH, concurring, agreed with the decision to affirm the judgment of the Court of Appeals, but disagreed with the reasoning of the majority. This case does not involve a closely drawn issue. An issue is closely drawn if a credibility contest between the defendant and an alleged accomplice must be resolved in order to rule on it. Here, the defendant did not testify and his credibility was not otherwise put at issue. The defendant was not entitled to the cautionary instruction permitted by *People v McCoy*. The Court of Appeals properly determined that there was insufficient evidence to conclude that Michael Martin and Eugene Lawrence were accomplices of the defendant. The *McCoy* decision has no application under the facts of this case. The opinion in *McCoy* does not contradict MCL 769.26 or MCR 2.516(C), fits well within the established rules of appellate review, represents a valid rule of law that ensures the fair administration of justice, and should not be struck down.

Affirmed.

CRIMINAL LAW — ACCOMPLICE TESTIMONY — CAUTIONARY INSTRUCTIONS.

An unpreserved claim on appeal that a trial court failed to give a cautionary jury instruction regarding the testimony of a claimed accomplice is reviewed for plain error that affects the substantial rights of the defendant; the reviewing court must be mindful of the discretion historically accorded to trial courts in deciding whether to give a cautionary accomplice instruction.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attor-

ney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Valerie R. Newman*) for the defendant.

CORRIGAN, J. In *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974), this Court invented a new rule regarding cautionary instructions on accomplice testimony. That rule provided that the trial court's failure to give a cautionary instruction upon a defense request requires reversal of a conviction. Moreover, reversal may be required even in the absence of a defense request if the issue of guilt is "closely drawn." We reject the *McCoy* rule because it has no basis in Michigan law. Indeed, it contravenes long-standing authorities according discretion to trial courts in deciding whether to provide a cautionary instruction on accomplice testimony. Moreover, the *McCoy* rule is inconsistent with MCL 768.29, which provides that the failure to instruct on a point of law is not a ground for setting aside a verdict unless the instruction is requested by the accused, and MCR 2.516(C), which states that a party may assign as error the failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict.

We further clarify that an unpreserved claim of failure to give a cautionary accomplice instruction may be reviewed only in the same manner as other unpreserved arguments on appeal. That is, appellate review is confined to the plain-error test set forth in *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994), and *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). We therefore affirm the judgment of the Court of Appeals,

because it reached the correct result in affirming defendant's convictions and sentences.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Defendant shot and killed two people in an execution-style slaying while robbing a drug house in Detroit. Among other evidence of guilt, the prosecution presented testimony from two witnesses whom defendant now claims were his accomplices, Michael Martin and Eugene Lawrence.

Martin testified that defendant came to his house and asked him for a gun to rob someone. Martin had no gun. Defendant then spoke on the telephone to Martin's brother-in-law, Lawrence. Martin did not hear their conversation. Martin then drove defendant to Lawrence's house. After they arrived, defendant and Lawrence spoke in a back room away from Martin, who again could not hear their conversation.

Lawrence testified that during this conversation, defendant asked him for a gun because some men had threatened him. Defendant did not mention to Lawrence any plan to rob a drug house. Lawrence did furnish a gun to defendant. Martin and defendant then drove back to Martin's home. Martin went inside his home while defendant walked off in the direction of a nearby drug house.

Defendant later telephoned Martin, stating that he was planning to rob a drug house. Martin hung up. Later that day, defendant visited Martin's home and admitted that he had shot the two victims in the head. After defendant left, Martin contacted Lawrence. Martin and Lawrence then went to defendant's home. Defendant told them that he was angry because he had killed the victims for only six rocks of crack cocaine. Defendant called an unknown person and directed him

to tell Martin where to find the gun. Defendant eventually directed Martin and Lawrence to a field near Martin's home where Martin found the gun.

The police questioned Martin twice. During the second interview, he disclosed what had happened. The police then retrieved the murder weapon. Martin and Lawrence were never charged with a crime in connection with the murders.

In addition to the testimony of Martin and Lawrence, the prosecution presented other evidence of defendant's guilt. One witness testified that defendant had also asked him for a gun. Another witness, Ronald Mathis, had seen defendant in the drug house just before the murders occurred. At that time, defendant offered to sell Mathis a gun. Mathis then left the premises. Upon his return approximately fifteen minutes later, Mathis discovered the victims' bodies and noted that defendant was gone. Finally, a cigarette butt recovered at the murder scene contained deoxyribonucleic acid (DNA) material that matched defendant's DNA.

Defendant was charged with several offenses, including first-degree murder, MCL 750.316. The jury convicted defendant of two counts of second-degree murder, MCL 750.317; one count of assault with intent to commit armed robbery, MCL 750.89; one count of possession of a firearm during the commission of a felony, MCL 750.227b; and one count of possession of a firearm by a person convicted of a felony, MCL 750.224f. Defendant was sentenced to concurrent terms of forty-five to seventy years' imprisonment for the second-degree murder convictions, forty to sixty years' imprisonment for the assault conviction, and two to five years' imprisonment for the felon in possession of a firearm conviction. Those sentences are to be served consecutively to the two-year term of imprisonment for the felony-firearm conviction.

The Court of Appeals affirmed defendant's convictions.[1] It rejected defendant's contention that the trial court had erred under *McCoy* in failing to sua sponte provide a cautionary instruction on accomplice testimony, concluding that: (1) this case did not present a closely drawn credibility contest, and (2) it was not clear that Martin and Lawrence were accomplices.

We granted defendant's application for leave to appeal. 470 Mich 869 (2004), mod 471 Mich 862 (2004).

II. STANDARD OF REVIEW

Whether the *McCoy* rule has a basis in Michigan law and whether it is consistent with MCL 768.29 and MCR 2.516(C) are questions of law that we review de novo. *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004). Moreover, as discussed later in this opinion, the decision whether to give a cautionary accomplice instruction falls within the trial court's sound discretion. MCL 768.29; *People v Dumas*, 161 Mich 45, 48-49; 125 NW 766 (1910); *People v Wallin*, 55 Mich 497, 505; 22 NW 15 (1885). We therefore review that decision for an abuse of discretion. Finally, where, as here, the defendant failed to preserve his claim, our review is confined to the plain-error framework set forth in *Grant* and *Carines*.

III. ANALYSIS

A. LEGAL BACKGROUND

In *McCoy*, this Court discussed dangers that inhere in accomplice testimony, including " 'the effect of fear, threats, hostility, motives, or hope of leniency.' " *McCoy*,

[1] Unpublished opinion per curiam, issued September 25, 2003 (Docket No. 240832).

supra at 236, quoting 30 Am Jur 2d, Evidence, § 1148, p 323. The *McCoy* Court stated that in *People v Jenness*, 5 Mich 305, 330 (1858), this Court referred to a judge's duty to comment, where warranted, on the nature of accomplice testimony. The *McCoy* Court acknowledged, however, that subsequent case law reflected that the trial court had discretion in deciding whether to provide a cautionary accomplice instruction. See *Dumas*, *supra*.

The *McCoy* Court also acknowledged that federal courts have not articulated a definitive rule regarding cautionary instructions on accomplice testimony. Indeed, the United States Supreme Court refused to reverse a conviction on the basis of a failure to give such an instruction in *Caminetti v United States*, 242 US 470, 495; 37 S Ct 192; 61 L Ed 442 (1917). The *Caminetti* Court stated that "there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them." *Id*.

Despite these authorities, the *McCoy* Court invented a novel rule: "For cases tried after the publication of this opinion, it will be deemed reversible error . . . to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." *McCoy*, *supra* at 240.

Justice COLEMAN dissented in *McCoy*. She cited MCL 768.29, which provides: "The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." She also quoted the predecessor to MCR 2.516(C), GCR 1963, 516.2: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the

jury retires to consider the verdict, stating specifically the matter to which he objects and the grounds of his objection."

Justice COLEMAN noted that the articulation in *Jenness* of a duty to comment on accomplice testimony predated both the statute and the court rule. Moreover, *Jenness* "was not a rigorously applied precedent." *McCoy*, *supra* at 248. For example, in *Dumas*, this Court stated:

> It is the long settled rule in this State that the credibility of an accomplice, like that of any other witness, is a question exclusively for the jury. And while there have been intimations, rather than rulings, to the effect that it is proper, or is not improper, especially in cases where an accomplice is the sole witness upon a material point, for the trial court to direct the attention of the jury to the circumstance and invite the exercise of caution upon the part of the jury, we know of no decision of this court in which it is held or intimated that the failure of the court to indulge in voluntary comment is ground for reversal. [*Dumas*, *supra* at 48.]

The *Dumas* Court had also quoted from *Wallin*, *supra*, where the trial court had refused a defense request to instruct the jury regarding circumstances that tended to discredit a witness. Chief Justice COOLEY, writing for a unanimous Court in *Wallin*, rejected the defense argument:

> "We repeat that instructions respecting the credibility of witnesses, which involve no question of law, are not matter of right. The judge is under no obligation to comment upon the facts; he may, if he chooses, confine himself strictly to laying down such rules of law as must guide the action of the jury, and leave the facts to them without a word of comment. In many cases this is no doubt the desirable course. And it is always within the discretion of the judge to adopt it." [*Id*. at 48-49, quoting *Wallin*, *supra* at 505.]

Justice COLEMAN's dissenting opinion in *McCoy* also noted that the Court of Appeals had rejected an argument for a cautionary accomplice instruction in *People v Sawicki*, 4 Mich App 467; 145 NW2d 236 (1966), in part because defense counsel on cross-examination had fully explored the circumstances of the accomplice's testimony:

> In a criminal case it is not only proper but it is the duty of counsel for defendant to place before the jury all circumstances surrounding the people's witness upon the stand, as well as any fact which would have any reasonable tendency to affect their credibility. It is the function of the jury to decide first if the witness is interested, and second if the witness' interest has affected the credibility of his testimony. The trial judge is not required to comment in his instruction concerning a witness' interest since it bears upon the question of credibility which is reserved to the jury. [*Id*. at 475 (citations omitted).]

In light of these authorities, Justice COLEMAN concluded in *McCoy* that neither statute nor case law required the court to give a cautionary accomplice instruction in the absence of a request. Moreover, the failure to so instruct did not deny the defendant in *McCoy* a fair trial, because "the accomplice was thoroughly cross-examined and the jury fully aware of all facets of his involvement. The judge correctly instructed that the testimony of all witnesses should be considered as to motive, prejudice, bias or interest in the outcome." *McCoy*, *supra* at 250.

This Court discussed the holding in *McCoy* in *People v Reed*, 453 Mich 685; 556 NW2d 858 (1996). In *Reed*, a codefendant testified in a joint trial, and the defendant argued on appeal that a cautionary accomplice instruction should have been given sua sponte. This Court rejected that argument because such an instruction would have prejudiced the codefendant.

The Court in *Reed* also explained that *McCoy* does *not* require *automatic* reversal for failure to instruct sua sponte in a closely drawn case. Rather, *McCoy* says only that such a failure to instruct *may* require reversal. Before *Reed*, this Court had not established standards for determining when the failure to instruct sua sponte requires reversal. The *Reed* Court concluded that reversal was not required where the accomplice's potential credibility problems have been plainly presented to the jury by other means, such as through defense counsel's cross-examination of the alleged accomplice. *Reed*, *supra* at 693.

The *Reed* Court did not require reversal because the codefendant/accomplice's credibility problems were plainly apparent to the jury. Defense counsel and the prosecutor had explored credibility problems during cross-examination. Moreover, the accomplice was not a prosecution witness, but was a codefendant, and thus was not the beneficiary of any favorable bargains from the prosecution.

In *People v Gonzalez*, 468 Mich 636; 664 NW2d 159 (2003), this Court questioned *McCoy*. We quoted MCL 768.29, which provides that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused," and MCR 2.516(C), which states that "[a] party may assign as error the . . . failure to give an instruction only if the party objects on the record . . . ." We then stated:

> In this case, defendant neither requested a cautionary accomplice instruction nor objected to the court's failure to give one. Therefore, defendant is precluded from arguing that the omitted instruction was error. MCR 2.516(C). Furthermore, because he failed to request the omitted instruction, defendant is not entitled to have the verdict set aside. MCL 768.29. Consequently, defendant's only re-

maining avenue for relief is for review under *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

> Because defendant failed to object to the omitted instruction, defendant's claim of error was forfeited. A forfeited, nonconstitutional error may not be considered by an appellate court unless the error was plain and it affected defendant's substantial rights. *Grant*, *supra* at 552-553. [*Gonzalez*, *supra* at 642-643.]

We then concluded that no error occurred because there was no evidence that the alleged accomplice was involved in the crime, and because the cautionary accomplice instruction would have been inconsistent with the defense theory at trial. Because the defendant could not demonstrate an error, he could not establish a plain error that affected his substantial rights, and thus he was not entitled to relief for the forfeited claim under *Grant*.

B. ANALYSIS

The rule created in *McCoy* has no basis in Michigan law. The *McCoy* rule mandates reversal of convictions for failing to give a cautionary accomplice instruction upon request, and allows reversal for failing to give such an instruction sua sponte where the issue of guilt is "closely drawn." But as Justice COLEMAN's dissent in *McCoy* demonstrates, this Court's decisions have historically accorded discretion to trial courts in deciding whether to provide a cautionary accomplice instruction. The mandatory rule invented in *McCoy* subverts this historical discretion.

Moreover, the discretion that this Court had, before *McCoy*, accorded to trial courts in this area is consistent with our statutory law. MCL 768.29 states: "The court shall instruct the jury as to the law applicable to the case and in his charge *make such comment on the*

evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require." (Emphasis added.) The phrase "as in his opinion the interest of justice may require" vests discretion in the trial court to decide to what extent it is appropriate to comment on matters such as the credibility of witnesses. The *McCoy* Court failed to consider this provision of MCL 768.29.

Despite these authorities, the *McCoy* Court chose to invent an unfounded rule. Indeed, in *People v Atkins*, 397 Mich 163, 171; 243 NW2d 292 (1976), this Court acknowledged the lack of a historical basis for the *McCoy* rule: "[T]he *McCoy* rule under discussion was given prospective application for the reason that it went beyond long-established Michigan precedent to the effect that special instructions regarding credibility was [sic] a matter within the sound discretion of the trial court."

Further, the first portion of the *McCoy* rule, i.e., that reversal is automatically required when the court fails to give an instruction upon request, conflicts with MCL 769.26. That provision states:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

As we explained in *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), in light of MCL 769.26, a defendant on appeal must demonstrate that a preserved nonconstitutional error was not harmless by persuading the reviewing court that it is more probable than not that

the error affected the outcome of the proceedings. "An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). See also *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000). The *McCoy* mandate of automatic reversal for failing to give a cautionary accomplice instruction upon request plainly contradicts MCL 769.26. Accordingly, we reject the automatic-reversal portion of the rule.

Next, the portion of the *McCoy* rule permitting reversal in the absence of a defense request if the issue of guilt is "closely drawn" contradicts MCL 768.29, which states that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused," and MCR 2.516(C), which says that "[a] party may assign as error the . . . failure to give an instruction only if the party objects on the record . . . ." As we explained in *Gonzalez*, an appellate court's review of unpreserved claims is governed by MCL 768.29 and MCR 2.516(C).

This Court in *Reed* correctly observed that *McCoy* does not by its own terms *require* automatic reversal for failure to instruct sua sponte where the issue of credibility is closely drawn. The *McCoy* Court said that reversal *may* be required in the absence of a request, *not* that reversal is automatic. The central flaw in this aspect of the *McCoy* rule, however, is that it authorizes reversal without regard to the plain-error analysis required by *Grant* and *Carines,* by focusing solely on whether the issue of guilt is closely drawn. As this Court explained in *Reed*, potential credibility problems in a closely drawn case may become plainly apparent to a jury in the absence of a cautionary instruction.

Fundamentally, it is the province *of the jury* to assess the credibility of witnesses. In making that assessment, the jury should decide whether witnesses harbor any bias or prejudice. *Dumas*, *supra*; *Wallin, supra; Sawicki*, *supra*. And it is the role of defense counsel, through cross-examination of prosecution witnesses and closing argument, to expose potential credibility problems for the jury to consider. *Id*. The *McCoy* "closely drawn" rule fails adequately to take account of these central components of our system of trial by jury.

For these reasons, we hold that, as with all unpreserved claims of error, an unpreserved claim that the court failed to give a cautionary accomplice instruction may be reviewed *only* for plain error that affects substantial rights. An appellate court must follow the *Grant*/*Carines* plain-error analysis, and only when the defendant satisfies that test is reversal ever appropriate. We discern no basis for treating this one category of unpreserved claim any differently from other categories of alleged error that a defendant has failed to preserve.

Moreover, in considering whether a plain error exists, a reviewing court should be mindful of the discretion historically accorded to trial courts in deciding whether to give a cautionary accomplice instruction. *Dumas, supra*; *Wallin*, *supra*.

Finally, applying the plain-error test to this case, we conclude that defendant has not met his appellate burden. A cautionary accomplice instruction was not clearly or obviously required in this case. As the Court of Appeals noted, it is not clear that Martin and Lawrence were accomplices in any event. Moreover, the prosecution presented evidence of guilt beyond the testimony of the alleged accomplices, including testimony from other witnesses and physical evidence that defendant was at the murder scene. Further, defense

counsel thoroughly cross-examined Martin and Lawrence and challenged their testimony during closing argument, thereby exposing their potential credibility problems to the jury. The court also instructed the jury to consider any bias, prejudice, or personal interest that a witness might have. For these reasons, defendant has not demonstrated a plain error that affected his substantial rights.

IV. CONCLUSION

We conclude that the *McCoy* rule has no basis in Michigan law and is inconsistent with MCL 769.26, MCL 768.29, and MCR 2.516(C). A trial court has discretion in deciding whether to give a cautionary accomplice instruction. Also, an unpreserved claim that the court failed to give a cautionary accomplice instruction may be reviewed only for plain error, under the framework set forth in *Grant* and *Carines*. Accordingly, we overrule *McCoy* and affirm the judgment of the Court of Appeals.

TAYLOR, C.J., and WEAVER, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

KELLY, J. (*concurring*). I would affirm the Court of Appeals decision, but I strongly disagree with the majority's reasoning. The decision in *People v McCoy*[1] should not be applied to this case. It represents a valid rule of law that we should retain, and the majority should not use this case as a vehicle to abandon it.

McCOY IS INAPPOSITE

In *McCoy*, we stated:

[1] 392 Mich 231; 220 NW2d 456 (1974).

> [I]t will be deemed reversible error . . . to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge. [*McCoy*, *supra* at 240.]

Defendant did not request a cautionary instruction in this case. To warrant giving the instruction, as *McCoy* tells us, the issue must be "closely drawn." *Id*. An issue is said to be closely drawn if a credibility contest between the defendant and an alleged accomplice must be resolved in order to rule on it. *People v Gonzalez*, 468 Mich 636, 643 n 5; 664 NW2d 159 (2003); *McCoy*, *supra* at 238-239.

This case does not involve a closely drawn issue. It is not one in which contrary versions of the facts were offered, leaving the jury to choose between them. Instead, the defense proceeded under the theory that the prosecution would be unable to prove every element of the charged offenses.

In argument before the jury, defense counsel attacked the story offered by the prosecution. He tried to show that the prosecution failed to meet the requirements for conviction. In some cases, to create a credibility contest between a defendant and an alleged accomplice, the defendant would have to take the stand. Other circumstances could arise as well that would create a credibility contest. However, because defendant in this case did not take the stand and his credibility was not otherwise put at issue, he was not entitled to the cautionary instruction permitted by *McCoy*.[2] *Id*. at 240.

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[2] At oral argument in this case, defense counsel admitted that *McCoy* was a "narrow case" and did not fit the facts of this case.

I also agree with the Court of Appeals that there was insufficient evidence to conclude that Michael Martin and Eugene Lawrence were defendant's accomplices. Whereas Martin accompanied defendant on some of his travels on the day of the murders, he never agreed to participate in the crime. In fact, he refused to participate. Martin may not have done enough to stop defendant, but his failure does not make him defendant's accomplice legally.

Lawrence provided defendant with a gun. But the evidence suggests that Lawrence was unaware that defendant planned to use it to commit a felony. Defendant asked Lawrence for the gun to protect himself from a person who had threatened him. Although insufficient evidence exists that Lawrence was defendant's accomplice, defense counsel implied during closing argument that Lawrence and Martin were defendant's accomplices.

The facts of the *McCoy* case were entirely different. There, the police arrested an individual whom they believed had been an accomplice in a robbery. The accomplice admitted that he and McCoy had committed the crime. *Id*. at 241 (COLEMAN, J., dissenting). Here, there was no such admission. All the evidence suggested that Martin and Lawrence were not involved in the crime. Because they were not accomplices, the trial court did not err in failing to give the special instruction on accomplice testimony. *Id*. at 238-240.

Hence, the *McCoy* decision has no application to this case, and the majority offers no justification for reaching and overruling it here. It is as inappropriate to address *McCoy* in this case as it was in *People v Gonzalez, supra,* in which Justice YOUNG wrote:

> [W]e conclude that there was no evidence of an accomplice in this case, and, therefore, *McCoy*'s "closely drawn"

> rule is not implicated. For that reason, we do not reach the question whether *McCoy* conflicts with MCL 768.29. [*Gonzalez, supra* at 643 n 6.]

We should not do here what we chose not to do in *Gonzalez*.

McCOY REPRESENTS A VALID RULE OF LAW[3]

The majority accuses the *McCoy* decision of lacking any basis in Michigan jurisprudence and of inventing a novel rule of law. Those claims should be examined more closely.

This Court stated long ago:

> We think the credibility of an accomplice, like that of any other witness, is exclusively a question for the jury; and it is well settled that a jury may convict on such testimony alone without confirmation. There is no good sense in always applying the same considerations in every case to every witness who may stand in the relation of *particeps criminis*. We think it is the duty of a judge to comment upon the nature of such testimony, as the circumstances of the case may require; to point out the various grounds of suspicion which may attach to it; to call their attention to the various temptations under which such witness may be placed, and the motives by which he may be actuated; and any other circumstances which go to discredit or confirm the witness, all of which must vary with the nature and circumstances of each particular case. [*People v Jenness*, 5 Mich 305, 330 (1858).]

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[3] Given that *McCoy* is inapposite, there is no need to apply it to the facts of this case. However, because the majority has decided to overturn *McCoy*, I provide a full discussion of the rules of law laid out in that case. Therefore, I will discuss both the requested cautionary instructions and sua sponte instructions. I feel that both were wisely recognized in *McCoy* and that both fit well within the established framework of appellate review in this state.

This was a rule of law that has been endorsed by this Court repeatedly over the past 134 years.[4] Obviously, because *McCoy* represents a natural growth of that history, it is neither novel nor lacking in legal basis.

REQUESTED CAUTIONARY INSTRUCTIONS AND ABUSE OF DISCRETION/HARMLESS ERROR REVIEW

Not only does *McCoy* have substantial historical support, it fits well within Michigan's long established framework of appellate review. *McCoy*[5] holds that "it will be deemed reversible error . . . to fail upon request to give a cautionary instruction concerning accomplice testimony . . . ."

The majority concludes that this rule contradicts the review established for both abuse of discretion and harmless error issues. It accuses *McCoy* of ignoring the discretion of the trial court to instruct the jury.

The opposite is true. *McCoy* explicitly recognizes the trial court's discretion and hews to the abuse of discretion standard. *McCoy*, *supra* at 237. Moreover, it provides guidance to when the standard is met.

McCoy recognizes that it is an abuse of discretion for a trial court to refuse to instruct a jury about the inherent unreliability of accomplice testimony. *Id*. at 236-237. This is consistent with MCL 768.29.[6] If the

[4] See *People v Schweitzer*, 23 Mich 301, 305 (1871), *People v Hare*, 57 Mich 505, 518; 24 NW 843 (1885), *People v Considine*, 105 Mich 149, 163; 63 NW 196 (1895), and *People v Koukol*, 262 Mich 529, 532-533; 247 NW 738 (1933).

[5] *Supra* at 240.

[6] MCL 768.29 provides:

> It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view

trial court fails to give an accomplice instruction, it fails to work toward "the expeditious and effective ascertainment of the truth regarding the matters involved." MCL 768.29. And it fails to make the comments on the evidence, the testimony, and the character of witnesses that justice requires.

As *McCoy* noted, accomplice testimony is fraught with dangers. Whether because of fear, threats, or hostility caused by government overreaching or the witness's greed or hopes of leniency occasioned by government deals, accomplice testimony has severe credibility problems. Given this inherent weakness, a skeptical approach to such testimony " 'is a mark of the fair administration of justice.' " *McCoy*, *supra* at 236, quoting 30 Am Jur 2d, Evidence, § 1148, p 323. Therefore, a court fails to meet the mark of fair administration of justice when it omits a requested accomplice instruction. Moreover, the omission constitutes an abuse of discretion.

For the same reason, the *McCoy* rule does not violate the tenets of review for harmless error. Given the inherent unreliability of accomplice testimony, any conviction based on such testimony, absent a proper instruction, will affirmatively appear to be a miscarriage of justice. The failure to give the instruction fails to meet the mark. We should avoid letting the standards of the Michigan criminal justice system fall below this mark.

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to the expeditious and effective ascertainment of the truth regarding the matters involved. The court shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require. The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.

The inclusion of the accomplice witness instruction ensures the fairness of the trial. Its exclusion, when it is merited, undermines the reliability of the verdict. Accordingly, the error cannot be harmless. *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002).

SUA SPONTE INSTRUCTION AND REVIEW FOR PLAIN ERROR

McCoy states that it may be error requiring reversal to fail to give the accomplice instruction if the issue is closely drawn, even absent a request from counsel. *McCoy*, *supra* at 240. The majority attacks this portion of *McCoy,* claiming that it contradicts the established review for plain error. A failure to instruct when there was no request is subject to review for plain error, the majority reasons, because the issue was neither raised nor addressed in the trial court.

For there to be plain error, our Court has decided, there must first be an error. Next, the error must be clear and obvious. Finally, it must adversely affect the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To warrant reversal, the error must either result in the conviction of an actually innocent defendant or it must affect the fairness, integrity, or public reputation of the judicial proceedings. *Id*. Again, the *McCoy* rule fits within the confines of these principles.

The first two elements of the plain error test are satisfied if a judge mistakenly fails to give the cautionary accomplice instruction. The error exists, and it is clear and obvious. The next question is whether the error adversely affected the defendant's substantial rights. To determine if an error affects substantial rights, the appellate court makes the same inquiry as when reviewing for harmless error, except that the

defendant bears the burden of persuasion. *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

The failure to give the cautionary accomplice instruction if it is appropriate undermines the reliability of any jury verdict. Hence, the error cannot be considered harmless. *Krueger*, *supra* at 54. This is especially true when the case boils down to a closely drawn credibility contest. Without basic protections, a criminal trial cannot reliably serve as a vehicle for properly determining guilt. A*rizona v Fulminante*, 499 US 279, 310; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Because this failure to instruct meets the harmless error standard, it also meets the plain error standard. *Olano*, *supra* at 734.

Moreover, such closely drawn cases will likely always meet the requirements for reversal. The omission of the instruction would mean that the trial court failed to meet the mark of the fair administration of justice. *McCoy*, *supra* at 236. This failure would raise serious questions regarding fairness, integrity, or the public reputation of the proceedings. *Carines*, *supra* at 763.

Contrary to the majority's conclusion, *McCoy* does not contradict MCL 769.26[7] or MCR 2.516(C).[8] MCL

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[7] MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

[8] MCR 2.516(C) provides:

> Objections. A party may assign as error the giving of or the failure to give an instruction only if the party objects on the record

769.26 and MCR 2.516(C) merely require that a defendant preserve issues for review. Those issues not preserved are subject to review for plain error.

McCoy works within the framework of plain error review. In overruling it, the majority abandons an important protection.

CONCLUSION

McCoy does not apply to this case because no credibility contest existed and there was insufficient evidence to justify characterizing Martin and Lawrence as accomplices. Therefore, this case provides an inappropriate vehicle for the majority to attack *McCoy*. Moreover, *McCoy* represents a valid rule of law that fits well within the established rules of appellate review. It should not be struck down.

CAVANAGH, J., concurred with KELLY, J.

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before the jury retires to consider the verdict (or, in the case of instructions given after deliberations have begun, before the jury resumes deliberations), stating specifically the matter to which the party objects and the grounds for the objection. Opportunity must be given to make the objection out of the hearing of the jury.

PEOPLE v WILEY

Docket No. 126221. Decided March 29, 2005. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave, affirmed the judgment of the trial court.

Namar Wiley pleaded guilty in the Wayne Circuit Court, James R. Chylinski, J., to a charge of second-degree murder, six counts of assault with intent to murder, and one count of possession of a firearm during the commission of a felony. Pursuant to a plea agreement, he agreed to and received a sentence in excess of the statutory guidelines range. The Court of Appeals, O'CONNELL, P.J., and OWENS and BORRELLO, JJ., denied the defendant's delayed application for leave to appeal in an unpublished order, entered April 9, 2004 (Docket No. 253533). The defendant sought leave to appeal in the Supreme Court.

In a unanimous memorandum opinion, the Supreme Court *held*:

A sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) where the record confirms that the sentence was imposed as part of a valid plea agreement. The statute does not require the specific articulation of additional substantial and compelling reasons for the departure. Furthermore, a defendant waives appellate review of a sentence that exceeds the guidelines where the defendant understandingly and voluntarily enters into a plea agreement to accept that specific sentence.

Affirmed.

1. SENTENCES — PLEA AGREEMENTS — APPEAL — SENTENCE DEPARTURES.

A sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) where the record shows that the sentence was imposed as part of a valid plea agreement; specific articulation of additional substantial and compelling reasons for the upward departure is not required.

2. SENTENCES — PLEA AGREEMENTS — APPEAL.

A defendant waives appellate review of a sentence that exceeds the sentencing guidelines where the defendant has understandingly

and voluntarily entered into a plea agreement to accept that specific sentence.

Namar Wiley in propria persona.

MEMORANDUM OPINION

We hold that a sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional "substantial and compelling" reasons by the sentencing court. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256-258; 666 NW2d 231 (2003).

Furthermore, a defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence.[1] MCR 6.302. In that respect, this case is similar to *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993), in which this Court stated that a defendant who pleads guilty with knowledge of the sentence will not be entitled to appellate relief on the basis that the sentence is disproportionate. See also *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

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[1] It is fully understandable under the circumstances of a plea agreement why a defendant would waive appellate review of such a sentence, because it is implicit in every plea agreement that the defendant has derived some benefit from the agreement, otherwise it would not have been entered into. However, there is no obligation upon the sentencing court to identify the reasons underlying the defendant's acceptance of the plea agreement or to inventory the specific benefits that the defendant might have derived. Nevertheless, the court should complete the Sentencing Information Report and determine the appropriate guideline range, so that it is clear that the agreed-upon sentence constitutes a departure.

We therefore affirm the judgment of the trial court. In all other respects, defendant's application for leave to appeal is denied, because we are not persuaded that this Court should review the other questions presented.

TAYLOR, C.J., and CAVANAGH, WEAVER, KELLY, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

PEOPLE v DAVIS

Docket No. 125436. Argued October 6, 2004 (Calendar No. 6). Decided April 7, 2005.

Gevon R. Davis was charged in the Genesee Circuit Court with unlawfully driving away a motor vehicle and with concealing stolen property. The trial court, Robert M. Ransom, J., granted the defendant's motion to quash the information on the basis that the Double Jeopardy Clause, Const 1963, art 1, § 15, and the decision in *People v Cooper*, 398 Mich 450 (1976), prohibited the prosecution for the theft of the vehicle from Michigan after the defendant had pleaded guilty in Kentucky, where he was apprehended, to a charge of attempted theft of the vehicle by unlawful taking or disposition of property. The Court of Appeals, COOPER, P.J., and MARKEY and METER, JJ., affirmed in an unpublished opinion per curiam, issued November 25, 2003 (Docket No. 242207). The Supreme Court granted the prosecution's application for leave to appeal. 470 Mich 870 (2004).

In an opinion by Justice WEAVER, joined by Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The Double Jeopardy Clause does not bar the defendant's successive state prosecution in Michigan because the entities seeking to prosecute the defendant—Kentucky and Michigan—are separate sovereigns deriving their authority to punish from distinct sources of power. *Cooper*, which incorrectly perceived a narrowing of the dual sovereignty doctrine and which held that the Double Jeopardy Clause of the Michigan Constitution prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the state of Michigan and the jurisdiction that initially prosecuted are substantially different, must be overruled. The balancing of interests approach adopted in *Cooper* has been explicitly rejected in *Heath v Alabama*, 474 US 82 (1985). The decision of the Court of Appeals must be reversed and the matter must be remanded to the trial court for further proceedings.

Reversed and remanded.

Justice KELLY, dissenting, would affirm the decision of the Court of Appeals, stating that *Cooper* provides the correct frame-

work for resolving double jeopardy concerns involving dual sovereigns and should not be overruled. When interpreting the Michigan Double Jeopardy Clause, as we must in this case, the Michigan Supreme Court is not bound by the United States Supreme Court's analysis of the federal Double Jeopardy Clause. The constitutional history of Michigan reveals no intent by the people of this state that the Michigan Double Jeopardy Clause should be interpreted exactly as the federal provision is interpreted. Consistent with this history, *Cooper* balances the rights of individuals with the state's interests in preserving the public peace and protecting the public safety by allowing successive prosecutions only when the prosecution by another sovereign for the same criminal act does not vindicate this state's interests. Michigan's interests in this case have been adequately protected by the defendant's Kentucky conviction. A second prosecution in Michigan is incompatible with fundamental justice and the requirements of due process.

Justice CAVANAGH, dissenting, concurred with the result reached by Justice KELLY in her dissenting opinion and fully concurred with the reasoning articulated in parts IV and V of that opinion.

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — SINGLE CRIMINAL ACT — DUAL STATE PROSECUTIONS.

The power of separate states to undertake criminal prosecutions of a defendant for a single act that constitutes a transgression of the law of each state derives from separate and independent sources of power and authority; the dual sovereignty doctrine provides that an act denounced as a crime by both states may be punished by both states (US Const, Am V; Const 1963, art 1, § 15).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Arthur A. Busch*, Prosecuting Attorney, and *Donald A. Kuebler*, Chief, Research, Training, and Appeals, for the people.

Neil C. Szabo for the defendant.

Amicus Curiae:

Charles Sherman, Kym L. Worthy, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

WEAVER, J. The issue presented is whether our Double Jeopardy Clause[1] prohibits the state of Michigan from prosecuting defendant for the theft of an automobile from Michigan after defendant pleaded guilty in Kentucky, where he was apprehended, to a charge of attempted theft of the automobile by unlawful taking. We overrule *People v Cooper*[2] and hold that our Double Jeopardy Clause does not bar defendant's successive state prosecution in Michigan because the entities seeking to prosecute defendant in this case—Kentucky and Michigan—are separate sovereigns deriving their authority to punish from distinct sources of power. The decision of the Court of Appeals affirming the trial court's order granting defendant's motion to quash the information is reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

FACTS

It is not disputed that defendant stole a 1999 Chevrolet Malibu, valued at $8,200, and drove the automobile from Michigan to Kentucky, where he was apprehended.

On August 22, 2001, defendant was charged in Kentucky with theft by unlawful taking or disposition of property valued at $300 or more.[3] On September 4, 2001, defendant pleaded guilty to an amended charge of attempted theft by unlawful taking or disposition of property valued at $300 or more.[4] He was sentenced to 365 days in jail, to be suspended during two years' probation.

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[1] Const 1963, art 1, § 15.

[2] 398 Mich 450; 247 NW2d 866 (1976).

[3] Ky Rev Stat Ann 514.030.

[4] Ky Rev Stat Ann 506.010 and 506.020 address criminal attempt.

On March 22, 2002, defendant was charged in Genesee County, Michigan, with unlawfully driving away a motor vehicle and with receiving and concealing stolen property.[5] Defendant moved to quash the information on the basis of double jeopardy, asserting that the double jeopardy provision of the Michigan Constitution[6] and the case *People v Cooper* prohibited a second prosecution in Michigan for the theft of the automobile, unless the interests of Michigan and Kentucky were substantially different. The trial court granted defendant's motion on June 11, 2002, and dismissed the charges, concluding that the case was controlled by *People v Cooper*.

The prosecutor appealed, and the Court of Appeals affirmed in an unpublished opinion per curiam.[7] The Court of Appeals concluded that *Cooper* was still the controlling law because only three justices from this Court would have overruled *Cooper* in *People v Mezy*.[8]

This Court granted the prosecutor's application for leave to appeal.[9]

STANDARD OF REVIEW

Whether the information should have been quashed on the basis of double jeopardy is a question of law that this Court reviews de novo. *People v Nutt,* 469 Mich 565, 573; 677 NW2d 1 (2004). In interpreting a constitutional provision, the primary rule of constitutional interpretation has been described by Justice COOLEY:

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[5] MCL 750.413 and 750.535(3)(a).

[6] Const 1963, art 1, § 15.

[7] *People v Davis*, unpublished opinion per curiam of the Court of Appeals, issued November 25, 2003 (Docket No. 242207).

[8] 453 Mich 269; 551 NW2d 389 (1996).

[9] 470 Mich 870 (2004).

> "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.' " [*Traverse City School Dist v Attorney General,* 384 Mich 390, 405; 185 NW2d 9 (1971) (quoting Cooley's Const Lim 81) (added emphasis omitted).]

ANALYSIS

At issue in the present case is whether our Double Jeopardy Clause prohibits charging and trying defendant in Michigan for the theft of an automobile from Michigan after he pleaded guilty in Kentucky, where he was apprehended, to attempted theft of the automobile. Answering this question requires us to determine whether this Court correctly construed our Double Jeopardy Clause and correctly applied the doctrine of dual sovereignty in *People v Cooper*.[10]

Michigan's Double Jeopardy Clause provides, "No person shall be subject for the same offense to be twice

[10] Justice KELLY in dissent asserts that the majority answers the wrong question when it decides whether this Court "correctly applied the doctrine of dual sovereignty in *People v Cooper*." "The appropriate question," she asserts, "is whether the *Cooper* decision correctly interpreted our state's constitution." *Post* at 175. The dissent is mistaken. There is no difference between the "question" as phrased by the majority and the "question" as phrased by the dissent; both are ways of stating the issue in this case, which is whether Michigan's Constitution prohibits charging and trying defendant in Michigan for the theft of an automobile from Michigan after he pleaded guilty in Kentucky, where he was apprehended, of attempted theft of the automobile.

put in jeopardy." Const 1963, art 1, § 15. The federal provision is substantially similar, providing "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." US Const, Am V. In *Nutt, supra*, we explained that the protections provided by the Double Jeopardy Clause include: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. *Nutt, supra* at 574.

In *Nutt,* we further concluded that

> in adopting art 1, § 15, the people of this state intended that our double jeopardy provision would be construed consistently with Michigan precedent and the Fifth Amendment. [*Id.* at 591.]

This conclusion was based, in part, on an examination of the record of the constitutional convention in 1961. *Id.* at 588-590. In 1835, Michigan's Constitution, art 1, § 12, contained language similar to that of the federal constitution: "No person, for the same offense, shall be twice put in jeopardy of punishment." *Nutt, supra* at 588. In 1850 and 1908, the language of this provision was changed to "No person, after acquittal upon the merits, shall be tried for the same offense." Const 1850, art 6, § 29; Const 1908, art 2, § 14; *Nutt, supra* at 588*;* 1 Official Record, Constitutional Convention 1961, p 465. At the 1961 constitutional convention, it was proposed that the provision be revised to once again mirror the language of the federal constitution. *Nutt, supra* at 589; 1 Official Record, Constitutional Convention 1961, p 465. In discussing the proposed amendment at the constitutional convention, it was noted by Delegate Stevens that even when the language differed from the federal provision in 1850 and 1908, this Court

had " 'virtually held that this means the same thing as the provision in the federal constitution . . . .' " 1 Official Record, Constitutional Convention 1961, p 539. This historical context supports *Nutt's* conclusion that Michigan's double jeopardy provision should be construed consistently with the Fifth Amendment.

In *Bartkus v Illinois,*[11] the defendant was tried in federal district court for the robbery of a federally insured savings and loan association and was acquitted. After his acquittal, a state grand jury indicted the defendant on robbery charges from the same robbery. The defendant was tried, convicted, and sentenced to life imprisonment. On appeal, the defendant asserted that his state conviction was barred by double jeopardy. The United States Supreme Court disagreed, concluding that successive state and federal prosecutions based on the same transaction or conduct were not barred by the Double Jeopardy Clause. 359 US at 122-124.[12] The Court reasoned:

> It would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States. [*Id.* at 137.]

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[11] 359 US 121; 79 S Ct 676; 3 L Ed 2d 684 (1959).

[12] Justice KELLY references the more than thirty years of case law on which *Bartkus* was based but then asserts that the foundation for *Bartkus* is "questionable" and that it was undermined by *Benton v Maryland,* 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969). *Post* at 171, 172. We disagree. As noted in *Bartkus*, the body of precedent on which it relied provided "irrefutable evidence that state and federal courts have for years refused to bar a second trial even though there had been a prior trial by another government for a similar offense," and concluded that "it would be disregard of a long, unbroken, unquestioned course of impressive adjudication for the Court now to rule that due process compels such a bar." *Bartkus, supra* at 136. Moreover, the *Heath* case discussed later in this opinion makes it clear that the United States Supreme Court meant what it said in *Bartkus.*

In *People v Cooper,* the defendant was acquitted in federal court of attempting to rob a bank. He was then tried in state court on charges stemming from the same criminal act. 398 Mich at 453. In addressing the defendant's argument that his trial in state court was barred by double jeopardy, this Court acknowledged the holding in *Bartkus* that successive prosecutions were not barred by double jeopardy, but decided that a "trend in United States Supreme Court decisions" suggested "that the permissibility of Federal-state prosecutions as a requirement of our Federal system [was] open to reassessment." *Id.* at 457. The Court opined that the trend it perceived required increased scrutiny of the dual sovereignty doctrine, and that double jeopardy may bar successive prosecutions. *Id.* at 459-460.[13] The Court explained:

> The dual sovereignty notion is predicated on the belief that state criminal justice systems should be strong. Additionally, there is the fear that Federal legislation which covers a criminal act may involve interests unlike the interests which state legislation covering the same criminal act may seek to promote. We agree that where an individual's behavior violated state and Federal laws which are framed to protect different social interests, prosecution by one sovereign will not satisfy the needs of the other

[13] The *Cooper* Court cited *Elkins v United States,* 364 US 206; 80 S Ct 1437; 4 L Ed 2d 1669 (1960), and *Murphy v Waterfront Comm of New York Harbor,* 378 US 52; 84 S Ct 1594; 12 L Ed 2d 678 (1964), as cases that undermined the *Bartkus* decision. But neither case specifically addressed whether successive prosecutions were barred by double jeopardy. The issue in *Elkins* was whether "articles obtained as the result of an unreasonable search and seizure by state officers, without involvement of federal officers, [may] be introduced in evidence against a defendant over his timely objection in a federal criminal trial." 364 US at 208. And the issue presented in *Murphy* was "whether one jurisdiction within our federal structure may compel a witness, whom it has immunized from prosecution under its laws, to give testimony which might then be used to convict him of a crime against another such jurisdiction." 378 US at 53.

> sovereign. In such a case, given the Federal government's preemptive power, the inability of the state to vindicate its interests would truly be an "untoward deprivation of the historic right and obligation of the States to maintain peace and order within their confines. It would be in derogation of our federal system". *Bartkus, supra,* at 137 (Frankfurter, J.). Therefore, we cannot accept defendant's proffered alternative to the dual sovereignty doctrine which would prohibit *all* successive prosecutions by two sovereigns for the same act.
>
> However, the interest of the Federal and state governments in prosecuting a criminal act frequently coincide. When state and Federal interests do coincide, prosecution by one sovereign will satisfy the need of the other. [*Id.* (emphasis in original).]

Thus, the *Cooper* Court held "that Const 1963, art 1, § 15 prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different." *Id.* at 461.

Justice KELLY in dissent makes much of the *Cooper* Court's statement that its decision rested on Michigan's Constitution. *Id.* at 461. But simply stating this conclusion does not make it so. A close examination of *Cooper* reveals that it was not decided on the basis of different language in our Constitution or on the basis of a different history behind Michigan's adoption of a double jeopardy bar. Indeed, no analysis was made at all regarding any of the text or history of art 1, § 15, and apart from the conclusory statement at the end of the *Cooper* opinion that the decision was based on Michigan's double jeopardy provision, there is nothing in the opinion actually linking this statement to the actual language or history of Michigan's double jeopardy provision. Rather, the case was decided as it was because the *Cooper* Court simply questioned *Bartkus* and mis-

takenly perceived a "trend" in United States Supreme Court law.[14] Thus, although the *Cooper* Court was wrong in its understanding of federal law, it did look to federal law in construing Michigan's double jeopardy provision, just as the majority does in this case.

Nine years after this Court's decision in *Cooper*, the United States Supreme Court decided *Heath v Alabama,*[15] a case that demonstrates that the *Cooper* Court was incorrect about any "trend" narrowing the dual sovereignty doctrine or the ability of states to prosecute successively. In *Heath*, the petitioner hired two men to kill his wife. The petitioner met the men in Georgia, just over the border from his Alabama home, and led the men back to his home. The men kidnapped the petitioner's wife from the home; her body was later found on the side of a road in Georgia. The petitioner pleaded guilty in Georgia to a murder charge in exchange for a sentence of life imprisonment. He was then indicted in Alabama for the capital offense of murder during a kidnapping, convicted, and sentenced to death. 474 US at 83-86. The petitioner asserted that the Alabama prosecution constituted double jeopardy. The United States Supreme Court granted certiorari limited to the double jeopardy issue and "requested the parties to address the question of the applicability of the dual sovereignty doctrine to successive prosecutions by two States." *Id.* at 87.

The *Heath* Court determined that the dual sovereignty doctrine permitted successive prosecutions under the laws of different states. The Court explained:

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[14] Similarly, the dissent by Justice KELLY is based on nothing more than its disagreement with the *Bartkus* decision and its desire to substitute its own double jeopardy policy for the double jeopardy analysis that the language and history of Michigan's double jeopardy provision requires.

[15] 474 US 82; 106 S Ct 433; 88 L Ed 2d 387 (1985).

The dual sovereignty doctrine, as originally articulated and consistently applied by this Court, compels the conclusion that successive prosecutions by two States for the same conduct are not barred by the Double Jeopardy Clause.

The dual sovereignty doctrine is founded on the common-law conception of crime as an offense against the sovereignty of the government. When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offences." *United States v. Lanza*, 260 U.S. 377, 382 (1922). As the Court explained in *Moore v. Illinois*, 14 How. 13, 19 (1852), "[an] offense, in its legal signification, means the transgression of a law." Consequently, when the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable." *Id.,* at 20.

In applying the dual sovereignty doctrine, then, the crucial determination is whether the two entities that seek successively to prosecute a defendant for the same course of conduct can be termed separate sovereigns. This determination turns on whether the two entities draw their authority to punish the offender from distinct sources of power. See, *e.g., United States v. Wheeler*, 435 U.S. 313, 320 (1978); *Waller v. Florida*, 397 U.S. 387, 393 (1970); *Puerto Rico v. Shell Co.,* 302 U.S. 253, 264-265 (1937); *Lanza, supra, at* 382; *Grafton v. United States,* 206 U.S. 333, 354-355 (1907). Thus, the Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own "inherent sovereignty," not from the Federal Government. *Wheeler, supra, at* 320, n. 14. See *Abbate v. United States*, 359 U.S. 187, 193-194 (1959) (collecting cases); *Lanza, supra*. As stated in *Lanza, supra,* at 382:

"Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.

> "It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."
>
> See also *Bartkus v. Illinois,* 359 U.S. 121 (1959); *Westfall v. United States,* 274 U.S. 256, 258 (1927) (Holmes, J.) (the proposition that the State and Federal Governments may punish the same conduct "is too plain to need more than statement").
>
> The States are no less sovereign with respect to each other than they are with respect to the Federal Government. Their powers to undertake criminal prosecutions derive from separate and independent sources of power and authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment. [*Id.* at 88-89.]

The Court further explained that in cases where it had found the dual sovereignty doctrine inapplicable, it had done so "because the two prosecuting entities did not derive their powers to prosecute from independent sources of authority." *Id.* at 90. The Court explicitly rejected the balancing of interests approach adopted by this Court in *Cooper*. *Id.* at 92-93.

The correctness of the *Cooper* decision, particularly in light of the United States Supreme Court's decision in *Heath*, has already been questioned. In *People v Mezy,*[16] three justices[17] stated that they would overrule *Cooper* and hold that the double jeopardy provisions of the Michigan Constitution and the United States Constitution did not bar successive state and federal prosecutions. 453 Mich at 272. The justices noted that the United States Supreme Court had consistently held that successive state and federal prosecutions did not violate double jeopardy. *Id.* at 278-280. Further, the

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[16] 453 Mich 269; 551 NW2d 389 (1996).

[17] The opinion was written by Justice WEAVER and signed by Justices BOYLE and RILEY.

justices noted that there was no " 'compelling' " reason to afford greater protection under the Michigan double jeopardy provision than the federal and that the two provisions should be treated as " 'affording the same protections.' " *Id.* at 280-281, quoting *People v Perlos*, 436 Mich 305, 313 n 7; 462 NW2d 310 (1990).[18]

Consistent with the United States Supreme Court decision in *Heath* and with the reasoning of three justices of this Court in *Mezy*, we now overrule *People v Cooper*.[19] As noted in *Nutt*, the common understanding of the people at the time that our double jeopardy provision was ratified was that the provision would be construed consistently with the federal double jeopardy jurisprudence that then existed. Applying the reasoning of *Bartkus,* which was clearly reaffirmed in *Heath*, the entities seeking to prosecute in this case—Kentucky and Michigan—are separate sovereigns deriving their authority to punish from distinct sources of power.

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[18] The justices also noted that, contrary to the *Cooper* Court's decision, the majority of states hold that both the United States Constitution and their constitutions allow for dual prosecutions by the state and federal governments. 453 Mich at 281 n 14.

[19] As recently noted, although we overrule precedent with caution, the doctrine of stare decisis is not applied mechanically to prevent the Court from overruling previous decisions that are erroneous. We may overrule a prior decision when we are certain that it was wrongly decided and " 'less injury will result from overruling than from following it.' " *People v Moore,* 470 Mich 56, 69 n 17; 679 NW2d 41 (2004), quoting *McEvoy v Sault Ste Marie,* 136 Mich 172, 178; 98 NW 1006 (1904). The United States Supreme Court decision in *Heath* clearly demonstrates that the *Cooper* Court was wrong about any "trend" that it thought it observed in United States Supreme Court case law concerning dual sovereignty and double jeopardy. Further, the *Cooper* Court failed to consider the language of our double jeopardy provision or its historical context. Additionally, there are no relevant "reliance" interests involved and therefore overruling *Cooper* would not produce any "practical real-world dislocations." See *Robinson v Detroit,* 462 Mich 439, 466; 613 NW2d 307 (2000). Therefore, we overrule the erroneous decision made by the *Cooper* Court.

Therefore, the prosecution of defendant in Michigan for the theft of the automobile is not barred by double jeopardy.[20]

The decision of the Court of Appeals affirming the trial court's order granting defendant's motion to quash is reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with WEAVER, J.

KELLY, J. (*dissenting*). This Court has granted the prosecutor's request to further weaken the Double Jeopardy Clause of the Michigan Constitution. The majority agrees with the prosecutor that the state's Double Jeopardy Clause does not bar this Michigan prosecution, despite the fact that Kentucky has already convicted defendant of the same crime.

I dissent. Our decision in *People v Cooper*[1] provides the appropriate protection against double jeopardy to Michigan citizens and to others within the state's jurisdiction. The majority decision presents yet another

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[20] Justice KELLY in dissent asserts that by looking to federal law to guide the interpretation of our double jeopardy provision, we are somehow giving away the people's sovereignty. *Post* at 182. We disagree. Rather, it is the dissent's interpretation that would cede this state's sovereignty to another state by foreclosing prosecution in Michigan, when there is no evidence in our constitutional history that the people of Michigan sought, in adopting Const 1963, art 1, § 15, to cede any of this state's sovereignty to the federal government or another state. Any abrogation based on double jeopardy principles of Michigan's sovereign power to prosecute offenders is a decision properly left to the people by amending the Constitution, and not to this Court. Further, we note that the Michigan Legislature *has* statutorily forbidden successive prosecutions only with regard to prosecutions concerning illegal drugs. MCL 333.7409 provides: "If a violation of this article is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state."

[1] 398 Mich 450; 247 NW2d 866 (1976).

instance in which this Court's majority disagrees with existing precedent, gives it short shrift, and changes Michigan law. I strongly disagree with the majority's choice to overrule *Cooper*.

This case does not present one of those rare occasions that requires reversing a previous decision of the Court. I would affirm the ruling of the Court of Appeals and, in doing so, I would follow this Court's precedent in *Cooper*.

I. FACTS AND STATUS OF THE CASE

Defendant allegedly stole an acquaintance's car or acquired it after someone else stole it in Michigan. He then drove the car to Kentucky, where he was arrested. By agreement with the Kentucky prosecutor, defendant pleaded guilty of attempted theft by unlawful taking or disposition of property valued at $300 or more. Ky Rev Stat Ann 514.030.

Later, defendant was charged in Michigan for the same car theft. The prosecutor accused him of unlawfully driving away a motor vehicle (UDAA), MCL 751.413, and receiving and concealing stolen property with a value of $1,000 or more but less than $20,000. MCL 750.535(3)(a). On defendant's motion, the trial court quashed the information and dismissed the charges on the basis that they violated the Double Jeopardy Clause of the Michigan Constitution. Const 1963, art 1, § 15. The Court of Appeals affirmed the decision. *People v Davis,* unpublished opinion per curiam of the Court of Appeals, issued November 25, 2003 (Docket No. 242207).

II. FEDERAL DOUBLE JEOPARDY JURISPRUDENCE

The United States Supreme Court determined in *Bartkus v Illinois*[2] that the Fifth Amendment's Double

[2] 359 US 121; 79 S Ct 676; 3 L Ed 2d 684 (1959).

Jeopardy Clause[3] allows successive prosecutions by the federal and state governments.

But *Bartkus* rests on a questionable foundation. The opinion is premised on a concept of dual sovereignty that the United States Supreme Court began to recognize in dicta starting in the mid-nineteenth century.[4] The doctrine was not applied at common law. It was first utilized by the Court in 1922, in *United States v Lanza*, 260 US 377; 43 S Ct 141; 67 L Ed 314 (1922).

In 1937, the United States Supreme Court held that the Fourteenth Amendment did not incorporate the Fifth Amendment's Double Jeopardy Clause against the states. *Palko v Connecticut,* 302 US 319; 58 S Ct 149; 82 L Ed 288 (1937), overruled by *Benton v Maryland*, 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969). In several earlier cases, the Court had allowed multiple state and federal prosecutions for the same offense. It had permitted the federal government to prosecute an offense for which a state court had already obtained a conviction. *Lanza, supra* at 382. Later, it had allowed states and the federal government to criminalize the same conduct. *Westfall v United States*, 274 US 256, 258; 47 S Ct 629; 71 L Ed 1036 (1927).

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[3] The relevant portion of the federal Double Jeopardy Clause reads, "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." US Const, Am V.

[4] See *Fox v Ohio*, 46 US 410; 12 L Ed 213 (1847) (a state may prosecute for passing false coin; the federal government may prosecute for counterfeiting; the former is a private wrong, while the latter is an offense directly against the federal government); *United States v Marigold*, 50 US 560; 13 L Ed 257 (1850) (federal statute and federal prosecution for uttering false coinage was constitutionally permissible); *Moore v Illinois*, 55 US 13; 14 L Ed 306 (1852) (Illinois law and federal fugitive slave law dissimilar in essential purpose, definition of the offenses, and type of punishment each statute authorized).

Then, in 1959, the United States Supreme Court in *Bartkus* allowed a state prosecution to proceed after the defendant had been acquitted of the charged offense in a federal court. It found that the federal Double Jeopardy Clause did not prohibit state prosecutions for state criminal offenses.

The reasoning of these cases was based on the argument that the Fifth Amendment's Double Jeopardy Clause was inapplicable to the states. Indeed, this was explicitly noted in *Bartkus,* in which Justice Frankfurter stated his view that the Fourteenth Amendment did not apply the first eight amendments to the states. *Bartkus, supra* at 124.

In 1969, the Supreme Court rejected the idea that the Fifth Amendment did not apply to the states through the Fourteenth Amendment. In *Benton v Maryland*,[5] the Court held that the Fifth Amendment protection is "a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment." *Benton, supra* at 794. Because *Bartkus* was based on the belief that the Fifth Amendment had no application to the states, *Benton* undermined the reasoning of *Bartkus*.[6] See *Smith v United States,* 423 US 1303, 1307; 96 S Ct 2; 46 L Ed 2d 9 (1975) (Douglas, Circuit Justice).

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[5] 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

[6] At least one commentator has recognized the paradox created by the dual sovereignty doctrine:

> The doctrine of selective incorporation, which makes the Double Jeopardy Clause applicable to the states, . . . depends upon the rationale that by enacting the Fourteenth Amendment the states surrendered a part of their sovereignty to the federal government. Yet, the dual sovereignty doctrine maintains that both the states and the federal government, bound by the same Double Jeopardy Clause because of their shared sovereignty, are separate sovereigns for purposes of assessing possible violations of

The weak underpinnings of the *Bartkus* line of cases is highlighted when one considers the common law on which our system of constitutional jurisprudence is based. As Justice Black noted in his vigorous *Bartkus* dissent, and as legal scholars continue to note,[7] the English common law did not recognize the concept of dual sovereignty.

Justice Black pointed out that protection from double jeopardy is part of the common law of nations. *Bartkus, supra* at 154 (Black, J., dissenting), citing Batchelder, Former Jeopardy, 17 Am L R 735 (1883). In fact, international law recognizes that multiple prosecutions by separate nations violate fundamental human rights.[8]

Post-*Bartkus* cases also raised questions regarding whether the dual sovereignty doctrine on which *Bartkus* was based would survive unscathed. For instance, in *Elkins v United States*,[9] the Court rejected the dual

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the Clause. *See, e.g., Heath,* 474 U.S. [82; 106 S Ct 433; 88 L Ed 2d 387 (1985)]. [McAninch, *Unfolding the law of double jeopardy*, 44 SC L R 411, 425 n 104 (1993).]

[7] See, for example, Comment, *The dual sovereignty exception to double jeopardy: An unnecessary loophole*, 24 U Balt L R 177, 180 (1994), citing Comment, *Successive prosecution by state and federal governments for offenses arising out of the same act*, 44 Minn L R 534, 537 n 18 (1960); Harrison, *Federalism and double jeopardy: A study in the frustration of human rights*, 17 U Miami L R 306 (1963); Grant, *Successive prosecutions by state and nation: Common law and british empire comparisons*, 4 UCLA L R 1 (1956).

[8] See, e.g., International Covenant on Civil and Political Rights, art 14(7), 999 UNTS 171, 177 (1976). A nation may not extradite a person if doing so would expose that person to subsequent prosecution for the same crime. 1 Restatement Foreign Relations Law of the United States, 3d, § 476(1)(b), p 566. The protection from double jeopardy has been a part of our western civilization since at least Greek and Roman times and is a " 'universal maxim of common law.' " *Bartkus, supra* at 151-153 (Black, J., dissenting), quoting 2 Cooley, Blackstone's Commentaries (4th ed, 1899), p 1481.

[9] 364 US 206; 80 S Ct 1437; 4 L Ed 2d 1669 (1960).

sovereignty doctrine in the context of search and seizure. There, the Court held that where state authorities obtained evidence during a search that would have violated the Fourth Amendment, the evidence must be excluded at the federal level.

Likewise, in *Murphy v Waterfront Comm of New York Harbor*,[10] the Court refused to apply the dual sovereignty doctrine. It held that a state may not constitutionally compel a witness to testify when that testimony might be used against him in a federal prosecution. These decisions rejecting the application of the dual sovereignty doctrine in other contexts, coupled with the *Benton* decision, prompted comment by many courts, including the *Cooper* Court. The question was whether the dual sovereignty doctrine would continue to be applied in the double jeopardy context.

More recently, though, the United States Supreme Court has held that successive prosecutions by individual states do not violate the Fifth Amendment's double jeopardy protection. *Heath v Alabama,* 474 US 82; 106 S Ct 433; 88 L Ed 2d 387 (1985). In *Heath*, the Supreme Court not only resurrected the dual sovereignty doctrine, it extended the doctrine to successive prosecutions by different states. No matter how flawed the reasoning of *Bartkus*, then, the Supreme Court has validated it. It has verified that, under current federal law, the dual sovereignty doctrine allows for successive prosecutions when they are initiated by different sovereigns.

This Court clearly does not have the power to overrule United States Supreme Court precedent in interpreting the Double Jeopardy Clause of the United States Constitution. On the other hand, we are not

[10] 378 US 52; 84 S Ct 1594; 12 L Ed 2d 678 (1964).

bound to adopt that Court's analysis of the federal constitution when we interpret the Michigan Constitution. This is especially true when the analysis is flawed. While the Court's decision regarding a similar constitutional provision provides guidance, the rights of Michiganians are not tied to what the Court chose to do with a federal constitutional provision.

Although the Michigan Supreme Court commented in *Cooper* on the direction it thought the United States Supreme Court was headed, it grounded its decision on an interpretation of the Michigan Constitution. This was fitting. When determining the rights guaranteed to people in Michigan under the Michigan Constitution, our Court is not bound by later interpretations given the federal constitution by federal courts.

III. THE MICHIGAN CONSTITUTION

This case is not about the federal constitution's Fifth Amendment double jeopardy protection. It is about the double jeopardy protection provided by the Michigan Constitution to those within the jurisdiction of this state. The majority claims that it must determine whether we "correctly applied the doctrine of dual sovereignty in *People v Cooper*." *Ante* at 160. The appropriate question is whether the *Cooper* decision correctly interpreted our state's constitution. I assert that it did.

The *Cooper* Court rejected the United States Supreme Court's one-sided view of dual sovereignty. The current majority suggests that the *Cooper* Court incorrectly applied dual sovereignty, whereas the *Cooper* Court specifically rejected it. Instead, it appropriately adopted a rule that balances the rights of the state with the fundamental rights afforded to the accused.

As Justice Denise Johnson of the Vermont Supreme Court observed, "[W]e do not need a unique state source to justify our differences with the interpretation of the federal Constitution. The concept of sovereignty gives state courts the right and the justification to disagree." Woltson, ed, *Protecting Individual Rights: The Role of State Constitutionalism*, Report of the 1992 State Judges Forum (1993), p 43, quoted in Shepard, *The maturing nature of state constitution jurisprudence*, 30 Val U L Rev 421, 439 (1996).

> [O]ur courts are not obligated to accept what we deem to be a major contraction of citizen protections under our constitution simply because the United States Supreme Court has chosen to do so. We are obligated to interpret our own organic instrument of government. [*Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993).]

In interpreting the Michigan Constitution, " 'the provisions for the protection of life, liberty and property are to be largely and liberally construed in favor of the citizen.' " *Lockwood v Comm'r of Revenue*, 357 Mich 517, 557; 98 NW2d 753 (1959), quoting *United States ex rel Flannery v Commanding Gen, Second Service Command,* 69 F Supp 661, 665 (SD NY, 1946).

The Double Jeopardy Clause in the Michigan Constitution currently reads, "No person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. To determine the parameters of this guarantee, we must examine the history of our state's constitutional and common-law heritage.

Before reaching statehood, Michigan accepted the common law of England as part of its legal heritage. The common law was applied when Michigan was part of the province of Upper Canada in 1792. At that time, the legislature of Upper Canada repealed Canadian Law and declared that "*resort should be had to the laws of*

England as the rule for the decision of [real property and civil rights]." 1 Michigan Territorial Laws, Introduction, p viii (1871). Likewise, the Northwest Ordinance contained a provision indicating that the territories should apply the common law. Northwest Ordinance of 1787, art II.[11]

When the territory that would become Michigan shifted possession from England to the new United States of America, the common law remained. "It is a principle of universal jurisprudence that the laws, whether in writing or evidenced by the usage and customs of a conquered or ceded country, continue in force till altered by the new sovereign. . . . All that occurred here was the mere change of the sovereign power, *which left all rights and laws as they had been*." 1 Michigan Territorial Laws, Introduction, pp x-xi (1871). Furthermore, in 1795 the Governor and judges of the territory adopted an act declaring that the common law of England was the applicable law. *Id.* at xi-xii.

The common law of England held that protection from double jeopardy extended to prosecutions by other sovereigns. The practice in Great Britain in the seventeenth and eighteenth centuries was that prosecution by a different sovereign precluded England from retrying a defendant. See *State v Hogg*, 118 NH 262, 265-266; 385 A2d 844 (1978).

Michigan adopted its first constitution in 1835. At that time, its double jeopardy provision read, "No person for the same offense, shall be twice put in jeopardy of punishment." Const 1835, art 1, § 12. In 1850, the state constitution was expanded and reworded to read, "No person after acquittal upon the

[11] The 1783 Treaty of Paris finalized the boundaries between Canada and the United States.

merits shall be tried for the same offense." Const 1850, art 6, § 29. Constitutional convention notes from 1850 suggest that the proponent of this change considered it to be simply a clarification of the provision's language.[12]

After the 1850 Constitution was ratified, the Michigan Supreme Court had occasion to interpret this new language. It determined that the phrase "after acquittal on the merits" did not mean that jeopardy attached only after a verdict was rendered. Writing for the Court, Justice COOLEY stated:

> The present Constitution of this State was adopted in 1850, when all the tendencies of the day were in the direction of enlarging individual rights, giving new privileges, and imposing new restrictions upon the powers of government in all its departments. This is a fact of common notoriety in this State; and the tendencies referred to found expression in many of the provisions of the Constitution. Many common-law rights were enlarged, and given the benefit of constitutional inviolability; and if any were taken away, or restricted in giving new privileges, it was only incidentally done in making the general system more liberal, and, as the people believed, more just. Such a thing as narrowing the privileges of accused parties, as they existed at the common law, was not thought of; but, on the contrary, pains were taken to see that they were all enumerated and made secure. Some were added; and among other provisions adopted for that purpose was the one now under consideration. [*People v Harding*, 53 Mich 481, 485-486; 19 NW 155 (1884).]

The *Harding* Court, therefore, determined that the language used in the 1850 Constitution was meant to expand the rights our state's citizens had at common

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[12] "Mr. C. [Delegate Crary] said he considered the language used in the section indefinite, and his amendment merely proposed language more definite and better understood." Report of the Proceedings and Debates in the Convention to Revise the Constitution of the State of Michigan, p 58 (1850).

law. At common law, a person could be retried after an acquittal on the merits if the first court lacked jurisdiction. The language of the 1850 Constitution was intended to preclude this "great hardship." *Id.* at 486. "It was meant to give a privilege not existing at the common law; it had no purpose to take away any which before existed." *Id*.

A constitutional convention was next called in 1908, but that convention left the language of the double jeopardy provision untouched. During the 1961 constitutional convention, the double jeopardy provision again received attention. The convention notes suggest that the delegates were concerned only with the issue of when jeopardy attached. The actual language of the state constitution's double jeopardy provision indicated that the protection did not attach until a verdict of acquittal had been rendered. Yet, in *Harding,* the Michigan Supreme Court had determined that jeopardy attached long before the rendering of a verdict.

The delegates' discussion revolved solely around conforming the language regarding when jeopardy attached to the interpretation the Michigan courts had given it:

> Mr. Stevens: Mr. Chairman and delegates, the original wording of this was: "No person, after acquittal upon the merits, shall be tried for the same offense." The Supreme Court of Michigan, however, has virtually held that this means the same thing as the provision in the federal constitution,[13] which is what we have put in: "No person shall be subject for the same offense to be put twice in jeopardy."

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[13] Interestingly, while this characterized the Michigan provision as meaning "virtually . . . the same thing as the provision in the federal constitution" with regard to when jeopardy attached, the *Harding* Court made no reference to the federal constitution. Its holding was grounded in our state's unique constitutional history.

> It is true that in the opinion of some of the jurists of the state this might make it a little bit easier for the state to appeal in some cases. Otherwise it makes no difference except it brings the provision of the constitution more clearly into the practice of this state. [1 Official Record, Constitutional Convention 1961, p 539.]

And later, Delegate Stevens noted:

> You would think from reading this, probably—and that is a matter of clarification—a layman might think that only after a person has been acquitted on the merits has he been put in jeopardy. That is not the fact under the decisions of the Michigan supreme court. He is better protected than that. There is nothing in here that I believe can be construed to in any way delete or reduce the rights of the defendant. [1 Official Record, Constitutional Convention 1961, p 540.]

Reference was made to the similarity between the proposed provision and the language of the United States Constitution, the delegates noting that "[t]he wording which we propose is that which is found in the vast majority of state constitutions." 1 Official Record, Constitutional Convention 1961, p 540 (Delegate Danhof). However, nothing suggests that they meant by the similarity in wording that all aspects of the Double Jeopardy Clause would be construed the same as other sovereigns' clauses, either then or afterward.

The only discussion at the convention centered on conforming the language of Michigan's Double Jeopardy Clause to the interpretation Michigan courts had given to that language. Silence regarding other aspects of the protection should not be construed to mean that the delegates considered federal case law the definitive authority regarding the meaning of our state provision. Rather, this silence should be taken to mean what it more likely signifies: a lack of consideration of any of

the aspects of double jeopardy protection beyond the question of when jeopardy attaches.

This specific concern was carried through to the people when they voted on the new constitution. The Address to the People contains the following language:

> This is a revision of Sec. 14, Article II, of the present constitution. The new language of the first sentence involves the substitution of the double jeopardy provision from the U.S. Constitution in place of the present provision which merely prohibits "acquittal on the merits." *This is more consistent with the actual practice of the courts in Michigan*. [Emphasis added.]

In addition, the preface to the Address to the People states, "Traditional liberties and rights of the people were carefully reviewed and changes made are in the direction of clarifying and *strengthening them*." (Emphasis added.)

Given the full history of our constitution, and the history of the 1961 constitutional convention, several things are clear. First, the sole concern in revising the Double Jeopardy Clause in our state constitution was to clarify that jeopardy attaches when a jury is sworn, as our courts had interpreted. It does not attach when a verdict is issued, as appeared from the language of the 1908 Constitution. Second, the language regarding the United States Constitution in the Address to the People simply informs us from where that language was derived.

The change in the Double Jeopardy Clause in the 1963 Constitution did not signal the people's intent to adopt the United States Supreme Court's interpretation of all aspects of double jeopardy protection, past and future. Instead, the people intended to ratify what the Michigan courts had already held with regard to when jeopardy attaches.

Despite the history outlined above, the majority in *People v Nutt*[14] took this language to mean that the people intended to adopt the federal interpretation of the Double Jeopardy Clause. It assumed that the people knew what the United States Supreme Court had interpreted the federal Double Jeopardy Clause to mean, and that they agreed with it. It assumed that they were willing to accept all future interpretations that the federal courts applied to it. It assumed that they willingly gave away their sovereignty as a people and as a state by allowing the federal government to interpret our constitution for us.

I cannot agree with all those assumptions. I do not presume that the voters of our state intended that Michigan's Double Jeopardy Clause would be interpreted exactly as the federal provision is interpreted.

I have reviewed our common-law history before we became a state, our state's constitutional history, and the language in the Address to the People. It has become obvious to me that the people intended that the language of the state Double Jeopardy Clause was intended to mean what Michigan courts had said it means. See *Harding*, *supra*.

The holding in *Cooper* was grounded on the Michigan Constitution. This was specifically recognized in *People v Gay*,[15] in which the *Cooper* decision was reaffirmed and given retroactive effect. As Justice LEVIN noted, *Cooper* was a "reasoned and careful" analysis of the state constitution. *People v Mezy,* 453 Mich 269, 299; 551 NW2d 389 (1996) (LEVIN, J, dissenting).

Cooper protects the rights of Michigan's citizens. Unlike federal jurisprudence, it requires that the gov-

[14] 469 Mich 565; 677 NW2d 1 (2004).

[15] 407 Mich 681, 710-711; 289 NW2d 651 (1980).

ernment balance those individual rights with the state's interest in preserving the public peace and protecting the public safety. *Cooper* held that Michigan's rights as a sovereign were generally vindicated when a defendant was brought to justice in another jurisdiction. But, it also recognized that there would be times when another sovereign's prosecution would not validate Michigan's interests. In those rare cases, *Cooper* allowed a successive prosecution:

> Const 1963, art 1, § 15 prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different. Analysis on a case-by-case basis cannot be avoided. [*Cooper, supra* at 461.]

The balancing test of *Cooper* protects a person's rights "to avoid (1) continued embarrassment, expense and ordeal; (2) being compelled to live in a continuing state of anxiety and insecurity; and (3) the possibility that even though innocent he may be found guilty through repeated prosecutions." *Cooper, supra* at 460, citing *United States v Wilson*, 420 US 332, 343; 95 S Ct 1013; 43 L Ed 2d 232 (1975), and *Green v United States*, 355 US 184, 187-188; 78 S Ct 221; 2 L Ed 2d 199 (1957).

The facts that a court should consider in applying the *Cooper* balancing test include

> whether the maximum penalties of the statutes involved are greatly disparate, whether some reason exists why one jurisdiction cannot be entrusted to vindicate fully another jurisdiction's interests in securing a conviction, and whether the differences in the statutes are merely jurisdictional or are more substantive. [*Cooper, supra* at 461.]

The *Cooper* Court's rejection of the dual sovereignty doctrine as a basis for allowing successive prosecutions,

without reference to the defendant's fundamental interest in being free from double jeopardy, was unanimous.[16]

The majority uses *Heath* to attack the holding in *Cooper*. But *Cooper* does not rest on the decisions of the United States Supreme Court interpreting the federal constitution. It rests on the Michigan Constitution. It depends on balancing the interest of the state in curbing criminal activity with the liberty interests of those within its jurisdiction. *Gay, supra* at 693-694.

As discussed, this is perfectly consistent with the intent of the 1961 constitutional convention delegates and with the intent of the people. Given the rejection of the *Bartkus* one-sided approach to dual sovereignty, later cases such as *Heath* that apply the same one-sided approach have no bearing on whether *Cooper* was correctly decided. The *Cooper* rule is necessary to protect the individual's interest, as well as the state's interest in rare cases where the state's interest is not vindicated by another sovereign's prosecution.

The defendant here is being forced to undergo multiple ordeals when he should be able to rely on the finality of his prosecution in Kentucky. He had an expectation that his guilty plea in Kentucky would end governmental action against him involving the car theft. Instead, the Kentucky guilty plea can now be used against him in the Michigan proceeding. Defendant will again be punished for the same activity for which he has already been punished in Kentucky.

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[16] Justice COLEMAN concurred in the result, but believed that Michigan should apply the "same-elements" test for determining when successive prosecutions are brought for the same offense. *Cooper*, *supra* at 463 (COLEMAN, J., concurring). In *Gay,* the Court unanimously agreed that the *Cooper* decision was entitled to retroactive application.

Cooper specifically directs a case-by-case inquiry of whether the state's interests have been met. *Cooper, supra* at 461. It allows successive prosecutions when the interests of the two states are substantially different. The court considers the maximum penalties available, facts indicating that the other jurisdiction cannot be trusted to vindicate fully Michigan's interests, and whether the statutory differences are substantive or "merely jurisdictional." *Id.*

There is no evidence in the record before us that Michigan's interests have not been adequately protected by the proceedings in Kentucky. Defendant pleaded guilty in Kentucky to attempted theft of property having a value of more than $300. He was sentenced to one year's probation.

Defendant is charged in Michigan with UDAA and receiving stolen property worth $1,000 or more. These crimes are felonies punishable by not more than five years' imprisonment. Similarly, the Kentucky statute makes theft of property with a value of more than $300 a felony punishable by not more than five years' imprisonment. See Ky Rev Stat Ann 514.030 and 532.020(1)(a).

To conserve trial resources, Michigan prosecutors frequently offer a "plea bargain" to a defendant to plead guilty to a lesser offense. The Kentucky prosecutor's willingness to offer defendant a plea to a lesser offense cannot be said to undermine our state's interests. Furthermore, the Michigan prosecutor in this case does not argue that Michigan's interests were compromised.

The facts of this case serve to show that *Cooper* is not, in fact, unworkable. The interests sought to be protected by each state's law are not substantially different. The interests of the state of Michigan are amply protected, while the interests of the individual

are not ignored. The Double Jeopardy Clause was written not to protect the state or federal government, but to protect the individual.

To hold that Michigan will allow prosecution in our state after a federal or sister state prosecution for the identical act is to embrace a system of constitutional duality. It enables a state to pursue a person who either has been found innocent or has paid the price for his crime to another sovereignty. To harass the innocent, the acquitted, or the guilty person who has paid the price for a crime in money or freedom is not compatible with constitutionally legitimate state action. To the contrary, it is at just such harassment that our state constitution takes aim.

The policy that weakens double jeopardy protections is not validated because both state and federal sovereignties combine to embrace it. It is incongruous to allow a state's basic constitutional policy, one integral to its sovereignty, to be frustrated as a consequence of the duality that allows that state to exist. Furthermore, it is inconsistent and ironic to use that federalism, which has been justified in the name of protecting freedom, to obliterate a fundamental right.

Rarely are Michigan's interests not vindicated after one fair test of guilt. Normally, the cause of justice is not served in the second pursuit of one who has been subjected to jeopardy for the same act in a different jurisdiction. To hold otherwise is to require an accused either to prove innocence twice or to pay twice for the same offense. The sole rationale for it is that the acts complained of took place where two layers of government coincide.

For almost thirty years, *Cooper* and its progeny have protected citizens and others subject to the jurisdiction of this state from the risk of

> (1) continued embarrassment, expense and ordeal; (2) being compelled to live in a continuing state of anxiety and insecurity; and (3) the possibility that even though innocent [we] may be found guilty through repeated prosecutions. [*Gay, supra* at 694, citing *Wilson*, *supra* at 343, and *Green, supra* at 187-188.]

See also *People v Herron,* 464 Mich 593, 601; 628 NW2d 528 (2001). *Cooper* correctly held that Michigan's Double Jeopardy Clause protects us from multiple prosecutions for the same crime. That protection exists as long as the state's interest is protected by a prosecution for the crime in another state or by the federal government. The Court in *Cooper* did not need to find a "different history behind Michigan's adoption of a double jeopardy bar"[17] to conclude that the Michigan Constitution protects us from multiple prosecutions for a single crime. As explained, that protection has been a bedrock principle of our common law for decades.

IV. FOURTEENTH AMENDMENT DUE PROCESS

The right to be free from double jeopardy is a fundamental right

> deeply ingrained in at least the Anglo-American system of jurisprudence . . . . [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [*Green, supra* at 187-188.]

As Justice Black once observed, "double prosecutions for the same offense are so contrary to the spirit of our

[17] *Ante* at 164.

free country that they violate even the . . . Fourteenth Amendment." *Bartkus, supra* at 150-151 (Black, J., dissenting).

Justice Black recognized that, from an individual's perspective, multiple punishments inflict the same injustice whether levied by officers wearing one uniform or several. "In each case . . . [one] is forced to face danger twice for the same conduct." *Bartkus, supra* at 155 (Black, J., dissenting).

It is incompatible with fundamental justice that a person who has already faced trial in another court system should again be exposed to jeopardy in Michigan's courts. The dual threat from the single act is "repugnant to the conscience of mankind." See *Palko, supra* at 323. If the essence of due process, fairness, is to be recognized, one of its features must be this guarantee: a person may be exposed to the gauntlet of criminal proceedings only once for the same misconduct.

It does not matter to the individual that two separate sovereigns are responsible for the proceedings. What matters is that the government has resources and power the individual does not. Therefore, the government should not be

> allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [*Green, supra* at 187-188.]

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires a recognition that subjecting an individual to a second trial violates the fundamental fairness due every citizen of the United States.

V. THE DOCTRINE OF STARE DECISIS

> "[*S*]*tare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " [*United States v Int'l Business Machines Corp*, 517 US 843, 856; 116 S Ct 1793; 135 L Ed 2d 124 (1996), quoting *Payne v Tennessee,* 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991). See also *People v Petit,* 466 Mich 624, 633; 648 NW2d 193 (2002).]

To overturn a previous decision of this Court, we must be convinced that it was wrongly decided. In addition, we must conclude that greater injury will result from adhering to it than from correcting it. *Petit, supra* at 634, citing *McEvoy v Sault Ste Marie,* 136 Mich 172, 178; 98 NW 1006 (1904). A departure from precedent must be based on a " ' "special justification." ' " *Dickerson v United States*, 530 US 428, 443; 120 S Ct 2326; 147 L Ed 2d 405 (2000), quoting *Int'l Business Machines Corp, supra* at 856, quoting *Payne, supra* at 842 (Souter, J., concurring), quoting *Arizona v Rumsey*, 467 US 203, 212; 104 S Ct 2305; 81 L Ed 2d 164 (1984).

Nine years ago, Justice WEAVER's lead opinion in *Mezy* indicated a desire to overrule *Cooper.* Her position did not gain the support of a majority of the justices. The only change that could explain today's decision to overrule *Cooper* is the change in the make-up of this Court. Justice LEVIN's criticism in *Mezy*[18] of the lead opinion's desire to overrule *Cooper* is just as applicable today as it was when written. There has been no intervening showing that *Cooper* was clearly erroneous.

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[18] Because three justices indicated that they would overrule *Cooper* even though reaching the issue was unnecessary, three other justices explained why they would not overrule the case. Justice BRICKLEY simply indicated that *Cooper* need not be addressed by the Court.

The majority claims that *Cooper* is bad law. Its reason is that the *Cooper* Court did not apply the doctrine of dual sovereignty as articulated by the United States Supreme Court and that it misconstrued where the United States Supreme Court was headed.

Yet, although *Cooper* alluded to the track the United States Supreme Court appeared to be taking, it specifically noted that its decision was based on the Michigan Constitution. This majority's constrictive reading of the double jeopardy rights our constitution provides disagrees with the *Cooper* approach. It overrules *Cooper* without showing in what respect the *Cooper* analysis of our state Double Jeopardy Clause is wrong.

This lack of an explanation is understandable when one considers that there is nothing unworkable about *Cooper*. The majority asserts that less injury will result from overruling *Cooper* than from allowing it to stand. I believe that less injury will result only if one assumes that everyone accused of a crime is guilty. More injury will result to those our criminal justice system has been created to protect, those who are falsely accused. Hereafter, if one sovereign prosecutes and the accused is found not guilty, the sovereign may work with Michigan to achieve what it could not, secure conviction.

The majority's approach ignores the fact that, by overruling a dozen or more cases each term, it destabilizes our state's jurisprudence. It suggests to the public that the law is at the whim of whoever is sitting on the Supreme Court bench. Surely, it erodes the public's confidence in our judicial system. Less harm would result from retaining *Cooper* than from reversing it.

VI. CONCLUSION

Because I believe that *Cooper* provides the correct framework, based on the Michigan Constitution, for

resolving double jeopardy concerns, I would affirm the decision of the Court of Appeals.

I disagree with the majority that *Cooper* must fall. The *Cooper* decision was not incorrect when it was decided or when its holding was unanimously reaffirmed by this Court in *Gay*. It is not incorrect today. Greater injustices will come from its abandonment than from its retention.

One cannot but wonder if this departure from precedent will encourage the people of Michigan to "adjust themselves to all other violations of the Bill of Rights should they be sanctioned by this Court." *Bartkus, supra* at 163 (Black, J., dissenting).

Overturning *Cooper* strikes at the integrity of our justice system. It represents a greater threat to public security than it does a protection from criminals. The decisions in *Cooper* and *Gay* and the Court of Appeals decision in this case should be upheld.

CAVANAGH, J. (*dissenting*). I concur with the result reached by Justice KELLY in her dissent. I also fully concur with the reasoning articulated in parts IV, Fourteenth Amendment Due Process, and V, The Doctrine of Stare Decisis, of Justice KELLY's opinion.

ECHELON HOMES, LLC v CARTER LUMBER COMPANY

Docket Nos. 125994, 125995. Decided April 12, 2005. On application by the defendant for leave to appeal, the Supreme Court, after hearing oral argument on whether the application should be granted and in lieu of granting leave, reversed the judgment of the Court of Appeals and remanded the case to the circuit court for a hearing.

Echelon Homes, L.L.C., brought an action in the Oakland Circuit Court against Carter Lumber Company, seeking treble damages under MCL 600.2919a for Carter's alleged aiding in the concealment of stolen, embezzled, or converted property in allowing an employee of Echelon to open and use a charge account at Carter in the name of Echelon. Carter brought a counterclaim, seeking the outstanding balance on the account. The court, Gene Schnelz, J., granted motions for summary disposition by both parties. Both parties appealed and the appeals were consolidated by the Court of Appeals. The Court of Appeals, HOEKSTRA, P.J., and SAWYER and GAGE, JJ., affirmed the summary dismissal of Carter's claims against Echelon, but reversed the summary dismissal of two of Echelon's claims against Carter, holding that constructive knowledge that property is stolen, embezzled, or converted is sufficient to impose liability under MCL 600.2919a. 261 Mich App 424 (2004). Carter sought leave to appeal. The Supreme Court ordered oral argument on whether to grant the application, limited to the issue whether the Court of Appeals correctly held that constructive knowledge is sufficient to impose liability on Carter under MCL 600.2919a. 471 Mich 916 (2004).

In an opinion by Justice WEAVER, joined by Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

Constructive knowledge is not sufficient to impose liability under MCL 600.2919a. The case must be remanded to the circuit court for a hearing on whether there is a material issue of fact regarding whether there is sufficient circumstantial evidence to establish that Carter knew the property was stolen, embezzled, or converted.

1. Constructive knowledge that property is stolen, embezzled, or converted is not sufficient to impose liability under MCL 600.2919a, which requires that a person "knew" that property was stolen, embezzled, or converted in order to be held liable for aiding the concealment of stolen, embezzled, or converted property. That the person should have known is not sufficient to impose liability under the statute. Constructive knowledge is a distinct concept from knowledge, and cannot replace the requirement of knowledge in a statute. To the extent that the opinion in *People v Tantenella*, 212 Mich 614 (1920), stated otherwise, it must be overruled.

2. The defendant's knowledge that the property was stolen, embezzled, or converted can be established by circumstantial evidence.

3. Carter was under no obligation under MCL 600.2919a to make an inquiry into Echelon's employee's authority to conduct transactions in Echelon's name.

Reversed and remanded to the circuit court.

Justice CAVANAGH, joined by Justice KELLY, dissenting, agreed with the majority that circumstantial evidence can be sufficient to establish the knowledge requirement of MCL 600.2919a. However, the number of statutes in which the Legislature plainly expresses that actual knowledge is required belies the majority's position that the term "knew" in § 2919a means only actual knowledge. The use of the term "knew" must be viewed as allowing a broad range of knowledge to meet the statutory knowledge requirement. The word "knew" in § 2919a encompasses actual and constructive knowledge, and the defendant had a duty to make obvious inquiries that an honest person using ordinary caution would have made, instead of avoiding these inquiries.

RECEIVING STOLEN GOODS — STATUTORY CONVERSION — KNOWLEDGE.

A person must know that the property was stolen, embezzled, or converted in order to be held liable under the statute that allows recovery of treble damages by one who is damaged as a result of the person's buying, receiving, or aiding in the concealment of stolen, embezzled, or converted property; although constructive knowledge is not sufficient, the required knowledge can be established by circumstantial evidence (MCL 600.2919a).

Kickham Hanley P.C. (by *Timothy O. McMahon*) for the plaintiff.

Russell & Stoychoff, P.C. (by *Paul M. Stoychoff*), for the defendant.

Amicus Curiae:

Warner Norcross & Judd LLP (by *Jeffrey O. Birkhold* and *Matthew T. Nelson*) for Michigan Bankers Association.

WEAVER, J. MCL 600.2919a provides that a person who buys, receives, or aids in concealing stolen, embezzled, or converted property can be held liable for treble damages if he *knew* that the property was stolen, embezzled, or converted. The sole issue before this Court is whether constructive knowledge that property is stolen, embezzled, or converted is sufficient to impose liability under MCL 600.2919a. We hold that under the plain language of the statute, constructive knowledge is not sufficient to impose liability under MCL 600.2919a.

Therefore, we reverse the judgment of the Court of Appeals and hold that the statute requires exactly what it says—that the person knew that the property had been stolen, embezzled, or converted.

We remand this case to the trial court for a hearing on whether there is a material issue of fact regarding whether there is sufficient circumstantial evidence to establish that defendant knew the property was stolen, embezzled, or converted.

FACTS AND PROCEDURAL HISTORY

Plaintiff Echelon Homes, L.L.C., employed Carmella Wood as its bookkeeper and office manager from 1997 to 2000. During her employment, Wood engaged in fraudulent schemes against Echelon, including, but not limited to, forging company checks to herself, opening company credit cards in her name, and opening lines of

credit to herself in Echelon's name. During this time, Wood opened an unauthorized account with defendant Carter Lumber Company and purchased approximately $87,000 in materials used to remodel her home and her brother's home. Echelon did not discover Wood's fraudulent activity until June 2000, when it learned that Wood had embezzled over $500,000. When Wood's embezzlement was discovered, Echelon had an outstanding invoice from Carter for approximately $27,000.

Carter had extended a line of credit to Wood under Echelon's company name. Wood forged the credit application to initially obtain the account. Subsequently, Carter continued to increase the line of credit to Wood, to the point that Echelon became one of its largest credit customers. Carter never verified that Echelon had in fact authorized the credit account, nor did it ever verify that Wood had the authority to receive credit increases. Carter delivered goods to Wood's relatives and allowed her relatives to pick up goods without verifying that they were authorized by Echelon. Carter signed lien waivers for goods purportedly delivered to Echelon for specific jobs when Carter knew it had never delivered goods for those jobs. Wood has testified that she was not working with Carter, or any of Carter's agents, and that she was "scamming" Carter as well.

Echelon filed suit against Carter under various theories, including MCL 600.2919a, aiding and abetting conversion. Carter filed a counterclaim against Echelon for the $27,000 outstanding invoice. The trial court granted both parties' motions for summary disposition. Both parties appealed. The Court of Appeals affirmed the summary dismissal of Carter's claims against Echelon, but reversed the summary dismissal of two of

Echelon's claims against Carter. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424; 683 NW2d 171 (2004).

Carter filed an application for leave to appeal with this Court. This Court scheduled oral argument on the application for leave to appeal, limited to whether the Court of Appeals correctly held that constructive knowledge was sufficient to impose liability under MCL 600.2919a. *Echelon Homes, LLC v Carter Lumber Co*, 471 Mich 916 (2004).

ANALYSIS

The issue before us is whether constructive knowledge is sufficient to impose liability under MCL 600.2919a, which requires that a person "knew" that property was stolen, embezzled, or converted in order to be held liable for aiding and abetting.

This is a question of statutory interpretation, which this Court reviews de novo. *Stozicki v Allied Paper Co, Inc,* 464 Mich 257, 263; 627 NW2d 293 (2001). In reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent. *People v Morey,* 461 Mich 325, 329-330; 603 NW2d 250 (1999). "We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *Id.* at 330. "We must give the words of a statute their plain and ordinary meaning . . . ." *Id.* The plain and ordinary meaning of words can be ascertained by looking at dictionary definitions. *Koontz v Ameritech Services, Inc,* 466 Mich 304, 312; 645 NW2d 34 (2002).

A

MCL 600.2919a states:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property *knew* that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. [Emphasis added.]

A plain reading of this statute indicates that a person must know that the property was stolen, embezzled, or converted in order to be held liable. That the person "should have known" is not sufficient to impose liability under the statute.

The term "know" does not encompass constructive knowledge, that one "should have known." Black's Law Dictionary (8th ed) defines "knowledge" as "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." "Constructive knowledge," on the other hand, is defined as "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Id.*

Constructive knowledge is a distinct concept from knowledge, and cannot replace the requirement of knowledge in a statute. The Legislature uses the terms "knew" and "should have known" to indicate a difference between knowledge and constructive knowledge.[1] We found thirty-eight statutes that refer to constructive knowledge, using a variation of the phrase "knew or

[1] The dissent argues that the Legislature's frequent use of the term "actual knowledge" refutes our position that the term "knew," as used in

should have known." See MCL 205.14(2)(d) (a tobacco seller or distributor can be held liable for illegally selling tobacco products if it "knew or should have known that the manufacturer intended the tobacco product to be sold or distributed" outside the prescribed area); MCL 691.1417(3)(c) (to receive compensation for property damage or physical injury from a governmental agency the claimant must show that "[t]he governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect"); MCL 565.831(4) (a person who provides a statement used in an application for registration or property report is liable only for false statements and omissions in his statement and only "if it is proved he knew or reasonably should have known of the existence of the true facts by reason of which the liability is alleged to exist"); MCL 445.1902(b)(ii)(B) (misappropriation of a trade secret includes one who disclosed or used a trade secret of another when, at the time of disclosure or use, the person "knew or had reason to know that his or her

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this statute, is not satisfied by constructive knowledge. But the dissent overlooks the fact that the Legislature uses the terms "knowledge" and "knew" very differently.

There are some thirty-eight statutes that use a variation of the phrase "knew or should have known"; for those statutes constructive knowledge is sufficient. By contrast, there is only one statute, MCL 554.636, that uses the phrase "actually knew." (Ten statutes, including this one, use the bare word "knew.") The Legislature's ability to denote the type of knowledge required is better evidenced by the thirty-eight statutes in which it explicitly called for constructive knowledge than by the one occasion in which it used the term "actually."

The dissent cites forty-eight statutes in which the Legislature uses the phrase "actual knowledge." By contrast, there are only seven statutes that refer to "actual or constructive knowledge."

The multiple citations to statutes referencing "actual knowledge" do not affect the correct interpretation of the statute at issue here, which uses the term "knew."

knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it").

Relying on *People v Tantenella*, 212 Mich 614; 180 NW 474 (1920), Echelon argues that this Court has historically used constructive knowledge to impose liability under a criminal aiding and abetting statute.

In *Tantenella*, the defendant was charged with receiving a stolen car. The defendant claimed that he did not know that the car was stolen. However, the Court determined that the defendant had sufficient guilty knowledge to be guilty of the crime. *Id.* at 620. The *Tantenella* Court stated, "Guilty knowledge means not only actual knowledge, but constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred." *Id.* at 621. The Court went on to list facts that implied the guilty knowledge of the defendant: receiving possession of the car hours after it had been stolen, driving to Chicago with the suspected thief, changing the motor number and license number, claiming ownership, producing a fraudulent bill of sale, and giving authorities conflicting names. *Id.* All these facts were used by the Court to determine that the defendant was guilty of receiving stolen property.

Although the *Tantenella* Court characterized its analysis of these facts as examining the defendant's constructive knowledge, the Court was, in fact, determining that the defendant had knowledge, proven by circumstantial evidence, that the car was stolen. This is shown by the Court's extensive analysis of the facts that led it to believe that the defendant had knowledge. The *Tantenella* Court used the term "constructive knowledge" synonymously with knowledge proven through circumstantial evidence. Thus, the Court's use of the

term "constructive knowledge" is a misnomer; what the Court really meant was knowledge proven by circumstantial evidence.

The *Tantenella* Court's holding regarding "constructive knowledge" has correctly been interpreted by subsequent courts to mean actual knowledge proven by circumstantial evidence. See, e.g., *People v Westerfield*, 71 Mich App 618; 248 NW2d 641 (1976) (the defendant was found guilty of receiving a stolen car on the basis of suspicious circumstances surrounding his purchase); *People v Blackwell,* 61 Mich App 236, 240-241; 232 NW2d 368 (1975) ("although the term may convey a special meaning to lawyers, it is apparent that the *Tantenella* Court and the others which have used the identical instructions since *Tantenella* used the term "constructive knowledge" as a shorthand way of saying that this element of the charge may be proven circumstantially"); *People v White*, 22 Mich App 65, 68; 176 NW2d 723 (1970) (the defendant was charged with knowingly concealing stolen property on the basis of circumstantial evidence); *People v Keshishian*, 45 Mich App 51, 53; 205 NW2d 818 (1973) (circumstantial evidence sufficient to make prima facie showing of guilty knowledge).

We hold that, under MCL 600.2919a, constructive knowledge is not sufficient; a defendant must know that the property was stolen, embezzled, or converted. To the extent that *Tantenella* stated otherwise, it is overruled. But consistent with the actual holding in *Tantenella,* a defendant's knowledge that the property was stolen, embezzled, or converted can be established by circumstantial evidence.

B

Echelon also argues, and the Court of Appeals agreed, that Carter was required to make a reasonably

diligent inquiry into whether Wood was authorized to open credit accounts and conduct transactions in Echelon's name. In support of this argument Echelon relies on *In re Thomas Estate*, 211 Mich App 594; 536 NW2d 579 (1995). In *Thomas,* a bank improperly released funds to the former guardian of a minor, despite the fact that her guardianship had been terminated. At the time of the transaction, the bank had in its possession a letter that explicitly stated that the guardianship had been terminated. The bank was found liable for the improper release, and was required to compensate the estate of the minor for the loss.

The Court of Appeals in the present case reasoned that just as the bank in *Thomas* was required to make a diligent inquiry about the authority of the guardian, Carter was required to inquire about Wood's authority concerning Echelon. We disagree.

Thomas dealt with MCL 700.483, which in relevant part before its repeal stated: "The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, *except that restrictions on powers of conservators which are indorsed on letters as provided in section 485 are effective as to third persons*." (Emphasis added.) This statute explicitly stated that a bank *does not* need to make further inquiry into the powers of a conservator except when there are letters that restrict the conservator's powers. In *Thomas*, there were letters—letters that explicitly stated the date when the guardianship was to terminate. The bank did not consult these letters when it statutorily had an affirmative duty to do so. As a result, the bank was held liable for improper disbursement of funds.

But the statute in the present case, MCL 600.2919a, imposes no duty on the defendant to make an inquiry.

Therefore, Carter was not statutorily bound to make an inquiry into Wood's authority, and Echelon's analogy to *Thomas* is misplaced.

CONCLUSION

Constructive knowledge is not sufficient to impose liability under MCL 600.2919a. The term "knew" in the statute means knowledge that the property is stolen, embezzled, or converted.

In lieu of granting leave to appeal, we reverse the Court of Appeals holding that constructive knowledge is sufficient to impose liability under MCL 600.2919a. However, the trial court did not determine whether there was a material issue of fact concerning whether there was sufficient circumstantial evidence to establish that Carter knew that Wood's transactions were fraudulent. Accordingly, we remand this case to the trial court for a hearing on this issue. Defendant's application for leave to appeal on the remaining issues is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with WEAVER, J.

CAVANAGH, J. (*dissenting*). I agree with the majority that circumstantial evidence can be sufficient to establish the knowledge requirement of MCL 600.2919a. However, I disagree with the majority's contention that, as it relates to MCL 600.2919a, constructive knowledge is a distinct concept from knowledge.[1] The word "knew"

[1] MCL 600.2919a states the following:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or

as used in MCL 600.2919a encompasses actual *and* constructive knowledge; therefore, I must respectfully dissent.

The Legislature knows how to use the term "actual knowledge" and has used this term on numerous occasions. The number of statutes in which the Legislature plainly expresses that actual knowledge is required belies the majority's position that the term "knew" means only actual knowledge.

For example, in the following statutes the Legislature had no difficulty expressing the requirement of actual knowledge. MCL 15.305(1) ("with actual knowledge of such prohibited conflict"); MCL 15.325(1) ("with actual knowledge of the prohibited activity"); MCL 28.425a(2)(c) ("The prosecuting attorney shall disclose to the concealed weapon licensing board any information of which he or she has actual knowledge that bears directly on an applicant's suitability to carry a concealed pistol safely."); MCL 35.501 ("without actual knowledge"); MCL 205.29(2) ("had actual knowledge"); MCL 286.192(1) ("unless the person has actual knowledge"); MCL 324.5531(7) ("in proving a defendant's possession of actual knowledge, circumstantial evidence may be used"); MCL 324.11151(5)(b) ("in proving the defendant's possession of actual knowledge, circumstantial evidence may be used"); MCL 333.2843b(1) ("a physician . . . has actual knowledge"); MCL 333.5475a(1)(b) ("the property manager, housing commission, or owner of the rental unit had actual knowl-

converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise.

edge of the lead paint hazard"); MCL 333.13738(5)(b) ("in proving the defendant's possession of actual knowledge, circumstantial evidence may be used"); MCL 333.17015(14) ("the physician who relied upon the certification had actual knowledge"); MCL 390.1553(3)(a) ("does not have actual knowledge"); MCL 418.131(1) ("if the employer had actual knowledge that an injury was certain to occur"); MCL 432.207c(7) ("report all information . . . of which it has actual knowledge"); MCL 440.1201(25) ("[a] person has 'notice' of a fact when he or she has actual knowledge of it"); MCL 441.107(a) ("unless it is shown that he acted with actual knowledge"); MCL 445.813(1) ("unless done with actual knowledge"); MCL 449.1303(a) ("with actual knowledge of the limited partner's participation in control"); MCL 450.1472(2) ("with actual knowledge of the restriction"); MCL 450.4406(b) ("has actual knowledge"); MCL 487.717(1) ("shall not be chargeable with changes in rights of withdrawal due to death or incompetency in absence of actual knowledge"); MCL 490.385(1) ("has actual knowledge of a dispute"); MCL 491.422(2) ("with actual knowledge of the restriction"); MCL 491.604 ("unless it has actual knowledge that the facts set forth in the affidavit are untrue"); MCL 500.1371(2) ("with actual knowledge"); MCL 500.8127(2)(c) ("A person having actual knowledge of the pending rehabilitation or liquidation shall be considered not to act in good faith."); MCL 554.636(3)(b) ("which the lessor actually knew was in violation"); MCL 554.636(3)(c) ("the lessor actually knew that the provision was not included"); MCL 557.206(d) ("without actual knowledge of such breach"); MCL 600.1403(1) ("the seller had no actual knowledge of the actual age"); MCL 600.2945(j) ("does not have actual knowledge"); MCL 600.2949a ("the defendant had actual knowledge that the product was defective"); MCL

600.2974(3)(d) ("with the actual knowledge that the conduct was injurious to consumers"); MCL 700.2910(1)(c) ("after actual knowledge that a property right has been conferred"); MCL 700.3714(2) ("with actual knowledge of the limit"); MCL 700.5318 ("has actual knowledge that the guardian is exceeding the guardian's powers or improperly exercising them"); MCL 700.5504(1) ("without actual knowledge of the principal's death"); MCL 700.5505(1) ("the attorney in fact did not have actual knowledge of the principal's death"); MCL 700.5510(2) ("did not have actual knowledge"); MCL 700.7404 ("without actual knowledge"); MCL 750.159k(4)(a) ("did not have prior actual knowledge"); MCL 750.159m(4) ("did not have prior actual knowledge"); MCL 750.159q(1)(b) ("had prior actual knowledge of the commission of an offense"); MCL 750.159r(1)(a) ("who did not have prior actual knowledge"); MCL 750.219e(3)(a) ("without prior actual knowledge"); MCL 750.219f(4)(a) ("without prior actual knowledge"); MCL 750.411j(b) ("with the approval or prior actual knowledge"); MCL 750.411k(1) ("with prior actual knowledge"); MCL 750.540d(a) ("had prior actual knowledge of and consented to the violation").

I list these statutes not to overwhelm the reader, but to show the fallacy of the majority's position. The Legislature is fully aware of how to ensure a statutory requirement of actual knowledge. In MCL 600.2919a, it has not done so. This Court does not have the authority to impose an actual knowledge requirement when the Legislature has not seen fit to do so. See *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999).

The Legislature's ability to clearly state an actual knowledge requirement is indisputable given the number of statutes in which it expresses this requirement.

Therefore, the Legislature's use of the term "knew" in MCL 600.2919a must be viewed as allowing a broad range of knowledge to meet the statutory knowledge requirement.

This Court recognized the difference in specificity between using the terms "actual knowledge" and "knowledge" in *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 173; 551 NW2d 132 (1996). As this Court stated in *Travis*, *supra* at 173, "Because the Legislature was careful to use the term 'actual knowledge,' and not the less specific word 'knowledge,' we determine that the Legislature meant that constructive, implied, or imputed knowledge is not enough." Logically, the opposite is also true. The Legislature's careful selection of the term "knew," instead of "actually knew," indicates that a broad range of knowledge is sufficient to meet the statutory requirement. Because the Legislature's choice of the word "knew" encompasses constructive knowledge, defendant had a duty to make obvious inquiries that an honest person using ordinary caution would have made, instead of avoiding these inquiries. See *Deputy Comm'r of Agriculture v O & A Electric Co-op, Inc*, 332 Mich 713, 716-717; 52 NW2d 565 (1952).

Because this Court must follow the plain text of a statute and because the Legislature used the term "knew," which encompasses actual *and* constructive knowledge, I disagree with the majority's contention that constructive knowledge is insufficient to satisfy the requirement of MCL 600.2919a. Accordingly, I respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

JARRAD v INTEGON NATIONAL INSURANCE COMPANY

Docket No. 126176. Decided May 3, 2005. On application by the defendant for leave to appeal, the Supreme Court, after hearing oral argument on whether to grant the application and in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded the matter to the trial court for entry of an order granting summary disposition for the defendant. Rehearing denied *post*, 1251.

Arthur T. Jarrad brought an action in the Ingham Circuit Court against Integon National Insurance Company, seeking to challenge the decision of the defendant, the plaintiff's no-fault insurer, to deduct from the plaintiff's no-fault wage loss benefits long-term disability plan benefits the plaintiff received for the same automobile accident that gave rise to the wage loss benefits. The deduction was made pursuant to a coordination-of-benefits clause in the no-fault policy. The plaintiff claimed that the long-term disability benefits, which were provided to the plaintiff under a long-term disability plan established by a collective bargaining agreement and administered by an insurance company but self-funded by deductions from employees' paychecks and employer contributions, were not "other health and accident coverage" subject to coordination under MCL 500.3109a. On cross-motions for summary disposition, the trial court, Lawrence M. Glazer, J., agreed with the plaintiff and granted summary disposition in his favor. The Court of Appeals, CAVANAGH and COOPER, JJ. (ZAHRA, P.J., dissenting), affirmed in an unpublished opinion per curiam, issued January 27, 2004 (Docket No. 245068), concluding that the term "coverage" refers to protection afforded by an insurance policy or the sum of the risks assumed by a policy of insurance. The Court construed *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App 389 (1989), to preclude coordination where an employee receives wage loss benefits from his employer through a formal wage continuation plan pursuant to a collective bargaining agreement. The defendant sought leave to appeal. The Supreme Court ordered oral argument on whether to grant the application or take other action. 471 Mich 914 (2004).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR, and Justices WEAVER, YOUNG, and MARKMAN, the Supreme Court *held*:

A self-funded long-term disability plan constitutes "other health and accident coverage" that is subject to coordination under § 3109a. The term "other health and accident coverage" does not require that a risk actually be insured under a commercial insurance policy. The central question is not whether an insurance company actually provided the coverage, but rather whether the coverage is typically provided by an insurance company. There is no question in this case that long-term disability benefits are typically provided by insurance companies. The fact that the coverage here was self-funded by employer and payroll contributions, rather than by a separate insurance company, does not alter the fact that this type of coverage is typically provided by insurance companies. The existence of a collective bargaining agreement does not negate the existence of other health and accident coverage under § 3109a. The opinion in *Spencer* must be overruled to the extent that it is inconsistent with this opinion.

Reversed and remanded to the circuit court for entry of an order granting summary disposition for the defendant.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that the long-term disability plan covering the plaintiff does not constitute "other health and accident coverage" subject to coordination under MCL 500.3109a. The majority should not overrule *Spencer* and should not decide the significant issue in this case without the benefit of full briefing and oral argument. The dichotomy set forth by *Spencer* and *Rettig v Hastings Mut Ins Co*, 196 Mich App 329 (1992), is not inconsistent with the Legislature's intent in enacting § 3109a. There is a difference between a self-funded, noninsurance long-term disability plan pursuant to a collective bargaining agreement and a so-called typical insurance plan for purposes of the statute. The Legislature intended this difference to be dispositive when it refused to incorporate into § 3109a the broader provision contained in the model uniform act on which the no-fault act was patterned. *Spencer* was not wrongly decided. Rather, the *Spencer* panel properly consulted the model act's language and official comments when making its decision. Where, as in this matter, the no-fault act provision is narrower than the comparable provision of the model act, and a self-funded noninsurance long-term disability plan under a collective bargaining agreement is implicated, the no-fault act produces a result different from the model act. The decision of the Court of Appeals should be affirmed.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — COORDINATION OF BENEFITS — LONG-TERM DISABILITY PLANS.

A self-funded long-term disability plan constitutes "other health and

accident coverage" that is subject to coordination under § 3109a of the no-fault act (MCL 500.3109a).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — COORDINATION OF BENEFITS.

The central question in determining whether coverage is "other health and accident coverage" subject to coordination under the no-fault act is not whether an insurance company actually provided the coverage, but rather whether the coverage is typically provided by an insurance company (MCL 500.3109a).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas* and *L. Page Graves*), for the plaintiff.

Garan Lucow Miller, P.C. (by *James L. Borin* and *Daniel S. Saylor*), for the defendant.

CORRIGAN, J. In this no-fault coordination-of-benefits case, the trial court and the Court of Appeals ruled that an employer's self-funded long-term disability plan may not be coordinated with no-fault wage loss benefits. We hold that a self-funded long-term disability plan constitutes "other health and accident coverage" that is subject to coordination under MCL 500.3109a. We therefore reverse the judgment of the Court of Appeals, and remand the matter to the trial court for entry of an order granting summary disposition for defendant.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Plaintiff sustained injuries in an automobile accident. At the time of the accident, he was employed by the Michigan Department of Corrections. Under a collective bargaining agreement, the state provided a long-term disability (LTD) plan that covered plaintiff. An insurance company administered the plan and processed benefit payments, but the plan was self-funded

by deductions from employees' paychecks and employer contributions.

Following the accident, plaintiff began receiving monthly payments of $2,220.04 under the LTD plan. Under the coordination-of-benefits clause in plaintiff's no-fault policy, defendant, plaintiff's no-fault insurer, deducted the LTD benefits from its no-fault wage loss payments, for a net amount of $1,467.76 a month for three years following the accident.[1] Plaintiff filed this action to challenge the coordination of benefits. The parties filed cross-motions for summary disposition. The trial court granted summary disposition for plaintiff.

The Court of Appeals affirmed in a two-to-one decision.[2] The majority noted that MCL 500.3109a permits coordination of no-fault benefits with "other health and accident coverage . . . ." The majority explained that in *LeBlanc v State Farm Mut Automobile Ins Co*, 410 Mich 173, 204; 301 NW2d 775 (1981), this Court had construed the word "coverage" as "a word of precise meaning in the insurance industry, [that] refers to protection afforded by an insurance policy, or the sum of the risks assumed by a policy of insurance." While this definition has expanded under Court of Appeals case law to include medical benefits received from health plans *typically* provided by insurers, the majority opined that no such expansion of the term "coverage" has occurred regarding work-loss benefit plans.

Moreover, the majority construed *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App 389; 445 NW2d

[1] Under MCL 500.3107(1)(b), no-fault wage loss benefits are payable for up to three years after the accident.

[2] Unpublished opinion per curiam, issued January 27, 2004 (Docket No. 245068).

520 (1989), to preclude coordination where an employee receives "wage loss benefits from his employer through a formal wage continuation plan pursuant to a collective bargaining agreement." The majority distinguished *Rettig v Hastings Mut Ins Co*, 196 Mich App 329; 492 NW2d 526 (1992), because in that case LTD benefits were provided under an insurance policy, rather than directly by the employer under a collective bargaining agreement.

Judge ZAHRA, the dissenting Court of Appeals judge in this case, opined that the self-funded LTD plan constituted "other health and accident coverage" that is subject to coordination under MCL 500.3109a. Unlike *Spencer*, where the employer paid wage continuation benefits directly to the employee, the instant case involves an insurance-type benefit paid by a third party from accumulated payroll contributions. The dissent would have followed *Rettig,* in which the Court of Appeals held that LTD benefits "constitute protection *typically provided* by health insurance plans, which include payments for medical expenses resulting from an accident as well as wage-loss replacement benefits." *Rettig*, *supra* at 333 (emphasis added).

Judge ZAHRA also opined that the self-funded nature of the plan was not dispositive, because in drafting § 3109a, the Legislature used the broad term "coverage" rather than "insurance." Moreover, case law reflects that the phrase "other health and accident coverage" includes coverage *typically* provided by an insurance company, regardless of whether it is actually provided by an insurance company in a particular case. For example, Michigan courts have held that "other health and accident coverage" includes: military medical benefits paid by the federal government, *Tatum v Gov't Employees Ins Co*, 431 Mich 663; 431 NW2d 391

(1988); Medicare benefits, *LeBlanc*, *supra*; medical benefits provided under a union plan, *Lewis v Transamerica Ins Corp of America*, 160 Mich App 413; 408 NW2d 458 (1987); services offered by health maintenance organizations, *United States Fidelity & Guaranty Co v Group Health Plan of Southeast Michigan*, 131 Mich App 268; 345 NW2d 683 (1983); and medical and disability benefits provided by the Army and Veterans Administration, *Bagley v State Farm Mut Automobile Ins Co*, 101 Mich App 733; 300 NW2d 322 (1980).

Defendant applied for leave to appeal in this Court. We held oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1).[3]

II. STANDARD OF REVIEW

We review de novo the decision whether to grant summary disposition. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Moreover, the meaning of the phrase "other health and accident coverage" in MCL 500.3109a is a question of law that is also reviewed de novo. *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004).

III. DISCUSSION

A. LEGAL BACKGROUND

MCL 500.3109a states:

> An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section

[3] 471 Mich 914 (2004).

> shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

In *Nyquist v Aetna Ins Co*, 84 Mich App 589; 269 NW2d 687 (1978), the plaintiffs argued that Blue Cross-Blue Shield benefits were not insurance[4] and therefore could not be coordinated with no-fault benefits. The Court of Appeals concluded that coordination was permitted, noting "that § 3109a uses the word 'coverage' rather than 'insurance'; the use of the broader term militates against plaintiffs' restrictive reading of the section at issue." *Nyquist*, *supra* at 592. Moreover, the plaintiffs' restrictive reading would subvert the statutory purpose of eliminating duplicative coverage.

An employee's use of accumulated sick leave, however, is not subject to coordination. In *Orr v DAIIE*, 90 Mich App 687; 282 NW2d 177 (1979), the Court of Appeals noted that the word "coverage" means protection by an insurance policy, and that the Legislature thus intended to limit coordination to health and accident *insurance* coverage. Sick leave does not fall within this definition. The plaintiff's sick bank could fluctuate depending on usage. Thus, "[a]ny rate reduction granted based upon this fluctuating benefit could not be actuarially sound. However, a rate based upon another policy of insurance with fixed limits of liability would enable the insurance company to offer appropriately reduced premium rates." *Id*. at 690-691.

In *LeBlanc*, *supra*, this Court held that Medicare benefits were "health and accident coverage" subject to coordination. This Court stated that because the Legislature did not modify the statutory phrase "other

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[4] See *Michigan Hosp Service v Sharpe*, 339 Mich 357; 63 NW2d 638 (1954).

health and accident coverage" with the word "private," the Legislature "intended to give unrestrained application of § 3109a to health and accident coverage *from whatever source*." *LeBlanc, supra* at 202 (emphasis added). "Thus, both private and non-private plans were within the scope of the bill." *Id*. at 203.

The *LeBlanc* Court also stated: " 'Coverage,' a word of precise meaning in the insurance industry, refers to protection afforded by an insurance policy, or the sum of the risks assumed by a policy of insurance." *Id*. at 204. This Court concluded that Medicare constituted "other health and accident coverage" because the Court perceived "no just reason to differentiate Medicare from other, more traditional, forms of health and accident coverage which irrefutably are within the scope of § 3109a. Just like any so-called private insurer, Medicare compensates providers of medical and hospital services on behalf of participants who require health care." *Id*. at 205. This Court found it "inconsequential" that, in other contexts, "Medicare has been deemed not to be insurance in the usual sense of the term: the same has been said of Blue Cross and Blue Shield plans which, according to *Nyquist*, fall within § 3109a."[5] *Id*.

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[5] Although the *LeBlanc* Court concluded that Medicare was "other health and accident coverage," no coordination was allowed in that case because the insured did not elect a coordinated policy. This Court's holding avoided the *mandatory* coordination provision in MCL 500.3109(1) ("Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury.") by ruling that the *permissive* coordination provision in MCL 500.3109a controlled instead. This aspect of the analysis in *LeBlanc* is not implicated here because it is undisputed that plaintiff chose a coordinated policy. We also note that Congress has subsequently amended federal law to make Medicare benefits secondary to no-fault insurance. See 42 USC 1395y(b).

In *United States Fidelity*, *supra*, the Court of Appeals held that services offered by a health maintenance organization (HMO) were health and accident coverage for purposes of § 3109a. The Court of Appeals acknowledged that HMOs "have a unique character. Rather than providing health insurance and paying for the bills after the insured has been treated by a doctor, an HMO is a prepaid plan where the participant pays before hand for the services themselves. . . . *Under traditional definitions, a health maintenance organization does not sell insurance*." *United States Fidelity, supra* at 272 (emphasis added).

> But MCL 500.3109a; MSA 24.13109(1) does not refer to "insurance" but to "health and accident coverage". Not only have medical and disability benefits from the Army and the Veterans Administration been included within this statute, *Bagley v State Farm Mut Automobile Ins Co*, 101 Mich App 733; 300 NW2d 322 (1980), but Medicare payments have also been included. [*LeBlanc*, *supra*.] The term used, "coverage", is a broad term. [*Nyquist*, *supra*.] Accordingly, we hold that the services offered by defendant are "health and accident coverage" as defined by MCL 500.3109a; MSA 24.13109(1). [*Id.* at 272-273.]

In *Lewis*, *supra*, the Court of Appeals held that a union plan that pays medical expenses constitutes "other health and accident coverage" under § 3109a. The Court of Appeals noted that the intent of this provision "was to reduce insurance costs by obviating the potential for double recovery." *Lewis, supra* at 418. "To accomplish this end, the Legislature purposely used the broad term 'coverage' rather than 'insurance' in describing health and accident benefits available to the insured independent of the no-fault contract." *Id*.

In *Tatum*, *supra*, the Air Force paid the insured's medical expenses pursuant to a federal statute. This Court held that those benefits constituted "other health

and accident coverage" under § 3109a. Reviewing the holdings in *LeBlanc* and *Nyquist*, the *Tatum* Court reasoned:

> Military medical coverage is similar to both Blue Cross-Blue Shield and Medicare in the sense that, in various forms, each is comprehensive coverage of eligible individuals for their medical and hospitalization costs. Further, Blue Cross-Blue Shield coverage, when provided through one's employer, can parallel that which is provided to active military personnel by the federal government under [the federal statute]. We can perceive no rational basis for concluding that military medical benefits, which essentially serve the same purpose as Blue Cross-Blue Shield and Medicare benefits, are not "health and accident coverage" within the meaning of § 3109a. [*Tatum, supra* at 670.]

In *Spencer*, *supra*, the Court of Appeals held that wage continuation benefits paid directly by an employer pursuant to a collective bargaining agreement did not constitute "health and accident coverage" under § 3109a. The Court of Appeals opined that the Uniform Motor Vehicle Accident Reparations Act (UMVARA), a model act on which our no-fault law is based, contained a broader coordination-of-benefits provision, and that the model provision would have included wage continuation benefits pursuant to a union agreement. But because our no-fault law was drafted more narrowly, the Court of Appeals believed that the Legislature did not intend to allow coordination in this situation.

In *Rettig*, *supra*, the Court of Appeals held that LTD benefits paid by an insurance company could be coordinated under § 3109a. The panel stated that the phrase "other health and accident coverage" "has generally been limited to benefits typically associated with health insurance plans." *Rettig, supra* at 333. The LTD benefits at issue constituted such "coverage" "because they constitute protection typically provided by health insur-

ance plans, which include payments for medical expenses resulting from an accident as well as wage-loss replacement benefits. *LeBlanc*, *supra*, p 204." *Rettig*, *supra* at 333. The panel distinguished *Spencer* on the ground that the LTD benefits in *Rettig* were paid by an insurance company under an insurance policy, rather than a collective bargaining agreement.

B. ANALYSIS

While the case law is rather muddled regarding the precise meaning of the phrase "other health and accident coverage," we agree with the Court of Appeals dissent in this case that the term does not require that a risk *actually* be insured under a commercial insurance policy. As noted in *Nyquist*, in drafting § 3109a, the Legislature used the broader term "coverage" rather than "insurance." The *LeBlanc* Court stated that the term "coverage" refers to protection afforded by an insurance policy or the sum of risks assumed by an insurance policy. The Court concluded that Medicare is sufficiently similar to an insurance policy to constitute "health and accident coverage." Similarly, military benefits and HMO benefits have been treated as sufficiently akin to insurance to constitute health and accident coverage. *Tatum, supra*; *United States Fidelity, supra*.

Therefore, as the Court of Appeals dissent observed, the central question under our case law is *not* whether an insurance company *actually* provided the coverage, but rather whether the coverage is *typically* provided by an insurance company. That approach is consistent with the statutory text, which refers merely to "coverage" and contains no language limiting its application to commercial insurance policies.

Here, there is no question that LTD benefits are *typically* provided by insurance companies. Indeed, the Court of Appeals held in *Rettig* that LTD benefits fall within the statutory term. The fact that the coverage here was funded by employer and payroll contributions, rather than by a separate insurance company, does not alter the fact that this type of coverage is typically provided by insurance companies. We thus perceive no basis to preclude coordination with a self-funded plan.

Moreover, the view that a self-funded long-term disability plan is not "other health and accident coverage" disregards case law allowing coordination with self-funded medical plans under § 3109a. See, e.g., *Lewis*, *supra*; *Michigan Millers Mut Ins Co v West Michigan Health Care Network*, 174 Mich App 196; 435 NW2d 423 (1988); *Auto-Owners Ins Co v Lacks Industries,* 156 Mich App 837; 402 NW2d 102 (1987). We discern no principled reason why self-funded long-term disability plans should be treated differently from self-funded medical plans, in light of the holding in *Rettig* that LTD plans are "other health and accident coverage."

Additionally, the courts in *Rettig, Lewis, Michigan Millers Mut,* and *Lacks Industries* manifested an understanding that causing not only third-party funded LTD and medical plans, but also self-funded ones, to qualify as "other health and accident coverage" is consistent with the Legislature's overarching commitment in the no-fault act, and its later amendments, to facilitating reasonable economies in the payments of benefits, thus causing the costs of this mandatory auto insurance to be more affordable. See *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 151; 644 NW2d 715 (2002); *Cruz v State Farm Mut Automobile Ins Co,* 466 Mich 588, 597 n 13; 648 NW2d 591 (2002);

O'Donnell v State Farm Mut Automobile Ins Co, 404 Mich 524; 273 NW2d 829 (1979).

Also, the Court of Appeals has treated self-insurance as a form of insurance in other contexts. For example, in *Allstate Ins Co v Elassal*, 203 Mich App 548; 512 NW2d 856 (1994), the Court of Appeals recognized that self-insurance, as certified by the Secretary of State, is the functional equivalent of a commercial no-fault insurance policy. While the Court relied in part on provisions of the no-fault act, MCL 500.3101 *et seq*., and the financial responsibility act, MCL 257.501 *et seq*., it also discussed the "common understanding of insurance":

> The term insurance can be defined . . . as a contract between two parties for indemnification. Black's Law Dictionary (4th ed), p 943. However, definitions of insurance also include: "coverage by contract whereby one party undertakes to indemnify or guarantee another against loss by a specified contingency or peril," *Webster's Seventh New Collegiate Dictionary* (1970), p 439 (definition 2b), see also *Random House Webster's College Dictionary* (1991), p 699 (definition 2); "the sum for which something is insured," *Webster's Seventh New Collegiate Dictionary*, *supra*, p 439 (definition 2c); and "any means of guaranteeing against loss or harm," *Random House Webster's*, *supra*, p 699 (definition 6). In this case, Enterprise was certified as self-insured, meaning, for purposes of the no-fault and financial responsibility acts, that it had indemnified itself to satisfy judgments against it. [*Elassal*, *supra* at 555.]

We do not suggest that the holding in *Elassal* is directly relevant, because we are concerned here not with a self-insured *no-fault* plan, but rather with a self-funded LTD plan that a no-fault insurer seeks to coordinate with its no-fault policy. We simply observe that the *reasoning* in *Elassal* suggests that *even if* § 3109a referred to "insurance" and not (as it does) to "coverage," a strong argument would still exist that a

self-funded LTD plan constitutes "insurance" under the common understanding of that term.

Further, we reject the Court of Appeals majority's view—derived from the holding in *Spencer*—that the existence of a collective bargaining agreement somehow negates the existence of "other health and accident coverage." The text of § 3109a refers to health and accident coverage—the central question is whether other coverage *exists*, not *how* it came to exist. It is simply not relevant under the statutory text whether the coverage arose from a collective bargaining agreement.

Next, we address the *Spencer* Court's reliance on language in the UMVARA, the model act on which our no-fault act was based. The *Spencer* Court observed that the UMVARA contained the following provision:

> "(b) [B]asic reparation insurers may offer the following additional exclusions . . .
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> * * *
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> "(2) [Exclusions], in calculation of net loss, of any of those amounts and kinds of loss otherwise compensated by benefits or advantages a person receives or is unconditionally entitled to receive from any other specified source, if the other source has been approved specifically or as to type of source by the [commissioner] of insurance by rule or order adopted upon a determination by the [commissioner] (i) that the other source or type of source is reliable and that approval of it is consonant with the purposes of this Act, and (ii) if the other source is a contract of insurance, that it provides benefits for accidental injuries generally and in amounts as [sic] least as great for other injuries as for injuries resulting from motor vehicle accidents." [*Spencer*, *supra* at 399, quoting 14 ULA Civil Procedural and Remedial Laws, UMVARA, § 14(b)(2), pp 82-83.]

The *Spencer* Court also extracted an official comment to the model provision: " 'The cost reductions may be significant, however, in the case of an insurer offering to sell basic reparation policies to the employees of a large employer, who have defined, generous wage-continuation and accident and health benefits under a common employer-furnished or trade union plan.' " *Spencer*, *supra* at 399-400, quoting official comments to § 14(b)(2), *supra*, p 85.

The *Spencer* Court then reasoned that "it is clear from the comments that, under the UMVARA, wage continuation benefits pursuant to a union agreement were intended to be coordinated with no-fault benefits otherwise payable." *Spencer, supra* at 400. The Court then asserted that because the Legislature did not adopt "the broader language of the uniform act," it "did not intend for no-fault benefits to be coordinated with a broad array of other benefits which may perhaps be equally duplicative." *Id*.

We emphasize that a court's fundamental interpretive obligation is to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Where the Legislature has unambiguously conveyed its intent in a statute, judicial construction is not permitted. Because the proper role of the judiciary is to interpret, not write, the law, courts lack authority to venture beyond the unambiguous statutory text. *Id*.

The *Spencer* Court relied on the proposition that where the Legislature does not adopt a model provision, it presumably rejected the proposed language. *Spencer*, *supra* at 399, citing *Michigan Mut Ins Co v Carson City Texaco, Inc*, 421 Mich 144; 365 NW2d 89 (1984). The

Spencer Court failed, however, to adequately explain why this principle supported its holding.

The Legislature's deviation from the language in a model act does not grant a court license to simply assert, without any reasoning, that (1) the statute is narrower than the model provision, and (2) the statute must therefore produce a different outcome than the model provision would generate. Such conclusions do not follow ineluctably from the Legislature's rejection of particular language in a model provision.

It is, of course, possible that the Legislature rejected a model provision because it did not wish to enact the provision into law. Other inferences may arise, however. For example, our Legislature might simply have found a better way than the drafters of the model provision to express the same proposition. Perhaps our Legislature used a synonym or more succinct language to state whatever the drafters of the model provision had attempted to say. Or the Legislature might have concluded that another statutory provision in Michigan rendered the model provision unnecessary. Thus, the mere fact that a statute is written *differently* from a model act does not always compel the conclusion that our statute is written *more narrowly*.

But even if a statute *is* written more narrowly than a model provision, a court's analysis does not end there. Even a statute that is written narrowly could apply to the particular case before the court. A statutory provision that provides for coordination, but in *fewer* circumstances than a model provision, will still allow coordination in *some* circumstances. Otherwise, the statutory provision would never allow coordination and would be essentially nugatory. Courts must give effect to every word, phrase, and clause in a statute, and must avoid an

interpretation that would render any part of the statute surplusage or nugatory. *Koontz*, *supra* at 312.

Thus, even if the *Spencer* Court had supported its assertion that § 3109a is written more narrowly than the model provision, the question would remain whether the statute allowed coordination *in the circumstances at issue in that case*. Merely asserting, as the Court did in *Spencer*, that a statute is narrow does not, by itself, resolve whether the statute applies to a given case.

A court may not simply announce that the text of a statute differs from the language in a model act (or, as in *Spencer*, a *comment* to the model act) as an excuse to avoid the court's duty to interpret the statutory text *adopted by the Legislature*. The *Spencer* Court did not analyze the language of § 3109a. The Court failed to explain why the benefits at issue did not fall within the plain meaning of the term "other health and accident coverage." The Court also did not explain how the statutory phrase is not only narrower than the model language, but *too* narrow to allow coordination *in that case*.

Here, it is simply unnecessary to decide whether the model provision is broader than the statute. We conclude that § 3109a allows coordination in this case, regardless of whether it is broader or narrower than the model provision. As discussed, we agree with the Court of Appeals dissent that the statutory phrase, "other health and accident coverage," plainly includes defendant's self-funded long-term disability plan. We discern no textual basis to limit the phrase "other health and accident coverage" to commercial insurance policies. Section 3109a contains no such limitation, and we believe the phrase "other health and accident coverage" includes self-funded plans.

Therefore, regardless of how broadly the model provision might reach, the text of § 3109a plainly allows coordination of no-fault benefits with a self-funded long-term disability plan.[6] We overrule *Spencer* to the extent that it is inconsistent with this opinion.

IV. CONCLUSION

We conclude that the phrase "other health and accident coverage" in § 3109a includes a self-funded long-term disability plan, and that defendant may therefore coordinate its no-fault wage loss payments with plaintiff's LTD benefits. We thus reverse the judgment of the Court of Appeals and remand the matter to the trial court for entry of an order granting summary disposition for defendant.

TAYLOR, C.J., and WEAVER, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

CAVANAGH, J. (*dissenting*). In this no-fault case, I would conclude that the long-term disability (LTD) plan covering plaintiff does not constitute "other health and accident coverage" subject to coordination under MCL 500.3109a. I am not convinced that the dichotomy set

[6] Our dissenting colleague analyzes the model provision that the Legislature did not adopt. We again emphasize that a court's fundamental interpretive obligation is to discern the legislative intent that may reasonably be inferred from the words expressed in the statute. *Koontz*, *supra*, p 312. Where the Legislature has unambiguously conveyed its intent in the statutory text, judicial construction is not permitted. *Id*. We have examined the statutory text and concluded that the phrase used by our Legislature, "other health and accident coverage," is sufficiently broad to include a self-funded LTD plan. Because we are satisfied that the words adopted by our Legislature are sufficiently clear to resolve this question, we simply have no occasion to resort to the method of judicial construction utilized by the *Spencer* Court and advocated by the dissent in this case.

forth by *Spencer v Hartford Accident & Indemnity Co*, 179 Mich App 389; 445 NW2d 520 (1989), and *Rettig v Hastings Mut Ins Co*, 196 Mich App 329; 492 NW2d 526 (1992), is inconsistent with the Legislature's intent. Moreover, I would not decide this jurisprudentially significant issue without the benefit of full briefing and oral argument. Accordingly, I must respectfully dissent.

I. FACTUAL BACKGROUND

Plaintiff worked for the Michigan Department of Corrections. Under his collective bargaining agreement, plaintiff was allowed to participate in the LTD plan. The LTD plan was administered by a private insurance company; however, the plan was self-funded through payroll deductions and employer contributions. While still employed by the Department of Corrections, plaintiff was injured in an automobile accident. Plaintiff began receiving benefits under the LTD plan, and defendant, plaintiff's no-fault insurer, coordinated the LTD benefits with the no-fault work-loss benefits. Defendant maintained that the setoff was permissible under MCL 500.3109a. Plaintiff filed this action to challenge the setoff, and the parties filed cross-motions for summary disposition. The trial court granted summary disposition in favor of plaintiff, and the Court of Appeals affirmed.

II. LEGAL BACKGROUND

A. MCL 500.3109a

MCL 500.3109a provides:

> An insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deduct-

ibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

B. *SPENCER v HARTFORD ACCIDENT & INDEMNITY CO*

In *Spencer*, *supra*, the plaintiff was injured during the course of his employment and was unable to return to work. After the accident, the plaintiff received worker's compensation benefits. Additionally, under the terms of a collective bargaining agreement between the plaintiff's union and his employer, the plaintiff received the difference between his worker's compensation benefits and his base rate of pay. The defendant insurance company denied liability for no-fault work-loss benefits, claiming, among other things, that the wage continuation benefits were subject to setoff pursuant to MCL 500.3109a.

The *Spencer* panel noted that the "purpose of § 3109a is to reduce the cost of no-fault insurance by allowing insurers to offer policies that coordinate benefits with other similar coverages in return for charging a statutorily mandated reduced premium." *Spencer, supra* at 396. The Court of Appeals reasoned that § 3109a expressly limits setoff to health and accident coverage on the insured and, therefore, the issue was whether the additional wages the plaintiff received pursuant to a collective bargaining agreement constituted "other health and accident coverage" under § 3109a. The Court of Appeals held that the Legislature did not intend for § 3109a to apply to the type of benefits the plaintiff received.

After detailing this Court's decision in *LeBlanc v State Farm Mut Automobile Ins Co*, 410 Mich 173; 301

NW2d 775 (1981), as well as its own decision in *Orr v DAIIE*, 90 Mich App 687; 282 NW2d 177 (1979), the Court of Appeals noted that the scope of coverages within the meaning of "other health and accident coverage" had been subsequently expanded. However, "the cases so doing have generally been limited to benefits corresponding to typical health insurance plans." *Spencer*, *supra* at 398. In light of these decisions, and the absence of a clear construction of the phrase "other health and accident coverage," the Court of Appeals observed:

> It is also helpful when construing provisions of the Michigan no-fault insurance act to look to the Uniform Motor Vehicle Accident Reparations Act (UMVARA). The UMVARA is one of the model acts which was utilized as source material in the drafting of the no-fault act. *Citizens Ins Co of America v Tuttle*, 411 Mich 536; 309 NW2d 174 (1981). Thus, where a provision of the no-fault act is virtually identical to a provision of the UMVARA, the UMVARA will be looked to for guidance in construing a provision of the no-fault act. See *MacDonald v State Farm Mutual Ins Co*, 419 Mich 146; 350 NW2d 233 (1984). However, where there is an absence of a comparable provision in the Michigan act, it is presumed the Legislature considered but rejected the proposed language in the uniform act. See *Michigan Mutual Ins Co v Carson City Texaco, Inc*, 421 Mich 144; 365 NW2d 89 (1984). [*Id*. at 398-399.]

The *Spencer* Court then examined the language and official comments of the counterpart of § 3109a in the model act, 14 ULA Civil Procedural and Remedial Laws, UMVARA, § 14(b)(2). Notably, the Court of Appeals quoted the official comments to § 14(b)(2):

> "The cost reductions may be significant, however, in the case of an insurer offering to sell basic reparation policies to the employees of a large employer, who have defined, generous wage-continuation and accident and health ben-

efits under a common employer-furnished or trade union plan." [*Spencer, supra* at 399-400.]

In light of the differences between Michigan's no-fault act and the model act, the Court of Appeals reasoned:

> Thus, it is clear from the comments that, under the UMVARA, wage continuation benefits pursuant to a union agreement were intended to be coordinated with no-fault benefits otherwise payable. Instead of adopting the broader language of the uniform act, however, the Michigan act was drafted much more narrowly, and limited coordination to "other health and accident coverage." It appears, therefore, that in enacting the Michigan act the Legislature did not intend for no-fault benefits to be coordinated with a broad array of other benefits which may perhaps be equally duplicative. [*Id*. at 400.]

Thus, the Court of Appeals in *Spencer* held that the plaintiff's wage continuation benefits pursuant to a collective bargaining agreement did not constitute "other health and accident coverage" within the meaning of § 3109a.

C. *RETTIG v HASTINGS MUT INS CO*

In *Rettig*, *supra*, the Court of Appeals was again called upon to interpret § 3109a. The plaintiff in *Rettig* was injured in an automobile accident. At the time of the accident, the plaintiff was insured by the defendant under a no-fault insurance policy that contained a coordinated-benefits provision. The plaintiff also had an LTD plan issued by a different insurance company and made available to the plaintiff by her employer. The LTD plan was paid for by the plaintiff through payroll deductions. Notably, the plaintiff was employed as a supervisor and was not covered under a collective bargaining agreement. The trial court held that the

defendant was entitled to a setoff under § 3109a because the plaintiff's LTD plan constituted "other health and accident coverage" under § 3109a, and the Court of Appeals affirmed.

The *Rettig* Court, similar to the *Spencer* Court, observed that "[w]hile the scope of coverage included within the meaning of 'other health and accident coverage' . . . has expanded since *LeBlanc*, it has generally been limited to benefits typically associated with health insurance plans." *Rettig*, *supra* at 333. Accordingly, the Court of Appeals concluded that the LTD benefits received by the plaintiff fell within the purview of § 3109a "because they constitute protection typically provided by health insurance plans, which include payments for medical expenses resulting from an accident as well as wage-loss replacement benefits." *Rettig, supra* at 333.

Importantly, the Court of Appeals reasoned that its holding did not conflict with *Spencer*. The panel in *Rettig* observed that the plaintiff in *Spencer* received wages directly from his employer pursuant to a collective bargaining agreement. The Court of Appeals further noted:

> There, this Court observed that under the Uniform Motor Vehicle Accident Reparations Act, wage continuation benefits pursuant to a union agreement were intended to be coordinated with no-fault benefits, but that the Michigan version of the uniform act contained more restrictive language and limited coordination of benefits to insurance coverage. In contrast to *Spencer*, the long-term disability benefits in this case were provided to plaintiff by Reliance Standard Life Insurance Company pursuant to an insurance policy, not a collective bargaining agreement. [*Id.*]

III. THE COURT OF APPEALS DECISION IN THIS CASE

Here, the Court of Appeals, in an unpublished two-to-one decision, concluded that this case "is more like

Spencer than *Rettig*." Unpublished opinion per curiam, issued January 27, 2004 (Docket No. 245068). The majority reasoned that, like the plaintiff in *Spencer*, this "plaintiff received wage loss benefits from his employer through a formal wage continuation plan pursuant to a collective bargaining agreement. Consistent with established precedent, we agree with the trial court and conclude that those wage continuation benefits are not 'other health and accident coverage' within the contemplation of MCL 500.3109a."

Judge ZAHRA dissented, concluding that defendant was entitled to a setoff for the LTD wage-loss benefits because this case was more like *Rettig* than like *Spencer*. Unlike the benefits in *Spencer*, Judge ZAHRA opined, the LTD benefits in this case were not paid directly by the employer; rather, the plan was self-funded through accumulated payroll deductions. Accordingly, the Court of Appeals dissent found *Rettig* controlling because the LTD benefits plaintiff received constituted protection typically provided by health insurance plans. Moreover, Judge ZAHRA reasoned that the notion that plaintiff's LTD benefits were not actually provided by an insurance company was not dispositive.

IV. DISCUSSION

I agree with the majority that the case law is sufficiently "muddled" regarding the precise meaning of "other health and accident coverage." Moreover, I agree with the majority that the great weight of the case law suggests that the key question for § 3109a purposes is whether the coverage is typically provided by an insurance company. I disagree, however, with the majority's decision to peremptorily overrule *Spencer*, *supra*. More-

over, I disagree with the majority's decision to decide this case without the benefit of full oral argument and briefing.

In light of *Spencer's* thoughtful analysis, I do not believe that the legislative distinction noted by the Court of Appeals is accidental. Even if the term "coverage" is interpreted broadly, there is a difference between a self-funded, noninsurance LTD plan pursuant to a collective bargaining agreement and a so-called typical insurance plan for purposes of the no-fault act. Moreover, I am persuaded by *Spencer's* rationale that the Legislature intended this difference to be dispositive when it refused to incorporate the broader UMVARA provision into our no-fault act. Accordingly, if a person falls in the *Spencer* box, such as this plaintiff, then setoff is not permitted under § 3109a. However, if a person falls within the *Rettig* box, then setoff is permitted. As noted by the trial court, this dichotomy is not as arbitrary as it appears.[1] Thus, because I am not convinced that *Spencer* was wrongly decided, and because plaintiff falls within the *Spencer* box, I would affirm the Court of Appeals decision.

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[1] In granting plaintiff's motion for summary disposition, the trial court stated:

> I am persuaded that at this time case law does clearly hold that the legislature intended section 3109a only to apply to wage continuation benefits which are funded by insurance as opposed to wage continuation benefits which are self-funded. That is not as arbitrary as it at first may sound, because I agree with the Defendant that there's a clear legislative policy behind the statute, and that to trade—or mandate, I should say, the trading of a class of lower premium insurance policies in return for the acceptance by the consumer of coordination of benefits, not in this fact situation we're not talking about a consumer buying an insurance policy. We're talking about a consumer being part of a bargaining unit which collectively bargained a self-funded, non-insurance funded wage continuation benefit.

The majority concludes that *Spencer* was erroneously decided because "[i]t is simply not relevant under the statutory text whether the coverage arose from a collective bargaining agreement." *Ante* at 220. Rather, "[t]he text of § 3109a refers to health and accident coverage–the central question is whether other coverage *exists*, not *how* it came to exist." *Id*. (emphasis in original). The majority then criticizes the *Spencer* Court for examining the language of the model act on which our no-fault act was based and for venturing beyond the text of the statute. Stated differently, the majority criticizes the *Spencer* Court for evaluating the "muddled" case law construing the text of the statute, for examining the model act on which our no-fault act was based, and for not ignoring the elephant standing in the corner once the panel reasonably concluded that there is a glaring difference between the two acts.

This Court, however, has previously acknowledged that it is entirely appropriate, if not prudent, to examine a model act on which a Michigan statutory scheme was based when attempting to discern the Legislature's intent. See, e.g., *Donajkowski v Alpena Power Co*, 460 Mich 243, 256 n 14; 596 NW2d 574 (1999) ("The fact that our Legislature did not include this restriction in adopting its version of the model contribution act is significant to any good-faith effort to give meaning to the Legislature's intent."). Here, the UMVARA "clearly was 'one of the model acts utilized as source material in the drafting of the no-fault act . . . .' " *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 652 n 17; 513 NW2d 799 (1994), quoting *Tuttle*, *supra* at 546. And § 3109a was plainly based on § 14(b)(2) of the UMVARA. See *Spencer*, *supra*. Moreover, this Court has held that "where the statutory language differs from the UMVARA model, courts can presume that the Legislature considered the model act

and rejected it." *Marquis*, *supra* at 652 n 17. Thus, in my view, the *Spencer* panel properly consulted the model act's language and official comments when making its decision. See, e.g., *Ouellette v Kenealy*, 424 Mich 83, 86-87; 378 NW2d 470 (1985).

Even though the majority claims that the UMVARA should not have been examined, the majority nonetheless travels beyond the text of the statute in an attempt to explain away the Legislature's deviation from the language in the model act and, at the same time, further undermine the *Spencer* Court's ultimate conclusion. For example, the majority posits that the Legislature may not have included the language from § 14(b)(2) of the model act because "our Legislature might simply have found a better way than the drafters of the model provision to express the same protection." *Ante* at 222. The majority further surmises, "[p]erhaps our Legislature used a synonym or more succinct language to state whatever the drafters of the model provision had attempted to say." *Id*. Without citing any particular provision, the majority also hypothesizes that "the Legislature might have concluded that another statutory provision in Michigan rendered the model provision unnecessary." *Id*. The majority poses these questions in an effort to discount the *Spencer* Court's conclusion that § 3109a is more narrow than the model act.

In my view, however, the majority's attempts only solidify the conclusion reached in *Spencer*. Again, this Court has held that "where the statutory language differs from the UMVARA model, courts can presume that the Legislature considered the model act and rejected it." *Marquis*, *supra* at 652 n 17. Accordingly, *Spencer's* position that the Legislature rejected the applicable portion of the UMVARA in favor of a more

narrow provision is more defensible than the majority's translucent attempts to explain away the deviation and further muddy the waters. I believe that the *Spencer* Court adequately explained that because the Legislature rejected one portion of § 14 of the UMVARA, the Michigan statute is "narrower" (i.e., it does not contain the rejected portion of § 14). Moreover, I believe that under these circumstances—where § 14 of the UMVARA differs from § 3109a, and a self-funded noninsurance LTD plan under a collective bargaining agreement is implicated—the Michigan statute produces a different result.

Further, the majority explains that "even if a statute *is* written more narrowly than a model provision, a court's analysis does not end there" because even the narrow statute could apply to the facts of a given case. *Ante* at 222 (emphasis in original). Thus, even if *Spencer* were supportable, the majority claims that a court cannot merely assert that the statute is narrow and conclude that it does not apply. The majority simply dismisses the *Spencer* Court's analysis as incomplete.

In my view, *Spencer's* rationale is plainly supportable. The primary goal of statutory interpretation is to discern the Legislature's intent. To this end, the Court of Appeals examined the relevant statutory language and the "muddled" case law that construed this language, consulted the source of the statutory provision, found a difference between the model act and the statutory provision, and reasonably concluded that the Legislature rejected this portion of the model act and intended that wage continuation benefits pursuant to a collective bargaining agreement should not constitute "other health and accident coverage" within the meaning of § 3109a. I do not believe that *Spencer's* approach was incomplete. Indeed, I believe the approach was prudent and supported by our case law. When compared

with the majority's approach, I prefer *Spencer's* approach under these circumstances because it best effectuates, rather than ignores, the Legislature's apparent intent.

Finally, I would be remiss if I did not point out that neither the parties nor the lower courts in this case questioned the validity of *Spencer's* rationale. Rather, defendant and the Court of Appeals dissent simply argued that this case was more like *Rettig* than *Spencer*. Because the majority has seen fit to take aim at *Spencer*, the parties never specifically briefed this issue, and, arguably, this result was not clearly foreshadowed, I would have preferred to grant leave to appeal to have the benefit of full briefing and oral argument on *this particular issue*. As shown by the majority and dissenting opinions, the ongoing validity of *Spencer* is a jurisprudentially significant issue that could have wide implications. Thus, even though I believe at this point that *Spencer* was properly decided, I would prefer to grant leave and actually hear what the parties have to say on this particular issue.

V. CONCLUSION

I would conclude that *Spencer* was correctly decided and, therefore, would hold that the LTD plan covering this plaintiff is not subject to setoff under § 3109a. Accordingly, I would affirm the decision of the Court of Appeals. However, because *Spencer's* viability is jurisprudentially significant and the parties did not specifically brief this issue, I would prefer to grant leave to appeal to have the benefit of full briefing and oral argument on whether *Spencer* was properly decided. Thus, I must respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

CAIN v WASTE MANAGEMENT, INC (AFTER REMAND)

Docket Nos. 125111, 125180. Argued November 9, 2004 (Calendar No. 3). Decided May 3, 2005.

Scott M. Cain brought a claim for worker's compensation benefits against his employer, Waste Management, Inc., and its insurer, claiming total and permanent disability as a result of the amputation of his right leg and the loss of the use of his left leg following injuries suffered in the course of his employment. A magistrate granted total and permanent disability benefits, finding that the plaintiff had lost the industrial use of both legs. The Worker's Compensation Appellate Commission (WCAC) reversed, holding that the magistrate erred in failing to use a "corrected" standard in assessing the usefulness of the left leg. The Court of Appeals, FITZGERALD, P.J., and SAAD and WHITBECK, JJ., affirmed in part and reversed in part in an unpublished opinion per curiam, issued May 2, 2000 (Docket No. 214445), holding that the WCAC had exceeded its authority in applying the corrected test. The Supreme Court reversed in part the judgment of the Court of Appeals and remanded the matter to the WCAC to consider the plaintiff's specific loss claim, holding that total and permanent disability is not demonstrated where the proofs indicate that a braced limb is functional and can support industrial use and that, in evaluating a claim under MCL 418.361(3)(g), the corrected standard should be applied. 465 Mich 509 (2002). On remand, the WCAC concluded that there was competent, material, and substantial evidence to support the magistrate's finding that the plaintiff had sustained the "specific loss" of his left leg under MCL 418.361(2)(k) and that, having shown the specific loss of each leg, the plaintiff is entitled to total and permanent disability benefits. The employer and its insurer appealed to the Court of Appeals by leave granted, and the Second Injury Fund appealed by leave granted from the same order. The appeals were consolidated. The Court of Appeals, COOPER, P.J., and FITZGERALD, J. (KELLY, J., concurring in part and dissenting in part), affirmed, holding that the WCAC properly affirmed the magistrate's determination that the plaintiff suffered a specific loss of his left leg, under MCL 418.361(2)(k), where the plaintiff lost the industrial use of his left leg in its uncorrected state. The WCAC properly awarded the plaintiff total and perma-

nent disability benefits under MCL 418.361(3)(b) for his specific (anatomical) loss of his right leg and the specific (industrial) loss of his left leg. 259 Mich App 350 (2003). The Supreme Court granted applications for leave to appeal by Waste Management and the Second Injury Fund and ordered the appeals to be argued and submitted together. 470 Mich 870 (2004).

In an opinion by Chief Justice TAYLOR, joined by Justices CAVANAGH, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court, after remand, *held*:

Specific loss benefits under MCL 418.361(2) do not require amputation. It is sufficient to qualify for such benefits if the limb or body part has lost its usefulness. With regard to total and permanent disability benefits under § 361(3)(b), which covers the loss of both legs, as with specific loss, if the legs have lost their usefulness, even though not amputated, the worker qualifies for total and permanent disability benefits.

1. The original understanding the word "loss" carried when the act was enacted was its plain and ordinary meaning, consistent with how it had been construed in the context of insurance law. Thus, "loss" includes not only amputation but also loss of usefulness. The original meaning of the word "loss" in the specific loss provisions does not require severance. There can be a loss where the claimant suffers the loss of usefulness of the member.

2. The Worker's Compensation Appellate Commission properly applied the "uncorrected" standard. It is proper to apply the uncorrected standard to specific loss claims.

3. The appellate commission's finding that the damage to the plaintiff's left leg "equated with anatomical loss and that the limb retains no substantial utility" is, in essence, that he lost the usefulness of the leg. Because that factual finding is supported by competent evidence, it must be affirmed. The Court of Appeals erred when it grafted a loss of industrial use standard onto the factual findings of the commission. Nonetheless, it reached the correct result with regard to the plaintiff's benefit eligibility. The plaintiff is eligible for specific loss benefits for the loss of his left leg.

4. The proper construction of the word "loss" in § 361(3)(b) is that it has the same meaning given it in § 361(2). The corrected standard does not apply to § 361(3)(b), unlike § 361(3)(g). Benefits are payable under § 361(3)(b) not only when there is anatomical loss but also when the limbs have no practical usefulness. Section 361(3)(g), with its reference to permanent and total loss of industrial use, calls the fact-finder to look to wage-earning capacity and the injured worker's ability to function in industry. These

words demand something distinct from the simple inquiry under § 361(3)(b) of whether the legs or feet have been amputated or have no practical usefulness. Sections 361(3)(b) and 361(3)(g) cover different things.

5. The corrected standard does not apply to § 361(3)(b), unlike § 361(3)(g). Section 361(3)(g), with its utilization of permanent and total loss language, compels a conclusion that if the condition is correctable, it is not permanent and total. There is no permanent and total language in § 361(3)(b) and the requirement of looking to correctability is absent from § 361(3)(b).

6. The plaintiff has suffered the loss of his amputated right leg and, as found by the appellate commission, his left leg has no practical usefulness. Thus, he has suffered a loss of both legs and falls within § 361(3)(b), qualifying for an award of total and permanent disability benefits under § 361(3)(b).

7. The plaintiff has suffered the specific loss of his left leg under § 361(2) and qualifies for an award of total and permanent disability benefits under MCL 418.361(3)(b). The decisions of the Court of Appeals and the appellate commission must be affirmed.

Justice WEAVER, joined by Justice KELLY, concurring, stated that the word "loss," as used in both MCL 418.361(2)(k) and MCL 418.361(3)(b), includes not only amputation but also situations in which there is a loss of the usefulness of the limb or member. There is sufficient evidence to support the appellate commission's factual finding that the plaintiff lost the usefulness of his left leg and is entitled to specific loss benefits for the loss of his left leg under § 361(2)(k). The plaintiff has suffered the loss of both legs under § 361(3)(b) because his right leg has been amputated and he has lost the usefulness of his left leg. Consequently, he is entitled to total and permanent disability benefits under § 361(3)(b). The decisions of the appellate commission and the Court of Appeals should be affirmed.

Affirmed.

1. WORKER'S COMPENSATION — SPECIFIC LOSS — TOTAL AND PERMANENT DISABILITY — LEGS — AMPUTATIONS.

Specific loss benefits under MCL 418.361(2) do not require amputation and may be awarded where the limb or body part has lost its usefulness; total and permanent disability benefits under MCL 418.361(3)(b) are proper where both legs have lost their usefulness, even though they have not been amputated.

2. WORKER'S COMPENSATION — WORDS AND PHRASES — LOSS.

The word "loss," as used in a provision of the worker's compensation act relating to total and permanent disability arising out of the loss

of both legs, has the same meaning it has in another provision of the act relating to the specific loss of a leg (MCL 418.361[2], 418.361[3][b]).

3. WORKER'S COMPENSATION — TOTAL AND PERMANENT DISABILITY — CORRECTED STANDARD OF LOSS.

The "corrected" standard does not apply to a determination of whether a worker qualifies for total and permanent disability benefits for the loss of both legs, but does apply to a determination of qualification for total and permanent disability benefits for the permanent and total loss of the industrial use of both legs (MCL 418.361[3][b], [g]).

Pinsky, Smith, Fayette & Hulswit, LLP (by *Edward M. Smith* and *Pamela K. Bratt*), for the plaintiff.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Ray W. Cardew, Jr.*, Assistant Attorney General, and *Gerald M. Marcinkoski*, Special Assistant Attorney General, for the Second Injury Fund.

Straub, Seaman & Allen, P.C. (by *Daniel W. Grow* and *James M. Straub*), for Waste Management, Inc., and Transportation Insurance Company.

Amici Curiae:

Martin L. Critchell for Ford Motor Company.

Daryl Royal for Michigan Trial Lawyers Association.

AFTER REMAND

TAYLOR, C.J. At issue in this worker's compensation case is whether a worker must suffer an actual amputation of a limb or body part in order to qualify for either specific loss benefits (also described as scheduled loss benefits) or total and permanent disability benefits. We hold that specific loss benefits under MCL 418.361(2) do not require an amputation. It is sufficient to qualify for such benefits if the limb or body part has

lost its usefulness. Regarding total and permanent disability benefits under MCL 418.361(3)(b), which covers the loss of both legs, as with specific loss, if the legs have lost their usefulness, even though not amputated, the worker qualifies for total and permanent disability benefits. We therefore affirm the decisions of the Court of Appeals and the Worker's Compensation Appellate Commission (WCAC).

BACKGROUND

This case was previously before us in *Cain v Waste Mgt, Inc*, 465 Mich 509, 513; 638 NW2d 98 (2002) (*Cain I*), where we summarized the facts describing plaintiff's injuries as follows:

> Plaintiff Scott M. Cain worked as a truck driver and trash collector for defendant, Waste Management, Inc. In October 1988, as he was standing behind his vehicle emptying a rubbish container, he was struck by an automobile that crashed into the back of the truck. Mr. Cain's legs were crushed. Physicians amputated Mr. Cain's right leg above the knee. His left leg was saved with extensive surgery and bracing.
>
> In February 1990, Mr. Cain was fitted with a right leg prosthesis, and he was able to begin walking. He returned to his employment at Waste Management and started performing clerical duties.
>
> Mr. Cain's left leg continued to deteriorate. In October 1990, he suffered a distal tibia fracture. Doctors diagnosed it as a stress fracture caused by preexisting weakness from the injury sustained in the accident. After extensive physical therapy and further surgery on his left knee, Mr. Cain was able to return to Waste Management in August 1991, first working as a dispatcher and then in the sales department.
>
> Waste Management voluntarily paid Mr. Cain 215 weeks of worker's compensation benefits for the specific loss of

his right leg. MCL 418.361(2)(k). However, there was disagreement concerning whether he was entitled to additional benefits.

To understand the benefits that are at issue, it is necessary to review several sections of the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Specific loss benefits are payable under MCL 418.361(2)(k) to an employee "for the loss of" a leg.[1]

[1] The full text of MCL 418.361(2) reads:

> In cases included in the following schedule, the disability in each case shall be considered to continue for the period specified, and the compensation paid for the personal injury shall be 80% of the after-tax average weekly wage subject to the maximum and minimum rates of compensation under this act for the loss of the following:
>
> (a) Thumb, 65 weeks.
>
> (b) First finger, 38 weeks.
>
> (c) Second finger, 33 weeks.
>
> (d) Third finger, 22 weeks.
>
> (e) Fourth finger, 16 weeks.
>
> The loss of the first phalange of the thumb, or of any finger, shall be considered to be equal to the loss of 1/2 of that thumb or finger, and compensation shall be 1/2 of the amount above specified.
>
> The loss of more than 1 phalange shall be considered as the loss of the entire finger or thumb. The amount received for more than 1 finger shall not exceed the amount provided in this schedule for the loss of a hand.
>
> (f) Great toe, 33 weeks.
>
> (g) A toe other than the great toe, 11 weeks.
>
> The loss of the first phalange of any toe shall be considered to be equal to the loss of 1/2 of that toe, and compensation shall be 1/2 of the amount above specified.

Total and permanent disability benefits are payable "[w]hile the incapacity for work resulting from a personal injury is total," MCL 418.351(1), and MCL 418.361(3) defines what "total and permanent disability" means.[2] Of particular relevance here are two of the

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The loss of more than 1 phalange shall be considered as the loss of the entire toe.

(h) Hand, 215 weeks.

(i) Arm, 269 weeks.

An amputation between the elbow and wrist that is 6 or more inches below the elbow shall be considered a hand, and an amputation above that point shall be considered an arm.

(j) Foot, 162 weeks.

(k) Leg, 215 weeks.

An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

(l) Eye, 162 weeks.

Eighty percent loss of vision of 1 eye shall constitute the total loss of that eye.

[2] The subsection reads in full:

Total and permanent disability, compensation for which is provided in section 351 means:

(a) Total and permanent loss of sight of both eyes.

(b) Loss of both legs or both feet at or above the ankle.

(c) Loss of both arms or both hands at or above the wrist.

(d) Loss of any 2 of the members or faculties in subdivisions (a), (b), or (c).

(e) Permanent and complete paralysis of both legs or both arms or of 1 leg and 1 arm.

definitions of total and permanent disability found in MCL 418.361(3)(b), "Loss of both legs or both feet at or above the ankle," and MCL 418.361(3)(g), "Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm . . . ."

In *Cain I*, we determined that because Mr. Cain had a brace on his left leg that enabled him to return to work, he had not lost industrial use of both legs, as required by MCL 418.361(3)(g).[3] We noted there is a difference between specific loss and loss of industrial use, and we "adopt[ed] as our own" the analysis of the WCAC in its April 1997 opinion. *Cain I, supra* at 521. In accord with that analysis, we held that the "corrected" standard applies to claims for permanent and total loss of industrial use under MCL 418.361(3)(g), and we remanded to the WCAC "to consider plaintiff's specific loss claim." *Cain I, supra* at 524. On remand, the WCAC determined actual amputation is unnecessary to qualify for specific loss benefits and, because plaintiff's leg is essentially useless, his injury "equated with anatomical loss." The WCAC cited as authority *Hutsko v Chrysler Corp*, 381 Mich 99; 158 NW2d 874 (1968), and *Tew v Hillsdale Tool & Mfg Co*, 142 Mich App 29; 369 NW2d 254 (1985). Both are cases in which specific loss claims were allowed where there had been a loss of use, but not an anatomical loss. The WCAC then concluded without further explanation that "[h]aving shown specific loss

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(f) Incurable insanity or imbecility.

(g) Permanent and total loss of industrial use of both legs or both hands or both arms or 1 leg and 1 arm; for the purpose of this subdivision such permanency shall be determined not less than 30 days before the expiration of 500 weeks from the date of injury.

[3] The reader is directed to *Cain I* for a full discussion of the procedural history of the case to that point, including details of the opinions of the magistrate, the WCAC, and the Court of Appeals.

of each leg, plaintiff is entitled to total and permanent disability benefits." On appeal, the Court of Appeals majority, citing *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981), affirmed the decision of the WCAC. 259 Mich App 350; 674 NW2d 383 (2003). It concluded that each of plaintiff's legs qualified for specific loss benefits (one through amputation and one through lost industrial use), and that these losses, when considered together, equaled a "loss of both legs" under MCL 418.361(3)(b), thus entitling plaintiff to total and permanent disability benefits.

Both the defendant employer and the Second Injury Fund sought leave to appeal. We granted both applications for leave, ordering the appeals to be argued and submitted together. 470 Mich 870 (2004). We directed the parties in both appeals to include among the issues to be briefed whether the "loss of industrial use" standard may be applied to claims of specific loss under MCL 418.361(2) and whether *Pipe, supra*, should be overruled. We further directed the parties in Docket No. 125180 to address the issues whether the WCAC exceeded the scope of this Court's remand order by awarding plaintiff total and permanent disability benefits and whether total and permanent disability benefits under MCL 418.361(3) (b) (loss of both legs) may be awarded on the basis of plaintiff's specific (anatomical) loss of one leg and his specific (industrial use) loss of the other leg.

STANDARD OF REVIEW

We review de novo questions of law in worker's compensation cases. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 697 n 3; 614 NW2d 607 (2000). Entitlement to worker's compensation benefits must be determined by reference to the statutory language

creating those benefits. *Nulf v Browne-Morse Co*, 402 Mich 309, 312; 262 NW2d 664 (1978). As we have noted in the past, when we construe a statute, our primary goal is to give effect to the intent of the Legislature and our first step in that process is to review the language of the statute itself. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The Legislature has specified the proper approach to construing statutory language, saying in MCL 8.3a:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.[4]

ANALYSIS: SPECIFIC LOSS

We turn first to the question of specific loss and therefore focus our analysis on MCL 418.361(2). The loss provision of this section repeatedly has been held to be intended to compensate workers who have suffered one of the losses enumerated in this provision, regardless of the effect on the worker's earning capacity.[5] *Cain I, supra* at 524; *Redfern v Sparks-Withington Co*, 403 Mich 63, 80-81; 268 NW2d 28 (1978). This means if a worker, for example, loses an arm, thumb, finger, leg, or so on in a workplace injury, specific loss benefits, as set

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[4] However, when a statute specifically defines a given term, that definition alone controls. *WS Butterfield Theatres, Inc v Dep't of Revenue*, 353 Mich 345; 91 NW2d 269 (1958).

[5] We note that MCL 418.354(16), in providing for coordination of social security and other benefits, recognizes this principle, stating in part, "It is the intent of the legislature that, because benefits under section 361(2) and (3) are benefits which recognize human factors substantially in addition to the wage loss concept, coordination of benefits should not apply to such benefits."

forth in the schedule, will be awarded even if no time is missed from work. At issue here is whether a limb (here, a leg), crushed but not severed, is to be treated as lost, thus entitling the injured worker to specific loss benefits.

Defendants argue that the word "loss" unambiguously means "amputation," especially in the context of § 361(2)(k), which expressly mentions amputation. As they argue it, amputation is required because MCL 418.361(2)(k) provides benefits for the loss of a leg by stating:

> Leg, 215 weeks.
>
> An amputation between the knee and foot 7 or more inches below the tibial table (plateau) shall be considered a foot, and an amputation above that point shall be considered a leg.

Thus, defendants assert that the amputation language, at least regarding legs, limits the word "loss" in the statute to mean that only amputations are compensable.

Plaintiff, on the other hand, while agreeing that the statute is unambiguous, argues that defendants' approach is flawed because it disregards the original meaning of the specific loss provisions when the WDCA was enacted almost a century ago in favor of a modern perception of the word's meaning. The original meaning, plaintiff asserts, is controlling because, although the statute has been amended many times since its enactment in 1912, the word "loss" has remained unchanged and without express qualifications or limitations. Plaintiff analogizes our task in determining the meaning of "loss" to that which we undertook in *Title Office, Inc v Van Buren Co Treasurer,* 469 Mich 516, 522; 676 NW2d 207 (2004), where we determined what the plain and ordinary meaning of "transcript" was in

1895. This analytical approach of plaintiff is sound. Because the statute itself does not define "loss," we agree with plaintiff that we must ascertain the original meaning the word "loss" had when the statute was enacted in 1912.

"When determining the common, ordinary meaning of a word or phrase, consulting a dictionary is appropriate." *Title Office, Inc, supra* at 522. In the dictionaries from the era of the original legislation, the definition of "loss" is fairly broad: "Perdition, ruin, destruction; the condition or fact of being 'lost,' destroyed, or ruined," *New English Dictionary* (1908); "State or fact of being lost or destroyed; ruin; destruction; perdition; as *Loss* of a vessel at sea," *Webster's New Int'l Dictionary of the English Language* (1921); "Failure to hold, keep, or preserve what one has had in his possession; disappearance from possession, use, or knowledge; deprivation of that which one has had: as, the *loss* of money by gaming, *loss* of health or reputation, *loss* of children: opposed to *gain*," *Century Dictionary and Cylopedia* (1911). From this we can see that severance is but one way a loss may occur; loss also occurs when something is destroyed, ruined, or when it disappears from use. We conclude that amputation is not required in order for a person to have suffered the loss of a specified body part.

Having ascertained the commonly understood meaning of the word "loss," our substantive analysis of its definition is complete. *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). Our conclusion is reinforced by the fact that the same meaning for the word "loss" is found in the cases construing late nineteenth-century private liability insurance plans for the aid of injured workers that were, in part, the models for the body-part loss provisions of our first worker's compensation act. When, in special

session, the Legislature in 1912 passed that first act, known as Michigan's "Workmen's Compensation Act,"[6] it was the culmination of the efforts of the five-person Employers' Liability and Workmen's Compensation Commission appointed by Governor Chase S. Osborn in 1911.[7] The commission had been formed because of what was described at the time as "wide dissatisfaction" with the employer's liability at common law for injuries suffered by his employees. Report of the Employers' Liability and Workmen's Compensation Commission of the State of Michigan, 5 (1911) (Report). The commission was directed to "investigate and report a plan for legislative action to provide compensation for accidental injuries or death arising out of and in the course of employment . . . ." *Id*. In its report, the commission, after concluding that the existing negligence-based system (1) failed to sufficiently encourage prevention of accidents, (2) did not protect employers against excessive verdicts, (3) resulted in inadequate compensation for injured workers, and (4) engendered animosity and strife, recommended a statute based on similar provisions already enacted in Massachusetts, Wisconsin, and New Jersey.[8] The Legislature, with very few changes to the recommended language, briskly enacted this pro-

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[6] 1912 (1st Ex Sess) PA 10.

[7] 1911 PA 245.

[8] These in turn were modeled after European laws that first appeared in the mid-1800s and that were well established by the end of that century, swept along by massive industrialization occurring at the same time throughout Europe. Harger, *Worker's compensation, a brief history*, <www.fldfs.com/WC/history.html> (accessed December 22, 2004). In this country, the first constitutional worker's compensation law was the 1908 Employer's Liability Acts, 45 USC 51-60. In 1911, the first states followed, and by 1913, twenty-three states had comparable laws. Harger, *supra*. By 1948, all the states had at least some form of worker's compensation, including the territories of Alaska and Hawaii. Harger, *supra*.

posal as Michigan's workmen's compensation act less than three weeks after the bill was introduced. 1912 (1st Ex Sess) Journal of the House 13, 149-150.

In dealing with what today is described as total and permanent disability, the 1912 statute stated in § 9:

> While the incapacity for work resulting from the injury is total, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half his average weekly wages, but not more than ten dollars nor less than four dollars a week; and in no case shall the period covered by such compensation be greater than five hundred weeks, nor shall the total amount of all compensation exceed four thousand dollars. [1912 (1st Ex Sess) PA 10, part II, § 9.]

In dealing with partial incapacity, the statute stated at § 10:

> While the incapacity for work resulting from the injury is partial, the employer shall pay, or cause to be paid as hereinafter provided, to the injured employee a weekly compensation equal to one-half the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter, but not more than ten dollars a week; and in no case shall the period covered by such compensation be greater than three hundred weeks from the date of the injury. In cases included by the following schedule the disability in each such case shall be deemed to continue for the period specified, and the compensation so paid for such injury shall be as specified therein, to wit:
>
> * * *
>
> For the loss of a leg, fifty per centum of average weekly wages during one hundred and seventy-five weeks. [1912 (1st Ex Sess) PA 10, part II, § 10.]

Section 9 allowed wage-based benefits to be paid to workers who were totally incapacitated from work,

regardless of the type of work-related injury that caused the incapacity, while § 10 provided for benefits when the worker was partially incapacitated. Moreover, the latter part of § 10, with its schedule of benefits for specific losses, allowed a set amount of weeks that benefits would be awarded when a worker suffered one of the specific injuries described. In doing so, it was intentionally patterned after the specific loss provisions of the above-referenced employers' private liability insurance plans, which were designed to provide benefits to workers injured on the job. Report, *supra*.[9]

The cases construing such insurance policies in that era, from Michigan and elsewhere, unmistakably indi-

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[9] The commission's report even included in its appendix the text of two plans "typical" at the time. Report, *supra*, Appendix VII, 143-146. The "Benefit and Relief Plans of the Cleveland-Cliffs Iron Company" provided:

> In addition to the monthly benefit payments, other amounts are paid for certain serious injuries, as follows:
>
> Loss of one arm, leg or eye, $166.66.
>
> Loss of both arms, legs or eyes, $500.

Similarly, the "Benefit and Relief Plans of the Oliver Iron Mining Company" provided:

> The following injuries have specified amounts, and others in proportion to these injuries:
>
> (a) For the loss of a hand, twelve months' wages.
>
> (b) For the loss of an arm, eighteen months' wages.
>
> (c) For the loss of a foot, nine months' wages.
>
> (d) For the loss of a leg, twelve months' wages.
>
> (e) For the loss of one eye, six months' wages.

Sections 9 and 10 of the 1912 act incorporated language similar to these insurance plans.

cate that the word "loss," just as it did in dictionaries of the time, meant not just severance or amputation but also the destruction of the usefulness of the member. In Michigan, our Court in *Fuller v Locomotive Engineers' Mut Life & Accident Ins Ass'n*, 122 Mich 548, 553; 81 NW 326 (1899), construing the specific loss provision in an insurance policy, said just this, indicating that

> where an insurance policy insures against the loss of a member, or the loss of an entire member, the word "loss" should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application.

Simply stated, under such a policy in Michigan, no amputation was necessary for a loss. The rationale for not limiting loss just to amputation was the understanding by this Court and, as we will explain, by other American courts that the term "loss" in such policies should be given its ordinary and popular meaning, which was broad enough to include loss of usefulness.

As the Missouri Supreme Court said on this topic, the word "loss" in insurance policies "was used in its ordinary and popular sense and [did] not mean that there should be a total destruction of the [member], anatomically speaking, but that the loss of the use of it for the purposes to which [the member] is adapted would be a loss of it . . . ." *Sisson v Supreme Court of Honor*, 104 Mo App 54, 60; 78 SW 297 (1904). The Kansas Supreme Court stated it similarly: "The loss of a member of the body, as used in an accident insurance policy, unless restricted or modified by other language, carries the common meaning of the term 'loss,' which is the loss of the beneficial use of the member. Obviously this may occur when there is not a complete severance of the member from the body." *Noel v Continental Cas*

Co, 138 Kan 136, 139; 23 P2d 610 (1933). The Kansas court then reinforced its holding by citing thirteen cases from ten other states from the late nineteenth and early twentieth centuries, holding to the same effect.[10]

Also buttressing our analysis is that, in the early years of the act's existence, the decisions of the Industrial Accident Board (IAB), the WCAC's predecessor, also construed "loss" as defined in the dictionary. That is consistent with its commonly understood meaning. This is consequential because half of the four IAB board members had served on Governor Osborn's commission and had recommended the very "loss" language we are considering.[11] We find the interpretation these board members gave to the statute useful in the same way that the comments of drafting committees can be "useful interpretive aids" for construing statutes. See *Gladych, supra* at 601 n 4. The IAB, in *Lardie v Grand Rapids Show Case Co*, 1916 Workmen's Compensation Cases 17, 19, in discussing loss, stated that "courts have uniformly construed provisions of accident policies in-

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[10] *Travelers' Ins Co v Richmond*, 284 SW 698 (Tex Civ App, 1926); *Continental Cas Co v Linn*, 226 Ky 328; 10 SW2d 1079 (1928); *Jones v Continental Cas Co*, 189 Iowa 678; 179 NW 203 (1920); *Locomotive Engineers' Mut Life & Accident Ins Co v Meeks*, 157 Miss 97; 127 So 699 (1930); *Moore v Aetna Life Ins Co*, 75 Or 47; 146 P 151 (1915); *Bowling v Life Ins Co of Virginia*, 39 Ohio App 491; 177 NE 531 (1930); *Citizens' Mut Life Ass'n v Kennedy*, 57 SW2d 265 (Tex Civ App, 1933); *Sneck v Travelers' Ins Co*, 88 Hun 94; 34 NYS 545 (1895); *Sheanon v Pacific Mut Life Ins Co*, 77 Wis 618; 46 NW 799 (1890); *Lord v American Mut Accident Ass'n*, 89 Wis 19; 61 NW 293 (1894); *Berset v New York Life Ins Co*, 175 Minn 210; 220 NW 561 (1928); *Sisson v Supreme Court of Honor*, 104 Mo App 54; 78 SW 297 (1904); *Int'l Travelers' Ass'n v Rogers*, 163 SW 421 (Tex Civ App, 1914).

[11] Richard L. Drake was its first secretary and Ora E. Reaves was one of three board commissioners. Reaves remained on the board until at least 1920. Michigan Official Directory and Legislative Manual, 1913-1914, 1915-1916, 1917-1918, and 1919-1920.

suring against the loss of a member, to cover cases where the usefulness of the member was destroyed by accident without resulting in severance or amputation." *Id*., citing *Fuller, supra* at 553. Similarly, that "loss" in the context of worker's compensation specific loss benefits did not mean only amputations, but also included loss of usefulness, was indicated by the IAB's decisions in an unnamed case cited in Industrial Accident Bd, Bulletin No 3, 13 (1913);[12] *Rider v C H Little Co*, Industrial Accident Bd, *supra* at 27, 29 (1913); *Hirschkorn v Fiege Desk Co*, 184 Mich 239; 150 NW 851 (1915); *Purdy v Sault Ste Marie*, 188 Mich 573, 579; 155 NW 597 (1915); *Cline v Studebaker Corp*, 189 Mich 514; 155 NW 519 (1915); *Lardie, supra*; *Carpenter v Detroit Forging Co*, 191 Mich 45; 157 NW 374 (1916); *Packer v Olds Motor Works*, 195 Mich 497; 162 NW 80 (1917); *Adomites v Royal Furniture Co*, 196 Mich 498; 162 NW 965 (1917).

The same can be seen in large part in this Court's jurisprudence of the time. For example, in *Purdy, supra* at 579, the Court affirmed the IAB's specific loss award for a crushed leg.[13] In *Lovalo v Michigan Stamping Co*,

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[12] The board stated in that case:

> The action of the surgeon in amputating a finger, or in failing to amputate it, or in choosing the point of amputation is not controlling in all cases of this kind. Each case depends for its decision upon the particular facts relating to the finger, and these might relate to the point of amputation, or the fact that the finger or a portion thereof had been rendered useless without being amputated. . . . The Board is further of the opinion that in case no part of the finger is amputated and the injury is such as to entirely destroy the usefulness of the first phalange or the entire finger, in that event the injured person has lost the first phalange or the finger, as the case may be, as completely as if the same had been amputated.

[13] The IAB's decision is at 1916 Workmen's Compensation Cases 65.

202 Mich 85, 89; 167 NW 904 (1918), the Court held that the claimant had suffered the loss of his hand where four fingers and nearly all the palm were amputated, saying that "the loss of all the palm and all of the fingers of the hand could . . . be reasonably considered the loss of the entire hand." Indeed, the only expressly contrary case in this era is *Wilcox v Clarage Foundry & Mfg Co*, 199 Mich 79; 165 NW 925 (1917), where the Court, in a case with difficult facts, determined that the specific loss provision required anatomical loss. The *Wilcox* Court made no effort to reconcile its holding with the IAB's clearly stated understanding of "loss," nor with *Fuller* or *Purdy*, but analogized instead to cases where the plaintiffs had suffered partial losses and this Court had required proof of *complete*, rather than *partial*, loss.[14] We conclude that, given its outlier status, as well as the fact that the construction it seeks to give to the term "loss" is inconsistent with the original meaning of "loss" in the act, *Wilcox* was incorrectly decided. Thus, we overrule *Wilcox* so that its potentially confusing shadow will be removed from our case law.[15]

To summarize, then, regarding this issue of the definition of "loss": the definition comes from its commonly understood meaning at the time of enactment. The contemporaneous uses of the word are corroborative and reinforcing of this definition.

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[14] Even if those cases can be read as requiring amputation, *Wilcox* was flawed in a broader sense by the fact that, rather than tracing its rationale to the act itself, it used as a template, as one might in a common-law case, the prior cases construing the act.

[15] We are reinforced in our notion that *Wilcox* is aberrant by the fact that the *Lovalo* Court, in reaching a holding contrary to *Wilcox* just one year later, left unaddressed the continuing strength of *Wilcox*, suggesting that the Court considered it confined to its facts.

Defendants assert that, even given this conclusion, the 1927 amendments forever altered the definition of "loss." In 1927, the Legislature, for the only time in the twentieth century, consequentially amended the specific loss section of the statute by adding to the provision regarding a leg the language: "An amputation between the knee and foot six or more inches below the knee shall be considered a foot, above this point a leg[.]"[16] 1927 PA 63. Keying off of this amendment, defendants urge that this language implicitly was designed to alter any previously broad understanding of the word "loss" so that after the amendment there could be no specific loss without an amputation. We think this explanation insufficiently appreciates that the amendment came in the wake of a series of cases where this Court had made debatable calls on the nature of the loss after an amputation.[17] That is, at what point on the limb had a loss become not just of a hand but of an arm, not just of a foot but of a leg? We believe the goal of the amendment was to bring certainty to this discrete set of determinations once there was an amputation. It is hard to conclude otherwise, given that the Legislature, in its amendment, did not expressly alter or redefine the word "loss" itself and especially given that word's quite clear meaning in the dictionaries of the time as well as the above-referenced

[16] Similarly, the amendment added to the provision for an arm, "An amputation between the elbow and wrist 6 or more inches below the elbow shall be considered a hand, above this point an arm."

[17] *Stocin v C R Wilson Body Co*, 205 Mich 1; 171 NW 352 (1919) (holding that a claimant had lost his arm, not just his hand, where it was severed below the elbow and the upper arm was atrophied), *Curtis v Hayes Wheel Co*, 211 Mich 260; 178 NW 675 (1920) (holding that the claimant had lost just a foot where his amputation occurred four to five inches below the knee), and *Reno v Holmes*, 238 Mich 572; 214 NW 174 (1927) (holding that a claimant had lost his leg, not just his foot, where it was severed $5\frac{1}{2}$ inches below the knee).

decisions of the IAB and this Court. Moreover, this Court's leading postamendment decision in the 1930s on the issue of loss[18] is consistent with this understanding that the 1927 amendment was not intended to reverse the holdings of the IAB and this Court on what is a loss.

This dominant theme of our case law, that loss does not require amputation, can be seen throughout the mid-century, albeit with some false starts.[19] Later in the century, in *Pipe v Leese Tool & Die Co*, 410 Mich 510; 302 NW2d 526 (1981), the Court correctly determined, consistent with the original understanding of the act and the earlier cases we have discussed, that amputation was not a prerequisite to a "loss."

Pipe, however, in a phrase used frequently in these cases, described this loss of usefulness as "loss of the industrial use . . . ." *Id*. at 527. The phrase "loss of industrial use" does not appear anywhere in the specific loss provisions, and seems to have been intended as judicial shorthand to describe the condition of the injured member from the standpoint of its use in employment. However, this description causes confusion because it does not adequately capture the proper standard, which is that specific loss is to be determined

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[18] See *Rench v Kalamazoo Stove & Furnace Co*, 286 Mich 314; 282 NW 162 (1938), where the Court allowed an award for loss of two hands where most of the plaintiff's fingers had been severed and he had suffered a total loss of use of both his hands.

[19] In the middle of the century, with *Hlady v Wolverine Bolt Co*, 325 Mich 23; 37 NW2d 576 (1949), as well as *Utter v Ottawa Metal Co*, 326 Mich 450; 40 NW2d 218 (1949), and *Barnett v Kelsey-Hayes Wheel Co*, 328 Mich 37; 43 NW2d 55 (1950), this Court decided cases contrary to this original understanding of the specific loss provisions. But these cases are inconsistent with the proper understanding of the statute and we note that they were hesitatingly followed, if at all, and *Hlady was* expressly overruled. *Mitchell v Metal Assemblies, Inc*, 379 Mich 368, 380; 151 NW2d 818 (1967).

without reference to the plaintiff's earning capacity or ability to return to work. That is, it is paid if the loss has been incurred and it is not relevant whether the worker can work after the loss. *Miller v Sullivan Milk Products, Inc*, 385 Mich 659; 189 NW2d 304 (1971); *Shumate v American Stamping Co*, 357 Mich 689; 99 NW2d 374 (1959). We believe it was this concept that the *Pipe* Court was attempting to articulate and we clarify by means of this opinion that holding.

To be clear, we are endeavoring here not to craft a new standard, but to articulate clearly the standard enacted in 1912. We find that the original understanding the word "loss" carried when the WDCA was enacted was its plain and ordinary meaning, consistent with how it had been construed in the context of insurance law. Thus, "loss" includes not only amputation but also loss of usefulness.[20] It was the intent of the drafters to write into the statute a word that was expansive enough to cover both situations and the words and language they chose conveyed this. Moreover, in our case law, this Court has with considerable consistency, albeit not unfailingly, upheld this construction. We do so again today, believing as courts have before us that the meaning we give to the word "loss" in MCL 418.361(2) is the meaning originally intended.

Defendants' approach would require us to ignore the statutory drafters' and enactors' turn-of-the-twentieth-century understanding of the common and approved meaning of "loss" in favor of a purportedly different contemporary understanding, divorced from its roots. This we cannot do. We are not free to substitute any other nonstatutory definition of a word or term for the meaning it indisputably had in 1912, and has main-

[20] In *Pipe, supra* at 530, and again in *Cain I, supra* at 524, we referred to this as anatomical loss or its equivalent.

tained for almost a century. This duty traces to the simple notion that we are to construe a statute "in the light of the circumstances existing at the date of its enactment, not in the light of subsequent developments. . . . 'The words of a statute must be taken in the sense in which they were understood at the time when the statute was enacted.' " *Wayne Co Bd of Rd Comm'rs v Wayne Co Clerk*, 293 Mich 229, 235-236; 291 NW 879 (1940), quoting 25 RCL, § 215, p 959. We therefore hold to the original meaning of the word "loss" in the specific loss provisions: it does not require severance and there can be a "loss" where the claimant suffers the loss of usefulness of the member.

In addition, we conclude that the WCAC properly applied the "uncorrected" standard. We discussed in *Cain I, supra* at 521-523, the propriety of applying the "uncorrected" standard to specific loss claims and the "corrected" standard to total and permanent disability claims. We reaffirm that rule today.

The WCAC found the damage to Mr. Cain's left leg "equated with anatomical loss and that the limb retains no substantial utility." The WCAC's factual finding is, in essence, that he lost the usefulness of his leg. Because that factual finding is supported by competent evidence in the record, it must be affirmed. *Mudel, supra* at 701. The Court of Appeals erred when it grafted a loss of industrial use standard onto the factual findings of the administrative tribunal. Nonetheless, it reached the correct result with regard to plaintiff's benefit eligibility. Accordingly, plaintiff is eligible for specific loss benefits for the loss of his left leg.

ANALYSIS: TOTAL AND PERMANENT DISABILITY

We next turn to analyze whether the WCAC correctly allowed plaintiff benefits under the total and perma-

nent disability provisions, MCL 418.361(3). Our task in interpreting the Legislature's work is, if possible, to read the seven eligibility requirements in § 361(3) so as to read none of them out or as an unnecessary duplication of another. In particular, we must endeavor to harmonize the three provisions concerning legs and to read them in a way that does not make any of the language surplusage. *Jenkins v Patel*, 471 Mich 158, 167; 684 NW2d 346 (2004); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). In short, we read the words in a statute together, to harmonize the meaning of the clauses and give effect to the whole. *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003).

Defendants argue that we cannot construe "[l]oss" in § 361(3)(b) to mean less than amputation because then cases of lost industrial use would fall under both § 361(3)(b) and § 361(3)(g), rendering the latter surplusage. We disagree. We find the proper construction of the word "[l]oss" in § 361(3)(b) is that it has the same meaning given it in § 361(2).[21] This conclusion is unsurprising, we believe, given the juxtaposition of §§ 361(2) and 361(3), which is itself a compelling reason to give them the same meaning. See, e.g., *Sibley v Smith*, 2 Mich 487, 491 (1853). Furthermore, doing so, as we will explain, causes no part of § 361(3) to be duplicative or nugatory. Dealing with § 361(3)(b) first, we find that using this definition of loss means that benefits are payable under this section not only when there is anatomical loss, but also when the limbs have no practical usefulness. Section 361(3)(g), on the other hand, as we discussed in *Cain I*, with its reference to permanent and total loss of industrial use, calls the

[21] We note that this meaning would also apply in §§ 361(3)(c) and 361(3)(d).

fact-finder to look to wage-earning capacity and the injured worker's ability to function in industry. As is apparent, these words demand something distinct from § 361(3)(b)'s simple inquiry regarding whether the legs or feet are amputated or have no practical usefulness. This means that what is covered under § 361(3)(b) may not be covered under § 361(3)(g). Stated more formally, §§ 361(3)(b) and 361(3)(g) cover different things and defining loss as we have here does not make either provision nugatory. An example may make this distinction clearer. If the legs are rendered useless but can be braced so as to make the performance of the job possible, there has been loss under § 361(3)(b) but no loss of industrial use under § 361(3)(g). This worker, indeed like Mr. Cain, would under this reading qualify for total and permanent disability benefits under § 361(3)(b) but not § 361(3)(g). Conversely, a worker whose legs have basic function, i.e., are practically useful, but whose legs have no industrial use even if braced (such as a ballerina), would qualify under § 361(3)(g) but not § 361(3)(b).

These examples limn that the "corrected" standard does not apply to § 361(3)(b), unlike § 361(3)(g). The reason is, as we explained in *Cain I*, that § 361(3)(g), with its utilization of permanent and total loss language, compels a conclusion that if the condition is correctable, it is not permanent and total. *Cain I, supra* at 519-520. In fact, when this language appears elsewhere in § 361(3), such as in §§ 361(3)(a) and 361(3)(e), the doctrine of correctability also applies. Because there is no such permanent and total loss triggering language in § 361(3)(b), it follows that the requirement of looking to correctability is absent.[22]

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[22] Again, §§ 361(3)(c) and 361(3)(d) are similarly worded.

In sum, Mr. Cain has clearly suffered the loss of his amputated right leg and the WCAC found that his left leg has "no substantial utility." That is, his leg has no practical usefulness. Thus, he has suffered a "loss of both legs" and falls within § 361(3)(b), qualifying for an award of total and permanent disability benefits under that provision.[23] Accordingly, the WCAC and the Court of Appeals decisions are affirmed.[24]

CONCLUSION

In conclusion, we find that Mr. Cain has suffered the specific loss of his left leg under MCL 418.361(2) and that he qualifies for an award of total and permanent disability benefits under MCL 418.361(3)(b). Therefore, we affirm the decisions of the Court of Appeals and the WCAC.

CAVANAGH, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

WEAVER, J. (*concurring*). I concur in the result of the majority opinion and its conclusions that plaintiff suffered a specific loss of his left leg under MCL

[23] We have read the concurrence and, to preclude potential confusion, only note that its conclusion is identical to ours.

[24] We also conclude that, although the WCAC made an error of law in its interpretation of § 361(3)(b), it was properly within its scope on remand to reach legal conclusions based on its reassessment of the facts. *Modreski v Gen Motors Corp*, 417 Mich 323; 337 NW2d 231 (1983). While the WCAC was precluded from reaching a decision contrary to that of this Court, *Cain I* did not address the question whether plaintiff had suffered total and permanent disability under § 361(3)(b). Although the WCAC's determination on remand that he met the requirements of § 361(3)(b) had the opposite outcome from its initial determination that he was not qualified under § 361(3)(g), its finding was based on a different legal theory. We conclude that it did not err in addressing legal questions raised by its new factual determination.

418.361(2)(k) and that he qualifies for an award of total and permanent disability benefits under MCL 418.361(3)(b). The word "loss," as used in both subsections of the statute, includes not only amputation but also those situations in which there is a loss of the usefulness of the limb or member.[1] As noted by Chief Justice TAYLOR, the Worker's Compensation Appellate Commission (WCAC) essentially found that on these facts, plaintiff lost the usefulness of his left leg and that he accordingly was entitled to specific loss benefits for the loss of his left leg under MCL 418.361(2)(k). *Ante* at 258. There is competent evidence to support the WCAC's factual finding and we must defer to the WCAC on this finding. *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691, 703; 614 NW2d 607 (2000). Further, plaintiff has suffered a "[l]oss of both legs" under MCL 418.361(3)(b) because his right leg has been amputated and he has lost the usefulness of his left leg. Consequently, he is entitled to total and permanent disability benefits. Therefore, I agree that the decisions of the WCAC and Court of Appeals should be affirmed.[2]

KELLY, J., concurred with WEAVER, J.

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[1] Dictionary definitions of the word "loss" include: "failure to preserve or maintain" and "destruction, ruin." *Random House Webster's New College Dictionary* (1997).

[2] While I agree with some of the basic conclusions of the majority, as should be evident from the fact that I am concurring separately, I do not sign on to all of the lengthy analysis on which the majority relies to support its conclusions.

GARG v MACOMB COUNTY COMMUNITY
MENTAL HEALTH SERVICES

Docket No. 121361. Argued November 9, 2004 (Calendar No. 1). Decided May 11, 2005. Amended 473 Mich 1205.

Sharda Garg, a person of Asian Indian ancestry, brought an action in the Macomb Circuit Court against Macomb County Community Mental Health Services, her employer, alleging violations of the Civil Rights Act, MCL 37.2101 *et seq*., specifically that she was denied promotions and subjected to poor treatment because of national-origin discrimination and in retaliation for engaging in activities protected by the act. A jury awarded damages, finding retaliation but not discrimination. The court, Roland L. Olzark, J., entered a judgment consistent with the verdict and denied the defendant's motion for judgment notwithstanding the verdict or a new trial. The Court of Appeals, GRIFFIN, P.J., and METER and KELLY, JJ., affirmed in an unpublished opinion per curiam, issued March 29, 2002 (Docket No. 223829). The Supreme Court granted the defendant's application for leave to appeal. 469 Mich 1042 (2004).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR, and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

The plaintiff failed to present sufficient evidence that she was subjected to retaliation either for her alleged opposition to sexual harassment or for filing a grievance claiming national-origin discrimination. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the trial court for entry of a judgment in favor of the defendant.

1. There is insufficient evidence either that plaintiff opposed sexual harassment or that defendant knew that plaintiff was engaged in opposition to sexual harassment in the workplace. The plaintiff claimed that she observed a supervisor sexually harass women in the workplace and that she engaged in activity protected by the Civil Rights Act by opposing such harassment in striking an unknown person who had touched her back and who turned out to be the same supervisor. However, the supervisor was not sexually harassing the plaintiff when she struck him, the plaintiff never

characterized her reaction to the touching as opposing sexual harassment until she filed her action, and the plaintiff never told or gave any indication to the supervisor or anyone else that striking the supervisor was an act of opposing sexual harassment.

2. The "continuing violations" doctrine of *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505 (1986), which allows consideration of acts falling outside the three-year limitations period of MCL 600.5805(1) and (10) applicable to actions under the Civil Rights Act, is inconsistent with the statute of limitations and must be overruled.

3. The plaintiff engaged in activity protected by the Civil Rights Act in filing a grievance alleging violation of the act. The defendant was aware of this activity. However, absent evidence of acts occurring outside the period of limitations, the plaintiff failed to establish a causal link between the filing of the grievance and the subsequent alleged adverse employment actions. There is no evidence to suggest any distinction between denials of promotion by the supervisor who received the grievance and by other supervisors who were not aware of the grievance. Also lacking was evidence that the plaintiff was treated any differently at work by the supervisor who received the grievance and by other supervisors who were not aware of the grievance.

Reversed and remanded to the circuit court.

Justice CAVANAGH, joined by Justice KELLY, dissenting, agreed with the majority's conclusion that there was insufficient evidence of retaliation based on the plaintiff's alleged opposition to the sexual harassment of her coworkers, but disagreed with the conclusion that the plaintiff presented insufficient evidence that she was retaliated against for filing a grievance. Further, *Sumner* should not be overruled and the continuing violations doctrine should not be abolished. The majority also erred in concluding that because the continuing violations doctrine no longer applies, evidence of prior acts must be excluded from consideration.

In this case, the continuing violations doctrine should be applied and should result in a conclusion that all of the adverse employment actions taken by the defendant against the plaintiff are actionable. A review of the four principles to be considered before established precedent is overruled, as detailed in *Pohutski v City of Allen Park*, 465 Mich 675, 694 (2002), shows that none of the factors weighs in favor of overruling *Sumner* and abolishing the continuing violations doctrine. Even if Justice CAVANAGH were to agree with the majority that the continuing violations doctrine is no longer viable, the natural consequence of abolishing that doctrine is not to exclude

untimely acts from consideration. Rather, abolishing the doctrine simply means that untimely acts are not actionable.

Justice WEAVER, joined by Justice KELLY, dissenting, agreed with the reasoning and conclusions in Justice CAVANAGH's dissenting opinion. She wrote separately to state that she is not persuaded that the unanimous adoption of the continuing violations doctrine in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505 (1986), was unwarranted or that the doctrine should be abandoned.

1. CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — RETALIATION.

A plaintiff seeking to establish a prima facie case of unlawful employment-related retaliation under the Civil Rights Act must show that the plaintiff engaged in a protected activity, that this was known by the defendant, that the defendant took an employment action adverse to the plaintiff, and that there was a causal connection between the protected activity and the adverse employment action (MCL 37.2701).

2. CIVIL RIGHTS — EMPLOYMENT DISCRIMINATION — LIMITATION OF ACTIONS — CONTINUING VIOLATIONS DOCTRINE.

The continuing violations doctrine announced in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505 (1986), which allows consideration of acts falling outside the three-year limitations period of MCL 600.5805(1) and (10) applicable to actions under the Civil Rights Act, is inconsistent with the language of the statute of limitations and may no longer be applied.

Pitt, Dowty, McGehee, Mirer & Palmer, P.C. (by *Beth M. Rivers* and *Robert W. Palmer*), and *Monica Farris Linkner* and *Allyn Carol Ravitz* for the plaintiff.

Kitch Drutchas Wagner DeNardis & Valitutti (by *Susan Healy Zitterman* and *Karen B. Berkery*) for the defendant.

Amici Curiae:

Michael A. Cox, Attorney General, and *Susan I. Leffler, Ron D. Robinson*, and *Suzanne D. Sonneborn*, Assistant Attorneys General, for the Michigan Civil Rights Commission and the Department of Civil Rights.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Patrick J. O'Brien* and *Heather S. Meingast*, Assistant Attorneys General, for the Attorney General.

Sachs Waldman, P.C. (by *Mary Katherine Norton*), for the Michigan State AFL-CIO, the Michigan Trial Lawyers Association, and the Michigan Employment Lawyers Association.

MARKMAN, J. We granted leave to appeal to consider whether there was sufficient evidence to support plaintiff's claims of retaliatory discrimination and whether the "continuing violations" doctrine of *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), should be preserved, modified, or abrogated in light of the language of the statute of limitations, MCL 600.5805(1). The jury found that plaintiff was not discriminated against on the basis of national origin, but was retaliated against on the basis of either her opposition to sexual harassment or because she filed a grievance claiming national-origin discrimination. The Court of Appeals affirmed. Because we conclude that, once evidence of acts that occurred outside the statute of limitations period is removed from consideration, there was insufficient evidence of retaliation based on either plaintiff's alleged opposition to sexual harassment or her filing of a grievance, we reverse the judgment of the Court of Appeals and remand to the trial court for entry of a judgment in favor of defendant. In so holding, we overrule the "continuing violations" doctrine of *Sumner, supra,* as inconsistent with the language of the statute of limitations, MCL 600.5805(1) and (10). As a result, we do not reach the other issues raised on appeal or the issues raised in plaintiff's cross-appeal.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Sharda Garg is of Asian Indian ancestry. She began her employment as a staff psychologist with defendant Macomb County Community Mental Health Services in 1978. Plaintiff testified that Donald Habkirk, the director of defendant's disability section, which included the facility where plaintiff worked, had during 1981 engaged in what plaintiff characterized as "sexually harassing" behavior with female coworkers. Specifically, plaintiff observed Habkirk pull one coworker's bra strap and snap the elastic panties of another. Plaintiff acknowledges that she herself was never treated in this manner or otherwise sexually harassed, and that she never reported to anyone the incidents she allegedly observed. Habkirk denied engaging in such conduct.

At "around the same time," plaintiff, while walking down an office corridor, felt someone's hand touch her upper back, near her shoulder. Plaintiff reacted as follows: "I felt somebody touching me, and I just turned around and swung at him." She further observed, "it was a very automatic reaction on my part." It was only after she hit this person that she realized it was Habkirk whom she had hit. She and Habkirk stared at each other for a moment before she proceeded into her office. Plaintiff did not file a grievance, tell anyone about the incident, or offer any explanation to anyone regarding why she had struck Habkirk. In response to a question concerning whether the touching was "improper," plaintiff did not characterize it as such.

While Habkirk never took any formal action against plaintiff for striking him, and indeed testified that he could not even remember the incident, plaintiff claims that her formerly cordial relationship with Habkirk deteriorated as he became increasingly cold and distant.

While plaintiff generally enjoyed a good employment relationship with defendant and its management initially, she asserted that she began to perceive changes in this relationship following the touching incident. After six years of being rated as either "outstanding" or "very good," plaintiff's 1983 performance review was downgraded to "satisfactory." It was also at this point that plaintiff applied for several job promotions, in each case unsuccessfully. The first position she applied for in 1983 was given to someone from outside the organization, despite a general inclination by defendant in favor of internal promotions. Two other promotion applications in 1983 were also rejected. Over the next three years, plaintiff applied unsuccessfully for four more promotions. Plaintiff was denied a total of eighteen promotion opportunities, including eleven during the period of 1983 through 1987. During this period, Habkirk always served in plaintiff's chain of command. Once at a dinner party with plaintiff's immediate supervisor, Robert Slaine, plaintiff's husband asked why plaintiff had not been promoted. Slaine responded that, in his opinion, it was because Habkirk did not like plaintiff. Slaine denied making this statement, and Habkirk denied telling Slaine that he disliked plaintiff.

In 1986, Kent Cathcart was chosen by Habkirk as the new program director in plaintiff's facility. However, little changed for plaintiff because she failed to receive any of the next three promotions for which she applied. In December 1986, she was denied a promotion in favor of a contract employee with less seniority. Following this rejection in February 1987, plaintiff filed her first promotion-related grievance with the union representing defendant's employees. When plaintiff was again denied a promotion in early 1987, this time in favor of a person from outside the company, she filed a second

promotion-related grievance with the union in June 1987, alleging that the denial was due to discrimination based on her national origin and color. The grievance was forwarded to Cathcart, and was denied without investigation. Plaintiff next applied for a promotion in 1989, but was again denied. Plaintiff was denied seven promotions during the period of 1989 through 1997.

Plaintiff claims that the "retaliation" against her for filing these grievances also took the form of poor overall treatment by defendant. Specifically, she claims that Cathcart, and the two supervisors who succeeded Cathcart after plaintiff was transferred to defendant's First North facility in 1995, treated her "in a degrading and humiliating manner." Plaintiff claims that Cathcart would criticize her for not participating in agency activities, but would then deny her requests to participate in meetings, conferences, and committees. In addition, plaintiff testified that Cathcart would reprimand her for being even two minutes late for work, but would let her coworkers "come and go as they pleased." Plaintiff also testified that Cathcart once chastised her for going outside to look at a rainbow, but that her coworkers were routinely allowed to go outside for cigarette breaks on company time. Cathcart also refused to give her keys to the facility. Finally, when she moved to First North, plaintiff was given an office that was formerly a storage closet. The office was uncarpeted and had no windows. In addition, it was located next to a bathroom, forcing plaintiff to hear "people defecating and urinating" throughout the day. Plaintiff was assigned to this office despite her seventeen years of seniority and the availability of more desirable office spaces.

Plaintiff also claims that Cathcart demonstrated a predisposition against "people of color" during the period that she was employed by defendant under his supervision. Specifically, plaintiff testified regarding four separate displays of this predisposition. First, when Cathcart learned that plaintiff's son had been accepted to medical school, he allegedly stated that "there are enough Indian doctors already." Second, Cathcart allegedly complained about the accent of an Indian psychiatrist, stating that "these people have been here long enough, they ought to speak good English." Third, Cathcart allegedly stated that he would not have hired an African-American nurse if a white candidate had been available. Finally, Cathcart allegedly used a racially derogatory term when referring to African-Americans. Cathcart denies making any of these statements.

On July 21, 1995, plaintiff brought this action under the Civil Rights Act, MCL 37.2101 *et seq.*, claiming that her promotion denials and poor treatment were due to national-origin discrimination and were in retaliation for engaging in activities protected by the act. Plaintiff originally claimed retaliatory discrimination based solely on the union grievance claiming national-origin discrimination. She later amended her complaint to allege that she was also retaliated against for opposing sexual harassment. Defendant denied the allegations and asserted that some of the allegations were barred by the three-year period of limitations. MCL 600.5805(1) and (10). Defendant moved for partial summary disposition on that basis, but the trial court denied the motion, citing the "continuing violations" doctrine adopted in *Sumner*.

Following a three-week trial, the jury found that plaintiff was not discriminated against because of na-

tional origin or color. However, the jury also found that defendant had retaliated against plaintiff because she "opposed sexual harassment or because she filed a complaint or charge about being discriminated against." The jury awarded plaintiff $250,000 in damages.

Defendant filed a motion for judgment notwithstanding the verdict or a new trial. The trial court noted that "physical acts can convey a message better than words," and that plaintiff's physical response to the touching by Habkirk was sufficient to inform defendant that she opposed Habkirk's sexually harassing behavior. The trial court further held that sufficient evidence was presented to allow a reasonable juror to find a causal connection between plaintiff's striking Habkirk and her failure to be promoted. Because the evidence supported at least one of the retaliation theories, defendant's motion was denied. In an unpublished opinion, the Court of Appeals affirmed the jury's verdict. Unpublished opinion per curiam of the Court of Appeals, issued March 29, 2002 (Docket No. 223829). The Court of Appeals held that the "continuing violations" doctrine allowed the introduction of factual allegations going back more than three years before plaintiff filed her lawsuit and thus the statute of limitations was not a bar to the facts plaintiff presented to the jury. With regard to the merits, the Court of Appeals held that when plaintiff struck Habkirk, a reasonable juror could have concluded that she " 'raise[d] the specter,' " quoting *Mitan v Neiman Marcus*, 240 Mich App 679, 682; 613 NW2d 415 (2000), that she was opposing Habkirk's sexual harassment. The Court of Appeals also determined that there was sufficient evidence to allow a reasonable juror to conclude that plaintiff established both of her retaliation claims.

After this Court directed the parties to present oral argument on whether to grant leave to appeal or take other action permitted by MCR 7.302(G)(1), 469 Mich 983 (2003), and having heard such argument, we granted defendant's application for leave to appeal, directing briefing regarding whether the "continuing violations" doctrine of *Sumner* was consistent with the statute of limitations, MCL 600.5805(1). 469 Mich 1042 (2004).

II. STANDARD OF REVIEW

The denial of a motion for judgment notwithstanding the verdict is subject to review de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). Reversal is permitted only if the evidence, while viewed in a light most favorable to plaintiff, fails to establish a claim as a matter of law. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Whether the "continuing violations" doctrine is consistent with MCL 600.5805(1) and (10) is a question of law that we review de novo. *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004).

III. ANALYSIS

The issue in this case is *not* whether plaintiff was treated poorly or insensitively by defendant. Nor is it whether defendant "retaliated" against plaintiff for her conduct in hitting Habkirk. Instead, the issue is whether defendant retaliated against plaintiff *specifically* for conduct on her part protected by the Civil Rights Act. MCL 37.2701 provides, in pertinent part:

> Two or more persons shall not conspire to, or a person shall not:

> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie case of retaliation, a plaintiff must show:

> (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

A. RETALIATION BASED ON OPPOSITION TO SEXUAL HARASSMENT

Plaintiff's first theory is that defendant retaliated against her because she opposed Habkirk's sexual harassment. At "around the same time" that plaintiff allegedly observed sexually harassing behavior by Habkirk toward female employees, she felt someone touch her on the back, near her shoulder, while she was walking near Habkirk's office.[1] Plaintiff testified that "I felt somebody's hand touching me, and I turned around and hit the person." She noted further that "it was a very automatic reaction on my part. I felt somebody touching me, and I just turned around and swung at him."

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[1] Plaintiff argued at oral argument before this Court that it was significant that she was passing a room Habkirk had just occupied, because it demonstrates that she "knew" it was Habkirk who touched her. However, she testified several times that she felt "somebody" touch her back, that she "*didn't know* who was in behind [her]," and that she simply "swung at *whoever it was* behind [her]." (Emphasis added.)

We conclude there is insufficient evidence for a juror reasonably to conclude that by striking Habkirk under these circumstances plaintiff was opposing sexual harassment, i.e., engaging in a "protected activity" under the Civil Rights Act. First, plaintiff acknowledged that Habkirk was not sexually harassing her at the time she hit him so that it is difficult to view her conduct as responsive to "protected activity." This is underscored by plaintiff's acknowledgment that Habkirk had *never* sexually harassed her. Second, there is no evidence that, before this lawsuit, plaintiff ever sought to cast her conduct in hitting Habkirk in terms of opposing sexual harassment at defendant's workplace. Such a message was never communicated to the alleged victims of Habkirk's sexual harassment or to fellow employees, much less to Habkirk, management, union representatives, or public agencies. Third, plaintiff testified that she did not even know it was Habkirk who touched her shoulder until after she struck him. That is, because plaintiff in her "automatic" response to the touching could just as likely have struck out at any one of her coworkers as at Habkirk, it is difficult to conclude that her action was somehow intended to communicate a principled opposition to prior incidents of supervisory misconduct. That is, there is simply no connection here between cause—the alleged sexual harassment—and effect—plaintiff's striking Habkirk.[2]

[2] This lack of connection is underscored by plaintiff's own testimony that the incidents of sexual harassment that allegedly prompted her opposition occurred only at "about the same time" that she struck Habkirk. Although we acknowledge that a reasonable juror would be entitled to conclude that this characterization is compatible with incidents of sexual harassment *preceding* plaintiff's hitting Habkirk, the lack of a clear temporal relationship between the cause and the effect does not well serve plaintiff's argument.

Moreover, although it is not necessary to our analysis in this case, even if plaintiff were indisputably responding to past sexual harassment by hitting Habkirk, we are not prepared to conclude that *any* response to conduct prohibited by the Civil Rights Act, no matter how excessive or inappropriate the response, including assaultive behavior, falls within the act's protections. An employee is not immunized for any type of responsive conduct, no matter how outrageous or disproportionate, simply because it is connected with opposition to discrimination. Obviously, no employee would be protected under the act from all "retaliation" by an employer for criminal, or sabotaging, or destructive activities simply because these occurred in response to perceived employer discrimination. For purposes of analysis under § 701(a), consideration must be given to separating the motivation underlying an employee's conduct and the means by which such motivation is translated into conduct.

Under these circumstances, we conclude that no juror could have reasonably concluded that defendant was engaged in a "protected activity" by opposing sexual harassment when she hit Habkirk.

Even if the jury here were persuaded that plaintiff was engaged in a "protected activity" by striking Habkirk, she has failed to show that *defendant knew* that she was engaged in such activity. Absent such a showing, there could be no "retaliation" on the employer's part to anything within the protection of the Civil Rights Act. While Habkirk obviously would have been aware that plaintiff had struck him, there was nothing inherent in this conduct that would have apprised him that plaintiff was thereby opposing sexual harassment. There is no evidence that Habkirk touched plaintiff at that time (or any other time) in a way that was

inappropriate; there is no evidence that plaintiff herself perceived that Habkirk touched her in a way that was inappropriate; there is no evidence that Habkirk reasonably could have discerned from the nature of plaintiff's response to his touching that she was communicating any message of opposition to sexual harassment; and there is no evidence that plaintiff at any time explained the "significance" of her behavior to Habkirk.

Nor is there anything else on the part of plaintiff following this incident that would communicate to anyone how she had been opposing sexual harassment by striking Habkirk. To the extent that she failed to communicate this supposed purpose to alleged victims of Habkirk's previous conduct, to coemployees, to management, to union representatives, to public authorities, or to Habkirk himself,[3] it is difficult to understand how defendant could have been sufficiently aware that plaintiff was engaged in "protected" activity so as to be able to "retaliate" against her for such conduct.

Under these circumstances, we conclude that no juror could reasonably have concluded that defendant was aware that plaintiff had been engaged in "protected activity" by opposing sexual harassment when she hit Habkirk.

Therefore, on the basis either that there is insufficient evidence that plaintiff was engaged in protected activity[4] or that defendant could have been aware of such activity, plaintiff has failed to establish a claim

[3] Nor did plaintiff discuss Habkirk's alleged inappropriate behavior itself with any of these parties.

[4] We do not agree with the Court of Appeals that plaintiff here has raised any specter that she was engaged in opposition to sexual harassment by her conduct.

under the Civil Rights Act. To the extent that she has failed to present sufficient evidence that she was engaged in protected activity, she has failed to satisfy the threshold requirement for coverage under § 701(a); to the extent that she has failed to present sufficient evidence that defendant could have been aware of such activity, she could not have been the object of "retaliation" under § 701(a).[5]

B. RETALIATION BASED ON FILING A GRIEVANCE

Plaintiff's second theory is that defendant retaliated against her after she filed a grievance claiming national-origin discrimination. After being refused a promotion for the eleventh time, plaintiff filed a grievance with her union in June 1987, claiming that she was being denied promotions because of discrimination based on national origin and color. Plaintiff claims that, as a result of filing the grievance, she was denied subsequent promotion opportunities and was subjected to poor treatment in general by Cathcart and the First North supervisors. With regard to this claim, it is undisputed that plaintiff engaged in a protected activity, namely filing a grievance claiming a violation of the Civil Rights Act. In addition, it is undisputed that

[5] Had plaintiff presented sufficient evidence with regard to these matters, i.e., shown both that she had been engaged in a protected activity and that defendant had been aware of this, she would still have been required to demonstrate that she suffered an adverse employment action *as a result of* her engaging in the protected activity, i.e., that there was some nexus or causal connection between the adverse employment action and the protected activity. See *DeFlaviis*, *supra*; *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (applying the antiretaliation provisions of the Whistleblowers' Protection Act, MCL 15.361 *et seq.*). See also *Shallal v Catholic Social Services of Wayne Co*, 455 Mich 604, 617; 566 NW2d 571 (1997) (noting that " 'whistleblower statute[s] [are] analogous to antiretaliation provisions of other employment discrimination statutes . . .' " [citation omitted]).

defendant was aware that plaintiff had engaged in this activity. Plaintiff presented testimony that defendant's retaliatory conduct took place over an eleven-year period, including acts that took place after she filed the instant action on July 21, 1995. Defendant argues that, pursuant to the three-year period of limitations, any claim based on acts occurring before July 21, 1992, is barred. MCL 600.5805(10). Despite the statute of limitations, both the trial court and the Court of Appeals permitted plaintiff to recover on the basis of untimely acts, or acts occurring before July 21, 1992, under the so-called "continuing violations" doctrine adopted in *Sumner*. We conclude that, absent evidence of these acts, there is insufficient evidence to establish a causal link between the 1987 grievance and any retaliatory acts occurring within the limitations period.

The "continuing violations" doctrine was first addressed by this Court in *Sumner*, *supra* at 510. We began our analysis in that case by stating that it is "appropriate . . . in discrimination cases [to] turn to federal precedent for guidance in reaching our decision." *Id.* at 525. We found particularly helpful the considerations relied on by federal courts in nullifying the statute of limitations in Title VII of the Civil Rights Act of 1964. 42 USC 2000e *et seq*. We described these as follows:

> First, [the Civil Rights Act] is a remedial statute whose purpose is to root out discrimination and make injured parties whole. Second, employees are generally lay people, who do not know that they must act quickly or risk losing their cause of action. An employee may fear reprisal by the employer, or may refer the matter to a union, which may not take any action within the limitation period. Employees may also delay filing their complaints in the hope of internal resolution or simply to give the employer a second chance. Third, and most importantly, many discriminatory

> acts occur in such a manner that it is difficult to precisely define when they took place. One might say that they unfold rather than occur. [*Sumner, supra* at 525-526].[6]

Sumner also found persuasive the United States Supreme Court's decision in *United Air Lines, Inc v Evans*, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977). In *Evans*, the United States Supreme Court for the first time addressed the "continuing violations" doctrine that had been created by the lower federal courts in order to overcome the statute of limitations.[7] The employee in *Evans*, a flight attendant with United Air Lines, was fired in 1968 on the basis of a "no marriage" rule that was later found to violate Title VII. She was rehired by the airline in 1972, but was not credited for her pre-1968 service and, therefore, was treated as a new hire for seniority purposes. The employee argued that the airline's refusal to recognize her past service constituted a "present effect to the past illegal act and

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[6] While it is not necessary to our analysis in this case, we note that the operation of our statute of limitations at least partially undercuts the significance of the factors cited by *Sumner*. In Michigan, an employee does not have to "act quickly or risk losing their cause of action" under the state Civil Rights Act but has up to three years to assert a claim in contrast to the 180 days allowed under Title VII. This extended period would also presumably accord an employee sufficient time to seek "internal resolution or simply to give the employer a second chance" without endangering her claim. Further, at least some reasonable observers might presume the three-year limitations period accords an employee sufficient time to determine that a discriminatory act has truly "unfolded."

[7] See, e.g., *King v Georgia Power Co*, 295 F Supp 943, 946 (ND Ga, 1968) (holding that "[t]he failure to allege that the complaint was filed with the EEOC [Equal Employment Opportunity Commission] within 90 days of the alleged unfair employment practices is of no importance, for the violations of Title VII alleged in the complaint may be construed as 'continuing' acts"); *Bartmess v Drewrys USA, Inc*, 444 F2d 1186, 1188 (CA 7, 1971) (holding that "the ninety day limitation is no bar when a continuing practice of discrimination is being challenged rather than a single, isolated discriminatory act").

therefore perpetuates the consequences of forbidden discrimination." *Id.* at 557. Therefore, she alleged that the "continuing violations" doctrine should be applied to allow her to obtain relief for the now-untimely 1968 firing. However, the United States Supreme Court held that merely demonstrating a "present effect to a past act of discrimination" is insufficient to create a continuing violation. *Id.* at 558. "[T]he emphasis should not be placed on mere continuity; the critical question is whether any present violation exists." *Id.* Therefore, in order to support a discrimination claim on a "continuing violations" theory, an employee must first demonstrate the existence of a present violation. Since the employee in *Evans* was unable to demonstrate any violation within the time limitations of Title VII, her claim was barred as untimely.

Sumner found the federal precedent persuasive and held that the "continuing violations" doctrine applied to claims under both the Civil Rights Act and the Handicappers' Civil Rights Act, MCL 37.1101 *et seq*. This Court adopted the *Evans* requirement that an employee must first demonstrate that a violation has taken place within the limitations period. *Sumner*, *supra* at 536. Once an employee has demonstrated this, he or she must then demonstrate either that his or her employer has engaged in a "policy of discrimination" or has engaged in "a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern . . . ." *Id.* at 528. There are three factors to consider in determining whether an employer has been engaged in a series of allegedly discriminatory acts:

> "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.,* a biweekly paycheck) or more

> in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" [*Sumner, supra* at 538, quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983).]

Whatever the merits of the policy crafted by *Sumner*, it bears little relationship to the actual language of the relevant statute of limitations, MCL 600.5805, and MCL 600.5827. Fundamental canons of statutory interpretation require us to discern and give effect to the Legislature's intent as expressed by the language of its statutes. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). If such language is unambiguous, as most such language is, *Klapp v United Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003), "we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto, supra* at 402.

MCL 600.5805 provides, in pertinent part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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>
> (10) The period of limitations is 3 years after the time of

> the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

MCL 600.5827 provides that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Thus, § 5805 requires a plaintiff to commence an action within three years of each adverse employment act by a defendant. Section 5805 does not say that a claim outside this three-year period can be revived if it is somehow "sufficiently related" to injuries occurring within the limitations period. Rather, the statute simply states that a plaintiff "shall not" bring a claim for injuries outside the limitations period. Nothing in these provisions permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as "continuing violations." To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature.[8]

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[8] The dissent is utterly deconstructionist in its attitude toward statutes of limitations, which is its right but which attitude nonetheless bears no relationship to that of the Legislature. We are told by the dissent, for example, that we often cannot determine when discriminatory acts have taken place, when civil rights claims have accrued or manifested themselves, whether an act of discrimination is "discrete or nondiscrete," and that even discrete acts of discrimination may not be readily identifiable. *Post* at 298. Doubtless, there are difficult evidentiary issues in the realm of civil rights as in most other realms of the law. Such difficulties, however, do not constitute authorization for ignoring the express direction of the Legislature that violations of the Civil Rights Act are to *be* subject to a period of limitations, one that is $2^{1}/_{2}$ years longer than the federal period of limitations. The dissent is obviously correct that the cost of a statute of limitations is that some acts of discrimination will go unredressed. This is the cost of *any* statute of limitations, but nonetheless a cost that the Legislature apparently believes is outweighed by the benefits of setting a deadline on stale claims. While the dissent may be

An additional flaw in *Sumner's* reasoning is its unduly heavy reliance on federal case law, particularly *Evans*. While federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis. Here, not only does the "continuing violations" doctrine in Michigan conflict with the requirements of §§ 5805 and 5827, but, at least arguably, the federal doctrine is given affirmative support by language in Title VII that is absent from the Civil Rights Act. In 1972, Congress amended Title VII to extend the period within which an employee must file a complaint with the Equal Employment Opportunity Commission from 90 days to 180 days. At the same time, Congress imposed a two-year limit on back pay awards. Thus, Congress implicitly recognized an employee's right to recover damages for discriminatory acts beyond those that occurred within the 180-day period. *Sumner* noted that such amendment constituted an "implicit endorsement of the continuing violation theory," because Congress allowed employees to recover damages for discriminatory acts beyond those that occurred within the 180-day period. *Sumner, supra* at 526. However, *Sumner* failed to note that there is no corresponding provision in Michigan law

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correct that the "continuing violations" doctrine "better protects" the victims of discrimination, *post* at 299, and that it is a "highly workable and preferable" doctrine, *post* at 300, it is not the doctrine chosen by the Legislature.

that even implicitly endorses the "continuing violations" doctrine. Thus, rather than supporting *Sumner's* holding, the existence of the federal statute leads to the opposite conclusion—that the "continuing violations" doctrine is contrary to Michigan law and, therefore, that federal precedent should not have been imported into Michigan law.[9]

Therefore, we overrule *Sumner* and hold that a person must file a claim under the Civil Rights Act within three years of the date his or her cause of action accrues, as required by § 5805(10).[10] That is, "three years" means three years. An employee is not permitted to bring a lawsuit for employment acts that accrue beyond this period, because the Legislature has deter-

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[9] We note that the United States Supreme Court recently rejected the "continuing violations" doctrine for Title VII claims with regard to discrete acts because it is contrary to the statute of limitations. *Nat'l R Passenger Corp v Morgan*, 536 US 101; 122 S Ct 2061; 153 L Ed 2d 106 (2002).

[10] Although we concur with the dissent that the doctrine of stare decisis constitutes " 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process,' " *post* at 297, quoting *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000), so also are these values promoted by the separation of powers doctrine, which holds that it is the responsibility of the judiciary to respect the intentions of the Legislature by giving faithful meaning to the words of the law. In this case, we conclude that the values identified in *Robinson*, and invoked by the dissent, are substantially better served by restoring the law to its written meaning rather than maintaining the judicial amendments of *Sumner*. Not only, in our judgment, are laws generally made more "evenhanded, predictable and consistent" when their words mean what they plainly say, and when all litigants are subject to the equal application of such words, but laws are also made more accessible to the people when each of them is able to read the law and thereby understand his or her rights and responsibilities. When the words of the law bear little or no relationship to what courts say the law means (as in *Sumner*), then the law increasingly becomes the exclusive province of lawyers and judges.

mined that such claims should not be permitted.[11] Whether or not the "continuing violations" exception of *Sumner* constitutes a useful improvement in the law, there is no basis for this Court to construct such an amendment.[12]

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[11] The principal difference between the majority and the dissent in approaching the interpretative process is that the majority is content to rely on the actual words used by the Legislature while the dissent insists on ascribing its own "purpose" to the act, *post* at 302 n 6, and interpreting the act consistent with this statement of purpose, no matter what barriers to this end have been inconveniently created by the Legislature in failing to use words that serve the dissent's self-stated "purpose." While it can scarcely be gainsaid that the purpose of the Civil Rights Act is "to root out discrimination and make injured parties somewhat whole," *id*., that purpose must be understood in the context of a competing "purpose" to ensure that relief under the act be subject to a statute of limitations. While the dissent apparently views a statute of limitations as compromising the act's "purpose," i.e., its *own* characterization of such purpose, we believe that it is better understood as requiring a more precise and fine-tuned statement of the act's purpose, one predicated on the intentions of the Legislature rather than on the preferences of the dissent. The words of any statute can be effectively undermined by a sufficiently generalized statement of "purpose" that is unmoored in the actual language of the law.

[12] This Court has rejected similar attempts to modify statutes of limitations. See *Boyle v Gen Motors Corp*, 468 Mich 226, 231-232; 661 NW2d 557 (2003) (rejecting application of the discovery rule to extend the statute of limitations in fraud cases); *Secura Ins Co v Auto-Owners Ins Co*, 461 Mich 382, 387-388; 605 NW2d 308 (2000) (holding that the doctrine of judicial tolling cannot be applied in the absence of statutory language permitting such tolling); *Magee v DaimlerChrysler Corp*, 472 Mich 108, 113; 693 NW2d 166 (2005) (noting that the "continuing violations" doctrine "renders nugatory the period of limitations established by the Legislature in MCL 600.5805[10]"). While the judicial temptation to relax a statute of limitations may be understandable in the context of a lawsuit in which a plaintiff, alleging that he or she has suffered a serious wrong, has been denied his or her day in court, the costs involved in terms of undermining the clarity and predictability of the law, allowing stale complaints to proceed, and injecting uncertainty into a myriad of legal relationships, are considerable, not to mention that a court that does so would be exercising "legislative," not "judicial," power. See Const 1963, art 3, § 2; art 4, § 1; art 6, § 1.

Accordingly, plaintiff's claims of retaliatory discrimination arising from acts occurring before June 21, 1992, are untimely and cannot be maintained. Without these untimely acts, plaintiff's claim is limited to acts occurring five to eleven years[13] after she filed her grievance. In light of this gap, there is insufficient evidence to allow a reasonable juror to find a causal link between the 1987 grievance and the discriminatory acts falling within the limitations period.

Furthermore, in order to show causation in a retaliatory discrimination case, "[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). There is no evidence to suggest any distinction between the promotion denial that occurred while plaintiff was in Cathcart's chain of command and those denials involving supervisors who had no knowledge of plaintiff's grievance. Five supervisors, including four who were directly responsible for postgrievance promotion decisions involving plaintiff, testified that they were unaware that plaintiff had filed any grievance. Plaintiff failed to introduce any evidence to contradict that testimony. However, despite the First North supervisors' lack of knowledge about the grievance, they treated her requests for promotions in the same manner that Cathcart did, i.e., they denied them. Because these supervisors were not aware of the grievance, they could not have "retaliated" against plaintiff for its filing. Further, there is no evidence that plaintiff's job qualifications changed in any meaningful way in the

[13] The first actionable claim in 1992 is five years after plaintiff's 1987 national-origin grievance and plaintiff claims that she was treated poorly up to the date of the 1998 trial, which was eleven years after the grievance was filed.

time between the denial by Cathcart and the denials by the other supervisors at First North. Thus, a juror could not reasonably conclude that the reasons behind the denials within First North were related to the grievance.

Plaintiff has failed to produce evidence affirmatively showing, as is her burden, that the reasons underlying the promotion denial involving Cathcart were any different from the denials involving supervisors who were unaware that plaintiff had filed a grievance. *West*, *supra* at 183-184; *DeFlaviis*, *supra*. It appears that both the trial court and the Court of Appeals identified a "causal connection" between the grievance and the promotion denials simply on the basis of timing—that is, because the denials occurred after the grievance, there must be a functional relationship. This is the kind of *post hoc, ergo propter hoc* reasoning rejected in *West*. We reject such reasoning in this case as well.

Similarly, plaintiff failed to establish that she was treated poorly by Cathcart and the First North supervisors *as a result of* the grievance. Plaintiff was unable to establish that Cathcart's treatment of plaintiff was distinguishable in any way from her treatment by supervisors who were unaware of the grievance.[14]

First, plaintiff claimed that Cathcart treated her differently from other employees by refusing to give her a key to the facility. However, her supervisor at First North, who denied any knowledge of the grievance, similarly refused to give plaintiff a key. Second, plaintiff claimed that her work was subjected to greater scrutiny

[14] In fact, Cathcart testified that he did not remember, and would not have been troubled by, the grievance. Further, plaintiff admitted that, during the period of alleged poor treatment, Cathcart intervened on her behalf when another supervisor sought to change her work hours.

by Cathcart than that of her coworkers. However, she also claimed that another First North supervisor, who is no longer an employee of defendant and did not testify, wrote her several memos a day "unfairly attacking" her performance. Finally, both plaintiff and the Court of Appeals found it noteworthy that she was moved to a "disgusting" office after the transfer to First North. However, the supervisor who assigned her that office testified that he was unaware of the grievance and had informed her that it was only a temporary situation. Under these circumstances, we conclude that no juror could have reasonably concluded that plaintiff was subjected to poor treatment *because* she had been engaged in "protected activity" by filing a grievance claiming national-origin discrimination.

Finally, plaintiff has failed to demonstrate that Cathcart's alleged derogatory comments based on national origin establish any causal connection between the grievance and the adverse employment action. In order to establish such a connection, plaintiff needed to show that the comments demonstrated Cathcart's discriminatory animus toward her and that, as a result of such animus, Cathcart retaliated against her for filing the grievance.

Plaintiff claims that Cathcart made a racially derogatory statement regarding Indians.[15] Plaintiff testified that Cathcart responded to the news that her son had

[15] Cathcart allegedly made another racially derogatory statement regarding Indians in 1989; however, it is outside the limitations period. We also note that Cathcart allegedly made two statements concerning African-Americans. These seem to have little bearing in this case because plaintiff is not African-American. Further, one of these statements occurred at least two years before plaintiff's grievance regarding national-origin discrimination and the other occurred approximately nine years afterward.

been admitted to a medical program by stating, "I don't know how many Indian doctors we need."[16] This statement does not pertain in any way to the promotion process; neither is it directed toward plaintiff in terms of evaluating her work performance or threatening any future treatment of her. See *Sniecinski*, *supra* at 136 n 8. However inappropriate or ill-informed this statement, it is better characterized, in our judgment, as a "stray comment" than as reflective of any "pattern of biased comments . . . ."[17] *Id*.

More to the point, for the same reason that plaintiff here has failed to demonstrate that Cathcart's treatment of her did not vary in any appreciable way from her treatment by other supervisors—concerning whom there is no evidence of even such "stray comments"—we do not believe that plaintiff has demonstrated that she was subjected to denials of promotions or otherwise poor treatment by defendant *on the basis of* her grievance. Again, we reiterate that the question is not the propriety or seemliness of Cathcart's statements, but merely whether such statements establish a causal link between plaintiff's grievance and her subsequent treatment by defendant.

In light of insufficient evidence that plaintiff was not promoted or otherwise treated poorly because she engaged in a "protected activity," i.e., having filed a grievance against defendant alleging national-origin discrimination, plaintiff has failed to establish a retaliation claim under the Civil Rights Act.

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[16] While plaintiff did not indicate when this statement was made, a juror could infer that it was made sometime between 1992 and 1995.

[17] This conclusion is underscored by the fact that the jury, after learning of all these statements, concluded that plaintiff had not been discriminated against on the basis of national origin.

IV. CONCLUSION

We conclude that the "continuing violations" doctrine is contrary to the language of § 5805 and hold, therefore, that the doctrine has no continued place in the jurisprudence of this state. Accordingly, *Sumner* is overruled. Further, we conclude that there is insufficient evidence to support plaintiff's claims of retaliation based on her opposition to sexual harassment and those acts by her employer following the grievance that were within the statutory limitations period. Accordingly, we reverse the judgment of the Court of Appeals and remand the matter to the trial court for entry of judgment in favor of defendant.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*dissenting*). I agree with the majority's conclusion that there was insufficient evidence of retaliation based on plaintiff's alleged opposition to the sexual harassment of her coworkers.

I disagree with the majority's conclusion that plaintiff presented insufficient evidence that she was retaliated against for filing a grievance. Moreover, I disagree with the majority's decision to overrule *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), and abolish the continuing violations doctrine. Finally, I disagree with the majority's rationale that because the continuing violations doctrine no longer applies, evidence of prior acts must necessarily be excluded from consideration. Accordingly, I must respectfully dissent.

I. PLAINTIFF PRESENTED SUFFICIENT EVIDENCE OF RETALIATION FOR FILING A GRIEVANCE

The Michigan Civil Rights Act "is aimed at 'the

prejudices and biases' borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases." *Miller v C A Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984) (citations omitted). To this end, the Civil Rights Act, MCL 37.2701, provides in pertinent part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

The Court of Appeals has observed that the purposes of the retaliation provisions of the act are "to protect access to the machinery available to seek redress for civil rights violations and to protect operation of that machinery once it has been engaged." *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 440; 566 NW2d 661 (1997) (citation omitted).

This Court has yet to formally delineate the prima facie elements of a retaliation claim under the Michigan Civil Rights Act. The Court of Appeals, however, has relied on federal precedent to formulate its own test. Today, the majority adopts the Court of Appeals test as its own. See *ante* at 273. Thus, to establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *DeFlaviis*, *supra* at 436,

citing *Polk v Yellow Freight Sys, Inc*, 876 F2d 527, 531 (CA 6, 1989), *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1310 (CA 6, 1989), and *Kroll v Disney Store, Inc*, 899 F Supp 344, 348 (ED Mich, 1995). Using these elements, I would conclude that the trial court properly denied defendant's motion for judgment notwithstanding the verdict (JNOV) on plaintiff's claim that she was retaliated against for filing a grievance against her supervisor.

As noted by the majority, the first two elements of the test are satisfied because plaintiff engaged in protected activity and defendant was aware that plaintiff had engaged in this activity. See *ante* at 277-278. Moreover, I would conclude that sufficient evidence was presented on the third and fourth elements; namely, there was sufficient evidence that defendant took adverse employment action against plaintiff and there was a causal connection between the filing of the grievance and the adverse employment action. With regard to these elements, I find the Court of Appeals characterization of the evidence persuasive. The Court of Appeals noted:

> [P]laintiff sufficiently established the elements of a retaliation claim by way of her evidence that (1) plaintiff filed a grievance alleging racial discrimination in June 1987; (2) Cathcart, a supervisor, knew about the grievance; (3) after filing the grievance, plaintiff failed to receive the next promotion that she sought, posted in December 1988, despite being qualified for the position; (4) plaintiff failed to receive seven total promotions between 1989 and 1997, despite being qualified for the positions; (5) individuals less qualified than plaintiff received promotions while plaintiff did not; (6) in 1994, plaintiff was transferred to a windowless office from which she could hear noises emanating from the adjacent bathroom, while persons more senior [sic] to plaintiff received better offices; (7) in 1996, Cathcart made a statement disparaging to blacks; (8) Cathcart made another comment disparaging to Indians; (9) Cath-

> cart reprimanded plaintiff but not others for minor infractions; (10) Cathcart ignored plaintiff in staff meetings and treated her poorly in the hallways; (11) in 1984 or 1985, Cathcart used the word "n——-" in referring to blacks; and (12) Cathcart remained in plaintiff's chain of command throughout the years. [Unpublished opinion per curiam of the Court of Appeals, issued March 29, 2002 (Docket No. 223829).][1]

A motion for JNOV should be granted only if the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Orzel v Scott Drug Co*, 449 Mich 550, 557-558; 537 NW2d 208 (1995). This Court reviews de novo a trial court's decision to grant or deny a motion for JNOV, and likewise reviews the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004). Under this standard, I cannot say that the evidence detailed by the Court of Appeals fails to establish a claim of retaliation as a matter of law. Moreover, while reasonable jurors could reach different conclusions, I cannot say that no reasonable juror could conclude that plaintiff was retaliated against for filing a grievance. Thus, I would hold that the trial court properly denied defendant's motion for JNOV on the retaliation theory.[2]

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[1] I disagree with the majority's contention that these statements should be considered mere stray remarks. Moreover, I find wholly unpersuasive the majority's logic that the derogatory statements concerning African-Americans are irrelevant because plaintiff is Indian.

[2] As noted previously, I tend to agree with the majority that plaintiff presented insufficient evidence that she was retaliated against for her alleged opposition to the sexual harassment of her coworkers. However, I disagree with the majority's election to decide, in dictum, whether responsive physical behavior constitutes protected activity. Given the majority's ultimate conclusion, this portion of the majority's opinion is

II. *SUMNER* AND THE CONTINUING VIOLATIONS DOCTRINE

The Michigan Civil Rights Act contains no internal statute of limitations. Nonetheless, this Court has applied the general three-year limitations period set forth in MCL 600.5805 to claims brought under the act. See, e.g., *Mair v Consumers Power Co*, 419 Mich 74; 348 NW2d 256 (1984). However, in recognition that such claims tend to "unfold rather than occur," this Court unanimously adopted a narrow exception to the statute of limitations—the continuing violations doctrine. *Sumner*, *supra* at 526. The continuing violations doctrine dictates that unlawful acts that occur beyond the period of limitations are actionable, as long as the acts are sufficiently related to constitute a pattern and one of the acts occurred within the period of limitations.

As noted by the *Sumner* Court, the federal courts developed the continuing violations doctrine as a narrow exception to Title VII's short limitations period. This Court detailed the reasons for the exception, reasons that still ring true today:

> These courts expressed concern with a number of factors which they felt militated against a strict application of the limitation requirement. First, Title VII is a remedial statute whose purpose is to root out discrimination and make injured parties whole. Second, employees are generally lay people, who do not know that they must act quickly or risk losing their cause of action. An employee may fear reprisal by the employer, or may refer the matter to a union, which may not take any action within the limitation period. Employees may also delay filing their complaints in the hope of internal resolution or simply to give the employer a second chance. Third, and most importantly, many discriminatory acts occur in such a manner that it is

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unnecessary. Moreover, although this issue was raised by the Attorney General as amicus curiae, this issue was neither raised below nor specifically briefed by the parties.

> difficult to precisely define when they took place. One might say that they unfold rather than occur. [*Id*. at 525-526.]

In light of the United States Supreme Court's decision in *United Air Lines, Inc v Evans*, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977), this Court observed that the continuing violations doctrine generally consists of two subtheories:

> The first subtheory involves allegations that an employer has engaged in a continuous policy of discrimination. In such a case, the plaintiff is alleging that "he is challenging not just discriminatory conduct which has affected him, but also, or alternatively, the underlying employment system which has harmed or which threatens to harm him and other members of his class."
>
> The second subtheory, the "continuing course of conduct" or "series of events" situation is relevant where an employee challenges a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period. [*Sumner*, *supra* at 528 (citations omitted).]

Here, plaintiff is alleging that defendant retaliated against her through a continuing course of conduct. Thus, the second subtheory applies to this case.

In determining whether a continuing course of conduct exists under the second subtheory, this Court adopted the approach set forth by the Fifth Circuit Court of Appeals:

> "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's

> awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate?" [*Sumner*, *supra* at 538, quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983).]

Under these circumstances, I would conclude that the continuing violations doctrine applies to plaintiff's retaliation claim. First, the acts involve the same type of continuing violation: repeated denials of promotions and disparate treatment in retaliation for engaging in protected activity. Second, defendant's acts occurred with frequency: plaintiff was consistently denied every promotion she applied for from the date the grievance was filed. Finally, on these facts, the consistent denials of promotions and disparate treatment did not have the degree of permanence that would necessarily preclude application of the continuing violations doctrine. Plaintiff did not suspect that the impetus for the adverse actions was the filing of the grievance until much later. While retaliatory conduct may be considered a discrete act under some circumstances, the facts of this case demonstrate that retaliation is often just as subtle and hard to detect as discrimination. Thus, I would apply the continuing violations doctrine and conclude that all the adverse employment actions taken by defendant against plaintiff are actionable.

III. THE MAJORITY'S DECISION TO OVERRULE *SUMNER*

The majority reasons that *Sumner* and the continuing violations doctrine have no place in Michigan law because they bear little relationship to the actual language of MCL 600.5805 and 600.5827. Rather, MCL 600.5805 "requires a plaintiff to commence an action within three years of each adverse employment act by a

defendant. . . . Nothing in these provisions permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as 'continuing violations.' " *Ante* at 282. Moreover, the majority concludes that *Sumner* "unduly" relied on federal case law. *Id.* at 283. According to the majority, the continuing violations doctrine is arguably given support by the language of Title VII, unlike the language of Michigan's statutory provisions. Additionally, Congress amended Title VII to impose a two-year limit on recovering back pay and, thus, implicitly endorsed the doctrine. The majority posits that there is no corresponding provision in Michigan law that even implicitly endorses the continuing violations doctrine. Accordingly, the majority overrules *Sumner* and holds that a person must file a claim under the Civil Rights Act within three years of the date his or her cause of action accrues.

"[T]his Court has consistently opined that, absent the rarest circumstances, we should remain faithful to established precedent." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996). The doctrine of stare decisis is " 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000) (citation omitted). The current Court has detailed four principles to consider before established precedent is overruled: "(1) whether the earlier case was wrongly decided,[3] (2) whether the decision defies 'practical workability,' (3) whether reli-

[3] Is not this "principle" a given? As I have noted previously, it would seem strange indeed for a "correctly decided" decision to be trashed.

ance interests would work an undue hardship, and (4) whether changes in the law or facts no longer justify the questioned decision." *Pohutski v City of Allen Park*, 465 Mich 675, 694; 641 NW2d 219 (2002). In my view, none of these factors weighs in favor of overruling *Sumner* and abolishing the continuing violations doctrine.

First, I cannot say that *Sumner* was wrongly decided. Like its federal counterpart, the Civil Rights Act "is a remedial statute whose purpose is to root out discrimination and make injured parties whole." *Sumner*, *supra* at 525. Because the Civil Rights Act is remedial in nature, it should be liberally construed. *Kassab v Michigan Basic Prop Ins Ass'n*, 441 Mich 433, 467; 491 NW2d 545 (1992) (CAVANAGH, C.J., dissenting); see also *Kassab*, *supra* at 451 (MALLETT, J., dissenting).

In *Sumner*, *supra* at 526, this Court astutely observed that "many discriminatory acts occur in such a manner that it is difficult to precisely define when they took place." Indeed, determining when a claim accrues or occurs is surprisingly difficult because violations of the act may not manifest themselves except at the end of a lengthy period. Whether a particular act is discrete or nondiscrete often depends on the circumstances of the individual case. And even so-called discrete acts may not always be readily identifiable. In fact, the United States Supreme Court recently left open the question whether discriminatory employment actions are subject to some sort of discovery rule. The Court noted that

> [t]here may be circumstances where it will be difficult to determine when the time period should begin to run. One issue that may arise in such circumstances is whether the

> time begins to run when the injury occurs as opposed to when the injury reasonably should have been discovered. But this case presents no occasion to resolve that issue. [*Nat'l R Passenger Corp v Morgan*, 536 US 101, 114 n 7; 122 S Ct 2061; 153 L Ed 2d 106 (2002).]

The continuing violations doctrine remains a salutary tool because, as a practical matter, it may be difficult to determine when a violation of the act was committed or when a civil rights claim accrues for purposes of MCL 600.5827.[4] Simply stated, a victim of discrimination may not be aware that he or she is being or has been discriminated against until after the period of limitations has expired. The continuing violations doctrine better protects the victim and does not reflexively give the discriminating party the benefit of judicial hindsight. However, the *Sumner* Court was careful to explain that not every prior act will be actionable under the continuing violations doctrine. Even though discriminatory acts may be difficult to ascertain, the continuing violations doctrine will not apply if there is not a pattern, the acts do not involve the same subject matter, the acts do not occur with frequency, or the plaintiff should have been aware that his or her rights under the act were being violated. In my view, *Sumner* remains a sound decision because it seeks to ameliorate the effects of strictly applying the limitations period where it is difficult to ascertain exactly when a civil rights claim accrues.

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[4] MCL 600.5827 provides:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.

Second, *Sumner* does not defy practical workability. As noted above, just the opposite is true. Because it is often extremely difficult to ascertain when a claim accrues, application of the continuing violations doctrine proceeds on a case-by-case basis. The doctrine is generally analyzed under two distinct subtheories and this Court has set forth a clear three-factor test to assist courts in determining whether a continuing course of discriminatory conduct exists. *Sumner*, *supra* at 538. In my view, *Sumner* remains a highly workable and preferable decision.

Third, overruling *Sumner* would work an undue hardship because of the reliance interests placed on that decision. *Sumner* has been entrenched in this state's jurisprudence for nearly twenty years. Further, as a practical matter, the continuing violations doctrine encourages lay employees, who may not be supremely confident that their rights are being violated, to seek internal resolution of their suspected complaints. Needless to say, such a course of action is advantageous to all persons involved. In reliance on *Sumner*, an employee could rest assured that possible violations of the Civil Rights Act would not become stale while attempting to resolve the complaint internally. Moreover, employees' fear of reprisals by employers was greatly diminished because of *Sumner's* safeguards. Because of *Sumner*, both employees and employers were relieved of the burden of being on "litigation watch" at the first sign of trouble. Employees and employers have relied on *Sumner* for quite some time and conducted their affairs and operations accordingly.

In my view, affirming the principles announced in *Sumner* would work far less of a hardship than overruling that decision. Indeed, opponents of the continu-

ing violations doctrine should be careful what they wish for. Overruling *Sumner* may actually encourage employees to run to court at the first sign of trouble. This will put a strain on everyone involved in the process—the employee, the employer, and the courts. Such inherent tension was alleviated by *Sumner* and the continuing violations doctrine. Thus, because the citizens of this state have justifiably relied on *Sumner* for nearly two decades and overruling that decision would unnecessarily disrupt these reliance interests, I would refrain from overruling *Sumner*.

Fourth and finally, there has been no change in the law or facts that has cast doubt on the wisdom of *Sumner*. Indeed, this Court has consistently cited and suggested that *Sumner*'s reliance on federal precedent was warranted. See, e.g., *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000) ("We are many times guided in our interpretation of the Michigan Civil Rights Act by federal interpretations of its counterpart federal statute. See, e.g., *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525; 398 NW2d 368 (1986).").[5] Thus, there has been no seismic shift, except for the makeup of this Court, that would warrant overruling *Sumner* and abolishing the continuing violations doctrine.

In sum, I disagree with the majority's decision to overrule *Sumner*. I believe that the continuing viola-

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[5] See also *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993) ("While this Court is not compelled to follow federal precedent or guidelines in interpreting Michigan law, this Court may, 'as we have done in the past in discrimination cases, turn to federal precedent for guidance in reaching our decision.' *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525; 398 NW2d 368 (1986)."); *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 375; 446 NW2d 95 (1989) ("This Court has frequently drawn from federal court precedent in interpreting other aspects of the Civil Rights Act. See, e.g., *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525; 398 NW2d 368 (1986) . . . .").

tions doctrine remains a venerable approach to analyzing claims brought under the Michigan Civil Rights Act.[6]

IV. THE MAJORITY'S APPLICATION OF ITS NEW RULE IS FUNDAMENTALLY FLAWED

Even assuming the continuing violations doctrine no longer pertains, the majority's additional reasoning cannot withstand scrutiny. Under the continuing violations doctrine, unlawful acts that occur beyond the period of limitations are *actionable*, as long as the acts are sufficiently related to constitute a pattern and one of the acts occurred within the period of limitations. The majority properly acknowledges this point of law.[7]

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[6] The majority posits that my conclusion to reaffirm the principles announced in *Sumner* stems from my preference to interpret the Civil Rights Act in harmony with my "own," "self-stated" "characterization" of the purpose of the act. *Ante* at 285 n 11. As detailed in *Sumner*, *supra* at 525, the purpose of the act is "to root out discrimination and make injured parties whole." In the same footnote, however, the majority acknowledges that *Sumner's* stated purpose of the act is undeniable. Nonetheless, the majority concludes that this undeniable purpose must heed another "competing" purpose–"to ensure that relief under the act be subject to a statute of limitations." *Ante* at 285 n 11. Accordingly, the majority would "fine-tune" the act's undeniable purpose and restate the "precise" purpose of the Civil Rights Act as follows: to intermittently root out discrimination and make injured parties somewhat whole. I prefer the undeniable purpose previously articulated by this Court because it is more consistent with the Legislature's intent. While the majority claims that the words of any statute can be undermined by considering the statute's purpose, today's decision demonstrates that the opposite proposition is equally true. Namely, a remedial statute can be tortured by a preference to ignore, not effectuate, *the Legislature's* purpose in enacting the statute.

[7] "Nothing in these provisions permits a plaintiff *to recover for injuries* outside the limitations period when they are susceptible to being characterized as 'continuing violations.' To allow *recovery* for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature." *Ante* at 282 (emphasis added). "An employee is not permitted *to bring a lawsuit* for employment acts that

Thus, the natural consequence of overruling *Sumner* and abolishing the continuing violations doctrine is that acts occurring beyond the period of limitations are no longer *actionable*. Yet the majority goes even further and reasons that evidence of acts occurring outside the period of limitations must be excluded.[8] Such a conclusion is fundamentally flawed.

For example, in *Morgan*, *supra* at 105, the United Stated Supreme Court held that Title VII "precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period."[9] While I disagree with the *Morgan* Court's holding, it is important to observe the Court's subsequent rationale. In light of its holding, the *Morgan* Court noted, "As we have held, however, this time period for filing a charge is subject to equitable doctrines such as tolling or estoppel." *Id*. at 113. Importantly, the Court also reasoned, "*Nor does the statute bar an employee from using*

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accrue beyond this period, because the Legislature has determined that such claims should not be permitted." *Id*. at 284-285 (emphasis added).

[8] "[W]e conclude that, *once evidence of acts that occurred outside the statute of limitations period is removed from consideration*, there was insufficient evidence of retaliation based on either plaintiff's alleged opposition to sexual harassment or her filing of a grievance . . . ." *Ante* at 266 (emphasis added). "We conclude that, *absent evidence of these acts*, there is insufficient evidence to establish a causal link between the 1987 grievance and any retaliatory acts occurring within the limitations period." *Id*. at 278 (emphasis added).

[9] However, I must note that the *Morgan* Court held that the continuing violations doctrine still applies to hostile work environment claims. "We also hold that consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible *for the purposes of assessing liability*, so long as any act contributing to that hostile work environment takes place within the statutory time period." *Id*. (emphasis added). Here, the majority does not attempt to exercise the same degree of prudence and reason. Rather, the majority simply concludes that all claims brought under the Civil Rights Act, whether premised on discrete or nondiscrete acts, are subject to the statute of limitations.

the prior acts as background evidence in support of a timely claim." *Id*. (emphasis added). This rationale comports with the natural consequences of abolishing the continuing violations doctrine: prior acts outside the period of limitations are not *actionable* (i.e., cannot serve as the basis for imposing liability), but these acts may still be used as background evidence to support a timely claim. Thus, the majority's conclusion that acts occurring outside the limitations period must be "removed from consideration" is unacceptable. *Ante* at 266.

I disagree with the majority's stated conclusion that evidence of acts occurring outside the limitations period must be "removed from consideration" because, as a practical matter, such evidence often must be considered, as the majority's rationale confirms. While certainly not a novel approach, I believe that it is entirely proper to examine relevant evidence even though such evidence may itself not be actionable. Stated differently, the decision whether to admit certain evidence is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion. See, e.g., *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Therefore, even though so-called untimely acts may not be *actionable* under the majority's approach, such acts may be considered as relevant background evidence in most instances. In my view, the majority misunderstands the consequences of overruling *Sumner*.

In response, the majority essentially argues that the United States Supreme Court in *Morgan* attempted to resurrect the continuing violations doctrine after having overruled the doctrine." The majority moans that consideration of background evidence would allow an employee to indirectly recover for past acts. The majority, transfixed with destroying every shred of the

additional protections afforded by the continuing violations doctrine, has lost sight of the bigger picture. The majority admittedly fails to see the practical difference between the *Sumner* rule and the logic employed by the *Morgan* Court. I would simply urge reexamination of these opinions because the differences are quite clear.

The United States Supreme Court concluded that the result of abolishing the continuing violations doctrine is that untimely claims are not actionable, period. Inexplicably, however, the majority feels compelled to conclude that any evidence that may have once constituted a claim under the Civil Rights Act, but is now barred by the statute of limitations, may never be admitted. But, again, this is not the majority's decision to make. If the trial court determines that evidence of the now time-barred claim is relevant to the timely claim, such evidence may be admitted as background evidence, but may not serve as the basis for any damage award. Sometimes the time-barred claim will not be relevant and the trial court may conclude that such background evidence is unnecessary. In other instances, the trial court may exercise its sound discretion and admit such evidence. The majority, however, oversteps its bounds when it concludes that such evidence may never be relevant and, therefore, may never be considered. I do not know how the *Morgan* decision could make this point of law any clearer.

In sum, I believe that the majority's resolve to dismantle the continuing violations doctrine has led it to an illogical result. The majority is essentially arguing that, in *Morgan*, the United States Supreme Court attempted to resurrect the continuing violations doctrine after having overruled the doctrine. This argument makes no sense. Rather, I believe that the

Morgan Court properly acknowledged that overruling the continuing violations doctrine means that untimely claims are not actionable, but, in some instances, the trial court may determine that evidence of these untimely claims may be admissible to provide necessary context.

V. CONCLUSION

I would hold that plaintiff presented sufficient evidence for a reasonable juror to conclude that she was retaliated against for filing her grievance. Moreover, I would affirm the principles announced in *Sumner*, and apply the continuing violations doctrine to plaintiff's claim of retaliation based on the grievance theory. Finally, even if I were to agree with the majority that the continuing violations doctrine is no longer viable, the natural consequence of abolishing that doctrine is not to exclude untimely acts from consideration. Rather, abolishing the continuing violations doctrine simply means that untimely acts are not actionable.[10]

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*dissenting*). I agree with the reasoning and conclusions of Justice CAVANAGH's dissenting opinion. This Court unanimously adopted the continuing violations doctrine in *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505; 398 NW2d 368 (1986). Justice BRICKLEY authored *Sumner,* and was joined by Justices CAVANAGH, LEVIN, and ARCHER. Justice RILEY, joined by Justice BOYLE, concurred in the adoption of the doctrine, but disagreed with the majority's application of it to the facts of the case. Chief Justice WILLIAMS, in a

[10] In light of the majority's resolution of this case, I too do not reach the other issues raised on appeal or in plaintiff's cross-appeal.

separate opinion, also concurred in the adoption of the doctrine. I am not persuaded that the adoption of the doctrine was unwarranted or that, after nineteen years, the doctrine should be abandoned.

KELLY, J., concurred with WEAVER, J.

PEOPLE v WILLIAMS

Docket No. 127115. Decided May 11, 2005. On application by the prosecution for leave to appeal, the Supreme Court, in lieu of granting leave, reversed the judgment of the Court of Appeals and remanded the case to the circuit court for reinstatement of the defendant's convictions and sentences.

John L. Williams was convicted in a bench trial in the Cheboygan Circuit Court, Scott L. Pavlich, J., of possession with intent to deliver fifty grams or more but less than 225 grams of a substance containing cocaine and possession with intent to deliver marijuana. The defendant appealed, challenging the trial court's denial of his motion to suppress evidence discovered during the search of his vehicle after an initial traffic stop for speeding. The Court of Appeals, BANDSTRA, P.J., and FITZGERALD and HOEKSTRA, JJ., reversed the convictions on the basis that the police officer exceeded the scope of the initial stop by asking the defendant to step out of his vehicle and answer questions about his travel plans while acting on a "hunch" and with no reasonable suspicion of criminal activity. Unpublished opinion per curiam, issued August 5, 2004 (Docket No. 249853). The prosecution sought leave to appeal.

In an opinion per curiam, signed by Chief Justice TAYLOR, and Justices CAVANAGH, WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The detention that occurred in this matter was reasonable and did not exceed the proper scope of a traffic stop. Because the defendant's Fourth Amendment rights were not violated as a result of the detention, the consent he gave for the search of his vehicle was valid. The judgment of the Court of Appeals must be reversed and the case must be remanded to the trial court for reinstatement of the defendant's convictions and sentences.

1. The reasonableness of a search or seizure depends on whether the police officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. The original stop in this case was based on probable cause and was reasonable. The subsequent detention was reasonably related in scope to the circumstances of this case.

2. A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing a police officer to ask reasonable questions concerning the alleged violation of the law and its context for a reasonable period. The determination of reasonableness must take into account the evolving circumstances with which the officer is faced. When, as here, a traffic stop reveals, or unveils, a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised. The traffic stop in this case was reasonable in both its scope and its duration. The trial court properly denied the defendant's motion to suppress the evidence.

Reversed and remanded to the circuit court.

Justice KELLY, dissenting, stated that the trial court erred in denying the defendant's motion to suppress the evidence provided by the trooper. The trooper's questioning in this case exceeded the permissible legal scope of inquiry regarding a speeding offense and was not reasonably related to the speeding offense. The answers to the trooper's questions did not give rise to an articulable suspicion that criminal activity was afoot. The decision of the Court of Appeals should be affirmed on the basis that the trooper had insufficient grounds for pursuing an investigatory stop and conducted his investigation merely on the basis of a hunch.

1. SEARCHES AND SEIZURES — REASONABLENESS.

The reasonableness of a search or seizure depends on whether the police officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the interference in the first place.

2. SEARCHES AND SEIZURES — TRAFFIC STOPS.

A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing a police officer to ask reasonable questions concerning the alleged violation of the law and its context for a reasonable period; the determination of reasonableness must take into account the evolving circumstances faced by the officer; an officer is justified in extending the detention long enough to resolve any suspicions raised when a traffic stop reveals, or unveils, a new set of circumstances.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Catherine Castagne,* Prosecuting Attorney, and *Eric Restuccia*, Assistant Attorney General, for the people.

Patrick & Kwiatkowski, PLLC (by *Aaron J. Gauthier*), for the defendant.

PER CURIAM. This case concerns the constitutionality of a traffic stop. After stopping defendant's vehicle for speeding, a state trooper asked defendant routine questions about his travel plans and obtained his consent to search the vehicle. Cocaine and marijuana were discovered during the search. Defendant argues, and the Court of Appeals determined, that his consent was invalid because his detention exceeded the proper scope of a traffic stop, in violation of the Fourth Amendment. The Court of Appeals held that the trial court should have suppressed the fruits of the search.[1]

We conclude that the detention was reasonable and did not exceed the proper scope of a traffic stop. Because defendant's Fourth Amendment rights were not violated as a result of the detention, his consent was valid. We reverse the judgment of the Court of Appeals and remand this case to the trial court for reinstatement of defendant's convictions and sentences.

I. BACKGROUND

On February 14, 2003, Michigan State Police Trooper Jason Varoni observed defendant's vehicle traveling eighty-eight miles an hour on I-75 in Cheboygan County, where the posted speed limit was seventy miles an hour. He stopped defendant's vehicle. Upon request, defendant produced his driver's license. Trooper Varoni told defendant why he had been stopped and asked defendant where he was going. Defendant answered that he was going to Cheboygan to visit friends and that he was staying at the Holiday Inn.

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[1] Unpublished opinion per curiam, issued August 5, 2004 (Docket No. 249853).

Because Cheboygan does not have a Holiday Inn, Trooper Varoni was suspicious of this response and asked defendant to step from the vehicle to answer additional questions. Defendant did so and, in response to further questioning, explained that he was coming from Detroit and that he intended to stay in Cheboygan for two days. No luggage was visible in the vehicle's passenger compartment; when asked about this, defendant said that he brought no luggage on the trip. Trooper Varoni asked defendant if he had "been in trouble before," and defendant disclosed that he had previously been arrested for a marijuana-related offense.

Trooper Varoni then questioned the vehicle's other two occupants about their own travel plans, but their inconsistent responses only increased his suspicions.[2] This questioning was completed about five to eight minutes after the traffic stop occurred. Trooper Varoni then informed defendant that he had received conflicting stories from the occupants of the vehicle. He asked for defendant's consent to search the vehicle, and defendant agreed.

Trooper Varoni contacted the Tuscarora Township canine unit, and asked that a drug-detection dog be sent to the scene. The canine unit arrived within three minutes and the dog signaled the presence of narcotics in the backseat of the vehicle. Trooper Varoni did not find any narcotics in that area, and he asked defendant for consent to search the vehicle's trunk. Defendant initially agreed, but then withdrew his consent. A

[2] The front-seat passenger claimed that he did not know where they were going or how long they would be gone; he confirmed that he had no luggage. The backseat passenger, defendant's wife, told Trooper Varoni that they were going shopping in Cheboygan and then Detroit. She said that they had made no arrangements for accommodations.

warrant was obtained, and the police discovered substances that appeared to be marijuana and cocaine.[3] Trooper Varoni wrote defendant a citation for speeding and two drug-related felonies, and arrested him.

Defendant was charged with possession with intent to deliver fifty grams or more but less than 225 grams of a substance containing cocaine, MCL 333.7401(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He moved to suppress evidence of the controlled substances seized from his vehicle, asserting that the search[4] and seizure were predicated on an illegal detention. The trial court denied the motion. It concluded that the statements made by the occupants of the vehicle raised reasonable suspicions in Trooper Varoni's mind. It further concluded that the delay caused by the additional questioning was not unreasonable under the circumstances presented.

Defendant was convicted as charged following a bench trial, and was sentenced to consecutive prison terms of seven to twenty years (for the cocaine conviction) and two to four years (for the marijuana conviction).

Defendant appealed, challenging the trial court's denial of his motion to suppress, and the Court of Appeals reversed. Concluding that the initial traffic stop had been lawful, the Court then determined that the trooper "unlawfully exceeded the initial stop when he asked defendant to step out of the vehicle" to answer questions about his travel plans while the officer pos-

[3] This was confirmed through later testing.

[4] Defendant disputes the validity of the initial search of the car; he does not separately challenge the validity of the later search of the trunk, which was conducted after Trooper Varoni obtained a search warrant and which led to the discovery of the controlled substances.

sessed only a "generalized hunch" that criminal activity was afoot. The trooper's questions had no relevance to the traffic stop, the Court held, and he had no reasonable suspicion of criminal activity to warrant asking the questions. The Court concluded that Trooper Varoni was acting on a "hunch," which is insufficient grounds for pursuing an investigatory stop. For these reasons, it reversed the trial court's ruling on the motion to suppress.

The prosecutor applied to this Court for leave to appeal.

II. STANDARD OF REVIEW

This Court reviews a trial court's findings at a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Custer*, 465 Mich 319, 325-326; 630 NW2d 870 (2001). But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress. *Jenkins*, *supra*; *People v Oliver*, 464 Mich 184, 191-192; 627 NW2d 297 (2001).

III. ANALYSIS

We review here the Court of Appeals determination that the traffic stop escalated into an illegal detention in violation of the Fourth Amendment, rendering defendant's eventual consent to search a nullity.

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall

> issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[5]

In assessing the protections created by this amendment, the United States Supreme Court has "long held that the 'touchstone of the Fourth Amendment is reasonableness.' " *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 L Ed 2d 347 (1996) (citation omitted). Reasonableness is measured by examining the totality of the circumstances. *Id*. Because of " 'endless variations in the facts and circumstances' " implicating the Fourth Amendment, reasonableness is a fact-intensive inquiry that does not lend itself to resolution through the application of bright-line rules. *Id*., quoting *Florida v Royer*, 460 US 491, 506; 103 S Ct 1319; 75 L Ed 2d 229 (1983).

In analyzing the propriety of the detention here, we apply the standard set forth in *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).[6] Under *Terry*, the reasonableness of a search or seizure depends on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[7] *Terry, supra* at 20.

In this case, there is no dispute that the initial traffic stop was occasioned by defendant's speeding, and was therefore based on probable cause and was reasonable.

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[5] US Const, Am IV.

[6] *Knowles v Iowa*, 525 US 113, 117; 119 S Ct 484; 142 L Ed 2d 492 (1998) (despite existence of probable cause, a common traffic stop is more analogous to limited detention authorized by *Terry* than to an arrest) (quoting *Berkemer v McCarty*, 468 US 420, 439-440; 104 S Ct 3138; 82 L Ed 2d 317 [1984]).

[7] The reviewing court considers the objective facts relating to the traffic stop; the officer's subjective state of mind is not relevant to the determination whether the detention was proper. *Oliver*, *supra* at 199.

Robinette, *supra* at 38. Under *Terry*, the remaining question is whether the subsequent detention was "reasonably related in scope to the circumstances" of this case. *Terry, supra* at 20. We conclude that it was.

As a threshold matter, the Court of Appeals erred when it agreed with defendant that the purpose of this traffic stop was fully effectuated when defendant handed Trooper Varoni his driver's license and other requested paperwork. This view of the essential nature of the traffic stop imposes an unreasonable restriction on an officer's ability to investigate a violation of the law.

A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing an officer to ask reasonable questions concerning the violation of law and its context for a reasonable period.[8] The determination whether a traffic stop is reasonable must necessarily take into account the evolving circumstances with which the officer is faced. As we observed in *People v Burrell*, 417 Mich 439, 453; 339 NW2d 403 (1983), when a traffic stop reveals a new set of circumstances, an officer is justified in extending the detention long enough to resolve the suspicion raised.[9]

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[8] There is considerable discretion allowed an officer charged with enforcing the traffic laws as a member of the executive branch of government. This discretion can be exercised effectively only if an officer is allowed to ask reasonable questions concerning the context of a traffic offense. To deny an officer the ability to ask reasonable questions, reasonably circumscribed in scope and duration, is to deny the officer the ability to reasonably exercise the officer's discretion.

[9] Put another way, when considering whether a detention is reasonably related in scope to the circumstances of the case, a reviewing court must consider whether "the officer's subsequent actions were fairly responsive to the emerging tableau—the circumstances originally warranting the stop, informed by what occurred, and what the officer learned, as the stop progressed." *United States v Chhien*, 266 F3d 1, 6 (CA 1, 2001).

It is no violation of the Fourth Amendment for an officer to ask reasonable questions in order to obtain additional information about the underlying offense and the circumstances leading to its commission. For example, in addition to asking for the necessary identification and paperwork, an officer may also ask questions relating to the reason for the stop, including questions about the driver's destination and travel plans. *United States v Williams*, 271 F3d 1262, 1267 (CA 10, 2001).[10] Specifically, an officer may ask about the "purpose and itinerary of a driver's trip during the traffic stop" in order to determine whether a "violation has taken place, and if so, whether a citation or warning should be issued or an arrest made." *United States v Brigham*, 382 F3d 500, 508 (CA 5, 2004). Such inquiries are "within the scope of investigation attendant to the traffic stop." *Id*.

Implicit in the authority to ask these questions is the authority to ask follow-up questions when the initial answers given are suspicious.[11] Likewise, there is no constitutional prohibition against asking similar questions of any passengers in the vehicle.[12]

Simply put, the Fourth Amendment does not impose a "one size fits all" rule of police investigation,[13] much less one that restricts the officer to informing the driver of the nature of the infraction, and subsequently ob-

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[10] See also *United States v Givan*, 320 F3d 452, 459 (CA 3, 2003); *United States v Linkous*, 285 F3d 716, 719 (CA 8, 2002); *United States v Hill*, 195 F3d 258, 268 (CA 6, 1999); *United States v Johnson*, 58 F3d 356, 357 (CA 8, 1995).

[11] *United States v Johnson*, 58 F3d 356, 357-358 (CA 8, 1995).

[12] *Linkous*, *supra* at 719 (an officer may question the occupants of a vehicle to verify information provided by the driver).

[13] See *Robinette, supra* at 39 ("In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry.").

taining the information necessary to fill out a citation. The Fourth Amendment requires only that the detention be *reasonable*—that is, that it be reasonably restricted in light of all the facts available to the officer. See *Robinette*, *supra* at 39.

That standard was satisfied here. Trooper Varoni introduced himself to defendant, explained the purpose of the stop, and obtained the necessary identification and paperwork in order to complete the citation for the civil infraction of speeding. In response to a routine question about his travel plans, defendant provided Trooper Varoni with an explanation that was implausible.[14] Therefore, even before Trooper Varoni could resolve the matter of defendant's violation of the traffic laws, he was presented with additional suspicious circumstances that warranted further investigation.

Trooper Varoni acted on these new suspicions by asking defendant additional questions about his travel plans and whether he had been in trouble before, and by briefly speaking with the vehicle's occupants. None of the answers provided by defendant or his companions allayed Trooper Varoni's suspicions. Moreover, the entire encounter took only five to eight minutes, at which time Trooper Varoni requested and obtained defendant's consent to search the vehicle.

After reviewing the facts and evaluating the totality of the circumstances, we conclude that the traffic stop here was reasonable in both scope and duration.

It follows that defendant was not being unlawfully detained when he was asked to consent to the search.

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[14] The Court of Appeals stated that there were "plausible" innocent explanations for the statements made by the vehicle occupants. But the fact that such explanations can be imagined does not mean that Trooper Varoni acted unreasonably in seeking to resolve the inconsistencies. See *Oliver*, *supra* at 204.

Consent must be freely and voluntarily given in order to be valid. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999); *Royer*, *supra* at 497. An investigatory stop, as occurred in this case, is not so inherently coercive that it renders involuntary consent given during the stop. *Royer, supra* at 501, 502; *People v Acoff*, 220 Mich App 396, 400; 559 NW2d 103 (1996). There is no suggestion that defendant was coerced into giving his consent.[15]

It is unnecessary to consider whether Trooper Varoni had an independent, reasonable, and articulable suspicion that defendant was involved with narcotics, or even whether the Fourth Amendment might impose such a requirement under different circumstances.[16] The detention and search here were reasonable because: (1) the initial traffic stop was lawful, (2) Trooper Varoni's questions about defendant's travel plans, and his limited follow-up, were reasonable and did not exceed the proper scope and duration of the initial traffic stop, and (3) after Trooper Varoni concluded his questioning, defendant voluntarily consented to the search of the vehicle. All in all, rather than amounting to a constitutional violation, we find that Trooper Varoni's work in this case amounted to excellent police work. The trial court properly denied defendant's mo-

[15] Defendant's own actions show that he understood that he could refuse the request. He later declined to consent to a search of the trunk.

[16] One aspect of an officer's ability to conduct a drug search without independent, articulable, and reasonable suspicion was addressed in *Illinois v Caballes*, 543 US ___; 125 S Ct 834; 160 L Ed 2d 842 (2005). Employing the reasonableness standard of *Robinette*, the United States Supreme Court held that, as long as the traffic stop is not prolonged, an officer may use a drug-detection dog to sniff a vehicle during the stop, even if the defendant does not consent and the officer lacks reasonable, articulable suspicion that the occupants of the vehicle are involved with narcotics.

tion to suppress evidence of the controlled substances found during the search of his vehicle.

IV. CONCLUSION

Because the detention was reasonable and did not constitute a violation of defendant's Fourth Amendment rights, we reverse the judgment of the Court of Appeals and remand this case to the trial court for reinstatement of defendant's convictions and sentences. MCR 7.302(G)(1).

TAYLOR, C.J., and CAVANAGH, WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

KELLY, J. (*dissenting*). I agree with the Court of Appeals that the trial court erred by denying defendant's motions to suppress and to strike the evidence provided by Trooper Jason Varoni. The trooper's questions of defendant were not reasonably related to the purpose of the traffic stop. Furthermore, defendant's statement to the trooper that he was staying at a Holiday Inn in Cheboygan could not evoke a reasonable suspicion that he was engaged in criminal activity. Therefore, I would affirm the decision of the Court of Appeals.

TERRY v OHIO

Traffic stops are subject to the test established by the United States Supreme Court in *Terry v Ohio*, 392 US 1, 20; 88 S Ct 1868; 20 L Ed 2d 889 (1968). According to *Terry*, an officer's investigation of a traffic stop must be "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* A defendant may not be detained even momentarily without reasonable, objective grounds for doing so. *Florida*

v Royer, 460 US 491, 498; 103 S Ct 1319; 75 L Ed 2d 229 (1983). The scope of the detention must be carefully tailored to the justification for the stop. *Id*. at 500.

Considering the totality of the circumstances, I would find that the officer's questioning in this case exceeded the permissible legal scope of inquiry regarding a speeding offense. It was not reasonably related to defendant's violation of the speed limit. Furthermore, I believe that the answers to the officer's questions did not give rise to an articulable suspicion that criminal activity was afoot.

SCOPE OF THE STOP

Trooper Varoni detained defendant for driving in excess of the speed limit. An additional reason for the stop was that his vehicle had a cracked windshield. There was no reasonable articulable suspicion of any other offense.

Neither the United States Supreme Court nor the Michigan Supreme Court has ever ruled that questioning beyond the scope of a traffic stop is allowed. The Court of Appeals decision in this case accurately reflects Michigan law. However, with this decision, the Court changes Michigan law to enlarge the permissible scope of an inquiry by a police officer during a routine traffic stop.

PERMISSIBLE QUESTIONING

The questions "Why the rush?" and "Where are you headed in such a hurry?" from a police officer may be reasonably related to a traffic stop for speeding. They seek an admission of speeding.

But questions about a driver's destination, purpose, length of stay, and with whom he will be staying are

meant to inquire into issues beyond a speeding offense. Not only have they nothing to do with a speeding offense, they are not helpful to a police officer's decision to release the driver or to issue a citation or warning.[1] *Ante* at 316.

On direct examination, Trooper Varoni testified that he asked defendant where he was going and that defendant offered that "he was going into Cheboygan to visit friends and that he was staying at the Holiday Inn." However, it is apparent from the cross-examination of Trooper Varoni that defendant did not volunteer this information to the trooper in response to a general question. Instead, as Trooper Varoni admitted:

> *A.* Uh, it's—it's my practice to ask more than just for those three pieces of uh, documentation [referring to license, registration, and insurance paperwork].
>
> * * *
>
> *Q.* All right. And then you proceeded to further this investigation by questioning Mr. Williams as to um, issues of where he was going and what he was going to do when he was there, is that correct?
>
> *A.* Yes.
>
> *Q.* And these questions weren't relevant to how fast he was going, were they?
>
> *A.* I-I ask everybody I stop where they're going to and where they are coming from.
>
> * * *

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[1] The majority cites several federal circuit court of appeals cases for the proposition that questions about travel plans are reasonably related to the scope of a traffic stop. We are not bound by these decisions, and, as noted above, I find their logic defective.

Q. My question was; the question about where he's going and how long he is staying is not relevant to how fast he's going and the purpose for your stop; is it?

A. That's correct.

Without question, the trooper asked defendant questions that exceeded the scope of legal inquiry regarding a speeding offense. The trooper evoked an answer regarding the location where defendant was planning to spend the night. He also asked defendant if defendant had any prior narcotics convictions. Trooper Varoni testified:

> Um, I asked him if he had been in trouble before and uh, he told me that he had. I asked if it had any—you know, related narcotics [sic], if he'd ever been arrested for anything to do with drugs and he told me that he had. I asked him for what and he said marijuana.

This question likewise was unrelated to the purpose of the traffic stop. Once defendant stated that he was staying at a Holiday Inn in Cheboygan in response to a question about where he would spend the night, the purpose of the investigation changed. Trooper Varoni's subsequent questions, having nothing to do with the scope of the traffic stop, changed the fundamental nature of the stop. What began as a routine traffic stop became an all-encompassing criminal investigation. Trooper Varoni admitted it:

Q. Your purpose of the initial stop had seized [sic]; you weren't investigating speeding violation [sic] anymore were you?

A. No, no I wasn't.

REASONABLE SUSPICION OF CRIMINAL ACTIVITY

Even if Trooper Varoni's questions had been appropriate for a traffic stop, a second pertinent concern for

the Court is whether defendant's answer provided a reasonable suspicion that criminal activity was occurring.

Trooper Varoni essentially admitted that he continued questioning the occupants of the vehicle on the basis of a hunch that something "wasn't quite right."

> *Q.* [*Mr. Kwiatkowsi*]: Is it possible that he was in error as to where the Holiday Inn was?
>
> *A.* [*Trooper Varoni*]: That's possible, yes.
>
> *Q.* And the fact that someone misstates where they're staying um, you're saying that made you suspicious of him, is that right?
>
> *A.* Uh, you—you can call it what you want, I don't know about suspicious but, yeah, it made me think twice about the statements he made.
>
> *Q.* All right, so you weren't suspicious?
>
> *A.* Yeah, I-I questioned his statements.
>
> *Q.* Well, now when you're talking about suspicion you understand suspicious of something, right? Of some activity that's unlawful, right?
>
> *A.* Yes, that could be.
>
> *Q.* Well, what was it about that response that you were suspicious of that was unlawful?
>
> *A.* I wasn't suspicious of any particular thing that was unlawful.
>
> *Q.* So it was unparticularized suspicion is that what you're saying?
>
> *A.* Um, I guess that could be.
>
> *Q.* Okay. Because you couldn't put your finger on what it was you were suspicious of, right?
>
> *A.* I was suspicious that something wasn't quite right.
>
> *Q.* But you didn't know what it was, right?
>
> *A.* That's right.

The trooper's intuition that "something wasn't quite right" and his observation that no luggage was visible in the passenger compartment were the things that made him suspicious. The trooper admitted that it is not uncommon for people to carry luggage out of sight in the trunk. Therefore, the only valid reason for the trooper to be suspicious was defendant's statement that he was staying at a Holiday Inn in Cheboygan.

The fact that defendant answered with the name of a hotel chain that did not have a facility in Cheboygan hardly created a reasonable suspicion that criminal activity was afoot.[2] The next question of defendant, once he had stepped out of the vehicle, was whether he had any prior conviction for drugs. It was likewise unrelated to the traffic stop. This question is a further indicator that the trooper was acting on a mere hunch.

Where there is no articulable basis to suspect that a crime is being committed, the officer's questions amount to nothing more than a fishing expedition. The questioning and the subsequent search in this case went beyond the scope of the traffic stop and were unsupported by any reasonable articulable suspicion.

I agree with the Court of Appeals that, given the totality of the circumstances, the trooper had insufficient grounds for pursuing an investigatory stop and

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[2] It is noteworthy that the explanations Mr. Williams and his two passengers gave are not as inconsistent as the prosecution would have the Court believe. Mr. Williams indicated that they were going to Cheboygan to visit friends and would be there "about two days." They would be staying at a Holiday Inn. His companion, Mr. King, indicated that he was not sure how long they were going to be gone. This is not inconsistent with defendant's statement.

Mrs. Williams indicated that they were planning to do some shopping in Cheboygan. She was not sure where they were staying; they did not have reservations. This is also not inconsistent with Mr. Williams's explanation.

conducted his investigation based merely on a hunch. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). I would affirm the decision of the Court of Appeals.

WARDA v CITY COUNCIL OF THE CITY OF FLUSHING

Docket No. 125561. Decided May 18, 2005. On application by the defendants for leave to appeal, the Supreme Court, after hearing oral argument on whether the application should be granted and in lieu of granting leave, reversed the judgment of the Court of Appeals and remanded the matter to the circuit court for the entry of an order dismissing the plaintiff's claims.

Stephen W. Warda, a former police officer for the city of Flushing, brought an action in the Genesee Circuit Court against the city council of the city of Flushing and the city of Flushing, seeking reimbursement of attorney fees the plaintiff incurred in successfully defending criminal charges resulting from the plaintiff's inspection of salvage motor vehicles. The city council had denied the plaintiff's request in resolutions entered by the council. After a bench trial, the court, James T. Corden, J., entered a judgment in favor of the plaintiff. The Court of Appeals, O'CONNELL, P.J., and WILDER, J. (JANSEN, J., dissenting), affirmed on the bases that the trial court properly found that the plaintiff acted within the scope of his employment when he performed the vehicle inspections and that the defendants abused their discretion in denying the request for reimbursement. Unpublished opinion per curiam, issued December 23, 2003 (Docket No. 241188). The defendants sought leave to appeal in the Supreme Court. The Supreme Court granted oral argument on whether to grant the defendants' application for leave to appeal and directed the parties to brief the issue whether the city council's decision is subject to judicial review. 471 Mich 907 (2004).

In an opinion by Justice MARKMAN, joined by Chief Justice TAYLOR, and Justices CORRIGAN and YOUNG, the Supreme Court *held*:

The city council constitutes a governmental agency for purposes of reimbursement of attorney fees under MCL 691.1408(2). The statute clearly provides that the decision to pay an officer's attorney fees is a matter left to the discretion of a municipality. The statute does not provide standards by which the discretion of the municipality is to be exercised. Because the statute neither places limits on the exercise of the city council's discretion nor provides standards by which a court can review the exercise of that

discretion, the statute affords the plaintiff no basis for relief. The decision here was not subject to judicial review absent an allegation that the exercise of discretion was unconstitutional, or unlawful under any other statute. The decisions in *Exeter Twp Clerk v Exeter Twp Bd*, 108 Mich App 262 (1981), and *Bowens v City of Pontiac*, 165 Mich App 416 (1988), which created exceptions to the discretionary language in MCL 691.1408(2) for pressing necessity and emergency conditions, must be overruled.

Reversed and remanded to the circuit court for entry of an order dismissing the plaintiff's claims.

Justice WEAVER, joined by Justices CAVANAGH and KELLY, dissenting, stated that leave to appeal should be granted in order to allow the Court, following full oral argument and full briefing, to decide the question raised by the Court regarding judicial power. The parties also should be directed to address the question whether the plaintiff has a legal remedy under MCL 691.1408, or whether subsection 3 of the statute prohibits the imposition of liability on a governmental agency for a decision made pursuant to subsection 2 of the statute.

1. MUNICIPAL CORPORATIONS — ATTORNEY FEES.

The decision of a municipality whether to pay an officer's attorney fees under MCL 691.1408(2) is within the discretion of the municipality; the statute does not place limits on the exercise of such discretion nor does it provide standards by which a court may review the exercise of that discretion.

2. MUNICIPAL CORPORATIONS — DISCRETIONARY DECISIONS — APPEAL.

Where a statute empowers a governmental agency to undertake a discretionary decision, and neither places limits on the exercise of that discretion nor provides standards by which a court can review the exercise of that discretion, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional.

Wascha & Waun, P.C. (by *Thomas W. Waun*), for the plaintiff.

Henneke, McKone, Fraim & Dawes, P.C. (by *Edward G. Henneke*), for the defendants.

MARKMAN, J. The question presented in this case is whether, pursuant to MCL 691.1408(2), Michigan

courts possess the authority to review a city council's discretionary decision to grant or deny reimbursement of private attorney fees incurred by a city police officer. Because the city council's decision under this statute constitutes a discretionary act of a separate branch of government, the judiciary is without authority to review it. Accordingly, we reverse the judgment of the Court of Appeals and remand this matter to the circuit court for entry of an order dismissing plaintiff's claims.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff was a Flushing police officer for approximately twenty years. Early in his career, at the suggestion of the chief of police, plaintiff obtained special training from the Secretary of State that certified him to inspect "salvage vehicles."[1] Plaintiff's employer paid for the training, and plaintiff received his regular pay while he attended the salvage vehicle inspection course.

At all times relevant to this case, an inspection fee of $25 was established by statute. MCL 257.217c(7). On the occasions that plaintiff conducted inspections in Flushing, plaintiff turned over this fee to the city, which deducted taxes and then remitted the balance to plaintiff along with his regular pay. On those occasions plaintiff conducted inspections outside Flushing, neither the police department nor the city of Flushing received any part of the associated fees. Plaintiff con-

[1] MCL 257.217c concerns the acquisition and transfer of distressed vehicles. In general, a seriously damaged vehicle (i.e., a "distressed vehicle" as defined by MCL 257.12a) must be issued a salvage certificate of title. The process of obtaining such a title requires an inspection and certification of certain matters by a specially trained officer. The specially trained officer must be a police officer and must be certified by the Secretary of State. MCL 257.217c(25), (26). The Secretary of State is responsible for overseeing the conduct of specially trained officers, and may suspend, revoke, or deny an officer's certification. MCL 257.217c(26).

ducted the vast majority of his inspections outside his regular duty shift hours. Plaintiff characterized his inspection work as "moonlighting" and as providing "supplementary income."

On March 2, 1992, plaintiff completed two inspection reports related to salvage vehicle inspections he conducted in Macomb County.[2] In these reports, plaintiff verified that certain repairs had been made when in fact they had not, and declared that the vehicles were roadworthy when in fact they were not. Following a criminal investigation, plaintiff was charged in April 1994 with false certification, a felony. MCL 257.903. The city discharged plaintiff on May 25, 1994, for violating department rules and regulations, including misconduct and lying about the inspections to a Michigan State Police investigator. However, in June 1997, a jury in Macomb County acquitted plaintiff of the criminal charge of false certification.

Subsequently, plaintiff requested payment of $205,000 from defendant for attorney fees incurred in defending the criminal charges. Plaintiff cited MCL 691.1408(2) as a basis for the city to reimburse such fees. By a resolution adopted at a meeting on September 8, 1997, the city council denied this request; it reiterated its position in a resolution adopted on June 22, 1998. The two resolutions explained that plaintiff's request for fees was denied because plaintiff's actions that had resulted in the fees were not for any "public purpose" of the city of Flushing and fell outside the scope of plaintiff's employment with the city.

Plaintiff filed the instant complaint for declaratory relief and a motion for summary disposition, contending that the city abused its discretion in denying his

[2] The city of Flushing is located in Genesee County.

request for attorney fees. Following a two-day bench trial in October 2001, the trial court found that: (1) while performing salvage vehicle inspections, plaintiff was acting in the course of his duties as a Flushing police officer; (2) the city council did not "offer one credible or acceptable reason" for denying plaintiff's fee request; and (3) a reasonable attorney fee was $109,200.

In a divided opinion, the Court of Appeals affirmed. Unpublished opinion per curiam, issued December 23, 2003 (Docket No. 241188). The majority concluded that the circuit court had not clearly erred in finding that plaintiff acted within the scope of his employment when he inspected salvage vehicles, or in finding that the city abused its discretion when it denied plaintiff reimbursement of his attorney fees. The dissenting judge would have reversed, concluding that the circuit court had clearly erred in finding that plaintiff's work as a salvage vehicle inspector fell within the scope of his employment as a Flushing police officer.

We granted oral argument on whether to grant defendants' application for leave to appeal pursuant to MCR 7.302(G)(1), and directed the parties to include among the issues briefed "whether the city council's decision is subject to judicial review." *Warda v Flushing City Council*, 471 Mich 907 (2004).

II. STANDARD OF REVIEW

This dispute requires us to determine whether the judiciary has the authority pursuant to the Constitution and MCL 691.1408(2) to review the city council's denial of plaintiff's request for reimbursement. We review these issues de novo. *Lapeer Co Clerk v Lapeer Circuit Judges,* 465 Mich 559, 566; 640 NW2d 567 (2002); *Jeffrey v Rapid American Corp,* 448 Mich 178, 184; 529 NW2d 644 (1995).

III. ANALYSIS

The question presented here concerns the extent to which the decision of a municipality to deny reimbursement for attorney fees under MCL 691.1408(2) is subject to judicial review. Michigan has long recognized that a municipality may indemnify a police officer for costs, including attorney fees, incurred because of the discharge of the officer's official duties. *Messmore v Kracht*, 172 Mich 120, 122; 137 NW 549 (1912). This principle is reflected in § 8 of the governmental immunity act, MCL 691.1408. As for the costs incurred by an officer in defending a criminal action based on conduct of the officer in the course of his employment, MCL 691.1408(2) provides:

> When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency *may* pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. An officer or employee who has incurred legal expenses after December 31, 1975 for conduct prescribed in this subsection may obtain reimbursement for those expenses under this subsection. [Emphasis added.]

For purposes of the statute, "governmental agency" is defined as "the state or a political subdivision." MCL 691.1401(d). "Political subdivision" is further defined:

> "Political subdivision" means a *municipal corporation*, county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly; a district or authority authorized

> by law or formed by 1 or more political subdivisions; or an agency, department, court, board, *or council of a political subdivision*. [MCL 691.1401(b) (emphasis added).]

Thus, the Flushing city council constitutes a "governmental agency" for purposes of the governmental immunity act.

The use of the word "may" in § 8 makes clear that the decision to pay an officer's attorney fees is a matter left to the discretion of the municipality. Further, we note that the statute does not limit or qualify the word "may" (with, for instance, a requirement of reasonableness) or provide any other standards by which that discretion is to be exercised. As such, the Flushing city council had full discretion under MCL 691.1408(2) in choosing whether to reimburse plaintiff's attorney fees.

The question, then, is the nature of this Court's power to review a purely discretionary action taken by a governmental agency. In *Veldman v Grand Rapids*, 275 Mich 100; 265 NW 790 (1936), we were faced with the question whether the plaintiffs, a group of Grand Rapids taxpayers, could sue to prevent the city's purchase of a power plant, where such purchase had been approved by that city's legislative body, the city commission. This Court observed:

> If the city commission had legal authority to do what it did do, that ends the matter. The question of whether the commissioners acted wisely or unwisely is not for the consideration or determination of this court.
>
> * * *
>
> If the charter of the city of Grand Rapids is constitutional, and of this there seems to be no question, and the State has thus conferred upon the city commission the power which it exercised and left the exercise of it to the judgment and discretion of the commissioners, then their action is conclusive. [*Id.* at 112-113.]

In the instant case, the state, through § 8 (the constitutionality of which has not been challenged), has clearly "conferred upon the city [council] the power which it exercised and left the exercise of it to the judgment and discretion" of the city council. *Veldman, supra* at 113. While the statute affords the city council the discretion to decide whether to reimburse a claim for attorney fees, the statute says nothing about the limits within which that discretion is to be exercised, let alone by which an appellate court would be guided in its review of a decision made pursuant to that discretion. As such, the Flushing city council's action to deny reimbursement of attorney fees is conclusive. Whether the council acted wisely or unwisely, prudently or imprudently, is not for the consideration or determination of this Court.[3]

As a result, we see no need to take sides in the matter addressed and resolved, both by the trial court and the Court of Appeals, regarding whether plaintiff's work as a salvage vehicle inspector fell within the scope of his employment as a Flushing police officer.

The following passage from *People v Gardner*, 143

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[3] We stress that this opinion only precludes the judiciary from reviewing the *discretionary* decision-making of legislative and executive agencies. Where decision-making falls outside the scope of such discretion, such decision-making would be fully subject to judicial review.

For instance, MCL 691.1408(2) confers discretionary decision-making authority on a governmental agency if three criteria are met: (1) a criminal action has been commenced against an employee; (2) the criminal action is based on the conduct of the employee occurring in the course of employment; and (3) the employee has a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the conduct. If any of these three criteria are not satisfied, a legislative or executive agency would lack the statutory discretion to award attorney fees. Therefore, if a legislative or executive agency chose to award attorney fees to a nonemployee, for example, the discretion afforded the agency under MCL 691.1408(2) would not preclude the courts from reviewing such a decision, because the preconditions giving rise to the discretionary authority would not have been met.

Mich 104, 106; 106 NW 541 (1906), succinctly summarizes both the role of the judiciary and the appropriate form of relief available to a plaintiff in a matter of this sort:[4]

> "The general rule is well established that courts will not inquire into the motives of legislators where they possess the power to do the act, and it has been exercised as prescribed by the organic law. In such case the doctrine is that the legislators are responsible alone to the people who elect them. And this principle is generally applied to purely legislative acts of municipal corporations." [Citation omitted.]

So long as the power to govern the city and control its affairs is vested by the people of Flushing in an elected city council, neither this Court nor any other may assume to direct the local policy of the city of Flushing. See *Veldman*, *supra* at 111; *Huse v East China Twp Bd*, 330 Mich 465, 470-471; 47 NW2d 696 (1951). Here, the city council concluded that the reimbursement of plaintiff's attorney fees would not serve the "public purposes" of the city of Flushing, and chose not to reimburse such fees. While such a decision might be one with which reasonable people would disagree, its wisdom is ultimately to be judged by the voters of the city of Flushing, and not by the judiciary of this state.

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[4] In the past this Court has considered whether such discretionary actions are subject to judicial review and have concluded that they are not. See, e.g., *Schwartz v City of Flint*, 426 Mich 295, 305-313; 395 NW2d 678 (1986). These cases are predicated on the doctrine of separation of powers that is set forth in Const 1963, art 3, § 2, which provides that "[t]he powers of government are divided into three branches: legislative, executive and judicial," and further provides that "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." We have recognized that the doctrine of the separation of powers applies to municipalities when exercising the powers delegated to them by the Legislature pursuant to Const 1963, art 7, §§ 21 and 22.

Accordingly, because the statute provides no limits within which the city council's discretion is to be exercised, let alone by which an appellate court would be guided in its review of an exercise of that discretion, MCL 691.1408(2) affords plaintiff no basis for relief.[5]

Moreover, in enacting MCL 691.1408(3), which precludes governmental liability under this act, the Legislature demonstrated an appreciation of this limitation on judicial power. MCL 691.1408(3), then, is not inharmonious with the separation of powers considerations that we have set forth.

However, while we conclude that there is no statutory basis for our review of the city council's decision, that conclusion does not end the inquiry. Even a discretionary action of a governmental agency must still comport with the constitutions of this state and the United States. As we have noted elsewhere:

> [T]he power of judicial review does not extend only to invalidating unconstitutional statutes or other legislative enactments, but also to declaring other governmental action invalid if it violates the state or federal constitution. [*Sharp v City of Lansing*, 464 Mich 792, 810-811; 629 NW2d 873 (2001).]

The decisions of a governmental agency, for example, to award attorney fees on the basis of race, religion, or nationality might implicate the equal protection guarantees of the federal and state constitutions, while decisions influenced by corruption might implicate the due process guarantees of these same constitutions. See *Huse, supra* at 470-471.

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[5] Plaintiff here does not identify any other statute pertinent to defendants that would render their conduct either illegal or ultra vires. See *People v Ford*, 417 Mich 66, 91; 331 NW2d 878 (1982). Obviously, the fact that one statute does not render conduct unlawful does not mean that another statute may not do so.

However, plaintiff here does not suggest that the city council's decision was unconstitutional in any way. Nor is there any evidence in the record that would suggest such unconstitutionality. Rather, the record reflects that the city council was faced with a discretionary decision that required it to choose among several permissible outcomes, and it chose accordingly. The gravamen of plaintiff's argument is simply that he is unhappy with the option the city council selected. Yet his dissatisfaction, however reasonable to this Court, does not call into question an otherwise valid decision of a governmental agency.[6] Where, as here, a statute em-

[6] While the exercise of discretion at issue here (a city council resolution) was legislative in nature, our holding extends equally to encompass discretionary actions undertaken by the executive branch in the absence of a guiding standard. In *Sutherland v Governor*, 29 Mich 320, 321 (1874), the Governor was empowered by statute to issue a certificate of approval "when he shall be satisfied that certain work has been done in conformity with the law." The parties performing the work brought a mandamus action to compel the Governor to issue such a certificate. This Court declined, for lack of jurisdiction, to entertain the application for mandamus. We observed:

> The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial. The party applying for action, which, under the constitution and laws, depends on the executive discretion, or is to be determined by the executive judgment, if he fails to obtain it, has sought the proper remedy and must submit to the decision. [*Id.* at 330-331.]

See also *Midland Co Bd of Supervisors v Auditor General*, 27 Mich 165, 166 (1873) ("the exercise of an official discretion belonging to an executive department of the State government, is not subject to review judicially, and cannot, therefore, be examined upon *certiorari* from this Court").

Where the executive carries out a function that is part of the inherent executive power and for which there are no constitutional or other standards, the judiciary is equally without power to review executive action. See, e.g., *United States v Curtiss-Wright Export Corp*, 299 US 304,

powers a governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency's exercise of that discretion or the judiciary's review of that exercise, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional.

In reaching a contrary conclusion, the Court of Appeals relied on *Exeter Twp Clerk v Exeter Twp Bd*, 108 Mich App 262; 310 NW2d 357 (1981), and *Bowens v City of Pontiac*, 165 Mich App 416; 419 NW2d 24 (1988). In *Exeter,* a township clerk hired private counsel in connection with a primary election after the township attorney declined to advise her on the legality of certain nominating petitions. When the township board refused to reimburse the clerk for her attorney fees and costs, she filed a mandamus action to obtain reimbursement under MCL 691.1408.[7]

320; 57 S Ct 216; 81 L Ed 255 (1936) (noting that the President's inherent power to handle international relations "does not require as a basis for its exercise an act of Congress, but . . . must be exercised in subordination to the applicable provisions of the Constitution"); *Cunningham v Neagle*, 135 US 1; 10 S Ct 658; 34 L Ed 55 (1890).

Where an executive branch action constitutes action taken pursuant to a legislative grant of authority and in accordance with standards set forth by the Legislature—a realm of action that encompasses virtually all administrative agency actions—it would normally be subject to judicial review. In such cases, there would be a legislatively set standard that a court of law would apply in reviewing such an action. See *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976).

[7] We note that while plaintiff in the instant case did not label his complaint as one for mandamus, he was in essence seeking a writ of mandamus from the circuit court to compel the city council to pay him his attorney fees. However, a writ of mandamus will be issued only where a plaintiff can prove that he has a " 'clear legal right to performance of the specific duty sought to be compelled' and that the defendant has a 'clear legal duty to perform such act . . . .' " *In re MCI Telecom Complaint*, 460 Mich 396, 442-443; 596 NW2d 164 (1999) (citation omitted). While this rule may have prompted the Court in *Exeter* to create its "pressing

The *Exeter* panel recognized that there were "no statutory guidelines demonstrating any legislative intent to answer the question of legal fee indemnification or reimbursement," and no cases directly on point. *Exeter, supra* at 268. The panel also recognized the wide discretion afforded to a municipality under the statute:

> [A] municipality, such as a township, in general possesses the discretion to determine whether (1) counsel for the township shall represent a township official sued in his or her capacity, (2) to approve retention of private counsel paid for by the township, (3) to indemnify the official for expenses incurred in defending the action, including attorneys fees, or (4) the township board may decline to provide legal representation or indemnification for such official. [*Id.* at 269.]

However, in spite of this recognition, the *Exeter* panel disregarded the latitude statutorily afforded to the municipality. The panel overlooked the fact that MCL 691.1408 provided no guidance regarding what standards an appellate court might employ in reviewing the township's decision; instead, it simply reviewed the decision for an abuse of discretion. *Id.*

The *Exeter* panel then proceeded to create a "pressing necessity" exception from statutory language, MCL 691.1408, that contained no such exception:

> Where it is factually demonstrated that pressing necessity or emergency conditions warrant a municipal official in employing legal counsel in a matter of official, public concern and legal services are provided without consent of the governing body, the courts may hold a municipal corporation liable for such legal services. [*Exeter, supra* at 269-270.]

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necessity" exception, there is simply no statutory basis for such an exception. Accordingly, because MCL 691.1408(2) provides only that a governmental agency "may" reimburse attorney fees, plaintiff has not shown that he had a "clear legal right" to reimbursement, nor that the city council had a "clear legal duty" to reimburse him. *In re MCI, supra*.

The Court of Appeals later extended this exception to apply to legal expenses incurred in the course of defending criminal charges. In *Bowens*, *supra*, a city councilman who went "undercover" to investigate illegal gambling within his district was wrongly implicated in a gambling enterprise, and incurred legal expenses defending against the resulting criminal charges. The Court of Appeals concluded that the plaintiff acted reasonably, in good faith, and for a public purpose in doing what he did, and that the *Exeter* exception applied because the "plaintiff had been faced with an emergency in immediately requiring the services of a skilled criminal attorney." *Bowens, supra* at 420.

We believe that the Court of Appeals panels in *Exeter* and *Bowens* misapprehended the limited role afforded to the judiciary in cases involving discretionary decisions of a governmental agency. To the extent that MCL 691.1408(2) sets forth no limits on the exercise of a governmental agency's discretion to reimburse attorney fees, it concomitantly sets forth no standards by which the decision of such agency can be reviewed meaningfully by the judiciary. The exercise of the "judicial power" by this Court, Const 1963, art 6, § 1, contemplates that there will be standards—legally comprehensible standards—on the basis of which agency decisions can be reviewed. Whether such standards consist of the provisions of the constitution, or the provisions of other pertinent laws, a judicially comprehensible standard is required in order to enable judicial review.[8] Here, there is no such standard. As a result, there is no basis upon which a court of law can properly review the actions of defendants under MCL 691.1408(2). Absent a compre-

[8] Cf. *Baker v Carr*, 369 US 186, 217; 82 S Ct 691; 7 L Ed 2d 663 (1962) (referring in the context of the political question doctrine to the impropriety of courts resolving matters in which there is a "lack of judicially discoverable and manageable standards").

hensible standard, judicial review cannot be undertaken in pursuit of the rule of law, but only in pursuit of the personal preferences of individual judges. The latter pursuit falls outside the "judicial power" in Michigan.

The Court of Appeals, relying on *Exeter* and *Bowens*, erred in concluding that decisions made pursuant to MCL 691.1408(2) are reviewable under an abuse of discretion standard. Absent a showing that the governmental agency exercised its discretion in an unconstitutional manner, the courts are without the power to review such decisions. Accordingly, we overrule *Exeter* and *Bowens*.

Because the Court of Appeals erred in reviewing the discretionary decisions involved in *Exeter* and *Bowens*, it follows that the exceptions to MCL 691.1408(2) the Court invented as a product of such review are also erroneous. However, even if the governmental agency decisions in those cases had been properly subject to judicial review, the exceptions invented therein still cannot stand. MCL 691.1408(2) specifies that a "governmental agency *may* pay for, engage, or furnish the services of an attorney . . . ." It says nothing about "pressing necessity" or "emergency." Where statutory language is clear, " 'no further judicial construction is required or permitted, and the statute must be enforced as written.' " *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003) (citation omitted). Because the exceptions adopted in *Exeter* and *Bowens* not only lack a statutory basis but also violate the clear language of MCL 691.1408(2) that a government agency "may" reimburse attorney fees, those exceptions cannot stand.

IV. CONCLUSION

Because MCL 691.1408(2) places the decision whether to reimburse the attorney fees at issue within

the discretion of the Flushing city council, the legislative branch of the local government, the judiciary is not empowered to review such decision absent a constitutional violation or other illegality. Where a statute permits a governmental agency to undertake a discretionary decision, and provides no limits to guide either the agency's exercise of that discretion or the judiciary's review of that exercise, the decision is not subject to judicial review absent an allegation that the exercise of discretion was in some way unconstitutional. To the extent that they are contrary to this rule, the Court of Appeals decisions in *Exeter* and *Bowens* are overruled.

The decision of the Court of Appeals is reversed. This matter is remanded to the circuit court for entry of an order dismissing plaintiff's claims.

TAYLOR, C.J., and CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

WEAVER, J. (*dissenting*). I would grant leave to appeal in this case rather than issue a final opinion at this time. This case is currently before the Court on an application for leave to appeal. The Court ordered oral arguments to help it decide if it should grant leave, deny leave, or take some peremptory action.

In its opinion, the majority addresses the broad question of judicial power, an issue raised by the Court, not the parties. Such an important and far-reaching question should not be decided without granting leave to appeal and receiving the benefit of full oral argument and full briefing, including inviting amicus briefing.

In granting leave to appeal, I would also ask the parties to address whether the plaintiff has a legal remedy under MCL 691.1408, or whether subsection 3 of the statute prohibits the imposition of liability on a

governmental agency for a decision made pursuant to subsection 2. MCL 691.1408, at the time applicable here, stated in relevant part:

> (2) When a criminal action is commenced against an officer or employee of a governmental agency based upon the conduct of the officer or employee in the course of employment, if the employee or officer had a reasonable basis for believing that he or she was acting within the scope of his or her authority at the time of the alleged conduct, the governmental agency may pay for, engage, or furnish the services of an attorney to advise the officer or employee as to the action, and to appear for and represent the officer or employee in the action. An officer or employee who has incurred legal expenses after December 31, 1975 for conduct prescribed in this subsection may obtain reimbursement for those expenses under this subsection.
>
> (3) *This section shall not impose any liability on a governmental agency*. [Emphasis added.]

Thus, the question would be whether the Legislature has specifically provided that a suit seeking to impose on a governmental agency liability based on MCL 691.1408, such as the suit here, could not be brought.

CAVANAGH and KELLY, JJ., concurred with WEAVER, J.

PEOPLE v SHEPHERD

Docket No. 127303. Decided May 24, 2005. On application by the prosecution for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals and remanded the matter to the circuit court for the reinstatement of the conviction and the sentence.

Nina J. Shepherd was convicted by a jury in the Midland Circuit Court, Thomas L. Ludington, J., of perjury as a result of giving false testimony in the trial of her boyfriend for fleeing and eluding the police. The Court of Appeals, COOPER and KELLY, JJ. (HOEKSTRA, P.J., dissenting), reversed the conviction on the basis that the trial court erred in admitting at the defendant's trial the transcript of the boyfriend's plea of guilty to a charge of subornation of perjury relating to the defendant's testimony at the boyfriend's trial. The dissenting Court of Appeals judge concluded that the error was harmless. 263 Mich App 665 (2004). The prosecution sought leave to appeal in the Supreme Court.

In an opinion per curiam, signed by Chief Justice TAYLOR, and Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The alleged constitutional error of admitting in evidence the transcript of the defendant's boyfriend's plea of guilty to a charge of subornation of perjury is harmless because it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.

Justice WEAVER, concurring, stated that she agrees with the result and most of the reasoning of the majority opinion, but wrote separately to note that the general principle that questions of constitutionality should not be decided if the case may be disposed of on other grounds does not necessarily apply in criminal cases. In this case, it is not necessary to address the constitutional issue when the Court has concluded that the admission of the evidence was harmless.

Reversed and remanded for the reinstatement of the conviction and the sentence.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that the important and recurring issue in this matter should not

be decided by opinion per curiam. The case should be held in abeyance for the Court's decision in *People v Jackson*, Docket No. 125250, or leave to appeal should be granted.

CONSTITUTIONAL LAW — CONFRONTATION CLAUSE — HARMLESS ERROR.

Harmless error analysis applies to claims concerning Confrontation Clause errors; a constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error (US Const, Am VI).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Norman W. Donker*, Prosecuting Attorney, and *Michael T. Garner*, Assistant Prosecuting Attorney, for the people.

Joseph L. Stewart for the defendant.

PER CURIAM. At issue is whether the alleged constitutional error of admitting in evidence a transcript of an unavailable witness's testimony in a different case was harmless. We conclude that it was harmless because other evidence was sufficient to sustain defendant's conviction. Accordingly, we reverse the judgment of the Court of Appeals and remand the matter to the trial court for the reinstatement of the conviction and the sentence.

I. BACKGROUND

In the early morning hours of June 2, 2003, defendant and her boyfriend, Bobby Butters, were departing from a Midland County bar owned by Rose York. Defendant was a former employee of the bar and Butters was a frequent customer. York testified that she observed defendant and Butters in the parking lot after closing and overheard them discussing rides. She saw defendant get in defendant's station wagon and she observed Butters drive off in his pickup truck.

Unbeknownst to defendant or Butters, the pickup truck was under surveillance by a Midland County sheriff's deputy, Sergeant Stephen Woods. Woods testified that he saw someone who appeared to match the general physical description of Butters get into the truck after speaking to a woman in the parking lot. Another sheriff's deputy then attempted to initiate a traffic stop, but Butters accelerated the truck to one hundred miles an hour, did not stop at a stop sign, and attempted to collide with a patrol car. He escaped, but was later apprehended.

Butters was charged with third-degree fleeing and eluding the police, MCL 750.479a(3); two counts of felonious assault, MCL 750.82; malicious destruction of fire or police property, MCL 750.377b; operating a vehicle while having a suspended or revoked license, MCL 257.904(3)(b); and driving a vehicle with an invalid or missing license plate, MCL 257.255(1). As part of the alibi defense that Butters advanced, defendant testified that Butters had departed the parking lot with her, in her station wagon, on the morning of the crime, and that, consequently, he could not have been the person in the truck who fled from the police. Butters was nevertheless convicted of third-degree fleeing and eluding and one count of felonious assault.[1] He was then charged with subornation of perjury, MCL 750.424, to which he pleaded guilty.[2] At his plea hearing, Butters

[1] The jury acquitted Butters of malicious destruction of fire or police property, and was unable to reach a verdict on the remaining count of felonious assault. The trial court dismissed that felonious assault charge and the licensing charges. The Court of Appeals affirmed. *People v Butters*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2003 (Docket No. 239277).

[2] By order of April 3, 2003 (Docket No. 246539), the Court of Appeals denied Butters's application for leave to appeal that conviction for lack of merit.

testified that defendant's testimony at his trial for fleeing and eluding was false information and that he had requested defendant to provide that testimony. Defendant was charged with perjury for giving the allegedly false testimony.

II. PROCEDURAL HISTORY

At defendant's trial, the court admitted the transcript of the hearing at which Butters pleaded guilty of subornation of perjury. Also admitted were certain statements that Butters was overheard making while he was in jail, a "script" of questions and answers that Butters had created for defendant in preparation for her testimony in his fleeing and eluding trial, and the testimony of witnesses who were present on the morning of the fleeing and eluding offense. Defendant's defense was that she was telling the truth when she testified in the earlier trial. The trial court denied defendant's motion for a directed verdict, and the jury found defendant guilty of perjury.

Defendant appealed, and the Court of Appeals majority reversed her conviction pursuant to *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).[3] The Court found constitutional error in the admission of the plea transcript, and the majority held that "[i]t is not at all clear that a rational jury would have found defendant guilty beyond a reasonable doubt absent the improperly admitted statement." 263 Mich App at 672-673. The Court of Appeals dissenting judge concluded that the error was harmless on the basis of the other evidence in support of the verdict.

The prosecutor seeks leave to appeal, conceding that the plea transcript was improperly admitted, but argu-

[3] 263 Mich App 665; 689 NW2d 721 (2004).

ing that the error was harmless beyond a reasonable doubt in light of the other legally admissible evidence that established defendant's guilt.

III. STANDARD OF REVIEW

"A constitutional error is harmless if '[it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " *People v Mass,* 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States,* 527 US 1, 19; 119 S Ct 1827; 144 L Ed 2d 35 (1999).

IV. ANALYSIS

In *Crawford, supra*, the United States Supreme Court held that, under the Confrontation Clause of the Sixth Amendment, testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. The Court of Appeals held that the trial court's admission of the transcript, in which Butters pleaded guilty of the crime of subornation of perjury, violated defendant's right to confront the witnesses against her. The Court correctly concluded that the alleged error was not a structural defect requiring automatic reversal. The question presented is whether the alleged constitutional error was harmless beyond a reasonable doubt. We agree with the dissenting Court of Appeals judge that it was.[4]

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[4] Because we conclude that the admission of the guilty plea transcript was harmless, it is not necessary to address whether the admission of the transcript violated the Confrontation Clause of the United States Constitution, US Const, Am VI, and "it is an undisputed principle of judicial review that questions of constitutionality should not be decided if the

Harmless error analysis applies to claims concerning Confrontation Clause errors, see *Delaware v Van Arsdall*, 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986). But to safeguard the jury trial guarantee, a reviewing court must "conduct a thorough examination of the record" in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error. *Neder, supra* at 19.[5] Having conducted such a review, we conclude beyond a reasonable doubt that a reasonable jury would have found defendant guilty of perjury even if the transcript of Butters's guilty plea to the charge of subornation of perjury had not been admitted.

At Butters's trial for fleeing and eluding, defendant testified that, on the morning in question, she had asked Butters to ride with her and that Butters gave his truck keys to Tony Miller. She testified that Butters requested that she take him to his grandmother's house to pick up some beer, that he told others that he was riding with her, and that Butters left the bar in defendant's car.

The statutory definition of perjury provides, in part:

> Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury . . . . [MCL 750.423.]

Apart from the plea transcript, the prosecution offered at least four other pieces of evidence that strongly

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case may be disposed of on other grounds." *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1,* 468 Mich 722, 734; 664 NW2d 728 (2003).

[5] This Court adopted the *Neder* harmless error standard in *Mass*, *supra* at 640 n 29.

supported a guilty verdict for perjury by establishing that defendant's testimony in the fleeing and eluding case was false.[6]

First, Rose York testified that she was standing outside in the parking lot when the patrons were leaving the bar. She observed defendant and Butters leave the bar together, heard them discussing rides, and saw them split up and go to their separate vehicles. She saw defendant get into her car and Butters get into his truck. Sheriff's Deputy Woods corroborated York's testimony. He testified that he had knowledge of Butters's physical appearance from prior contacts with him, and that he saw a person who generally matched that description talking with a woman and then getting in the vehicle that was being surveilled.

Second, Tony Miller testified that he was very intoxicated on the morning in question and needed to be driven home from the bar by Ty Maltby. Miller stated that he was never in Butters's pickup truck, but that defendant later telephoned him to ask him to tell the police that he had been driving it. Maltby, who testified that he had not been drinking during the time in question, corroborated Miller's testimony that Maltby drove Miller home. Thus, Miller could not have been driving Butters's pickup truck at the time of the fleeing and eluding offense.

Third, the prosecution also introduced the "script" that Butters had prepared for defendant and that had been introduced at the fleeing and eluding trial to impeach defendant's testimony. The trial court properly admitted it. The script contained twenty-one questions

[6] We recognize that the prosecutor emphasized the erroneously admitted guilty plea transcript in his argument, but this does not alter our analysis.

and answers, detailing the testimony that defendant would give at the earlier trial. It included the following:

> 3) Did you see keys in Butters [sic] hand? Yes[.]
>
> 4) What did he do with the keys? Gave them to his cousin Tony Miller[.]
>
> 5) When did he give his keys to Miller? On the way out of the Bar.
>
> 6) Why did Butters give his keys to Miller? Bob & I were going to his house to get beer from his refrigerator & then we were going to Tony's house. Tony needed a ride so Bob told Tony to take his truck.
>
> 7) How did you leave the bar? My car[.]
>
> 8) Who was with you? Bob Butters[.]

Finally, two corrections officers testified that, after Butters was arrested and incarcerated in the Midland County jail, they overheard him talking to two visitors.[7] Butters told the visitors: that there was no way he would have stopped for the sheriff's deputies because he had so much cocaine in the truck that he would have been put away for life; that he would have "killed one of the cops" before allowing himself to be caught; and that there was no way defendant would be charged with perjury because they were just trying to scare her.

Therefore, on the basis of this overwhelming evidence of the falsity of defendant's testimony in the fleeing and eluding trial, we conclude that it is clear beyond a reasonable doubt that a reasonable jury would have found defendant guilty of perjury even if the transcript of Butters's plea to the charge of subornation of perjury had not been admitted. Thus, the trial court's alleged error in admitting the transcript was harmless

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[7] The Court of Appeals correctly found that the corrections officers' testimony about Butters's nontestimonial statements to his visitors was properly admitted under MRE 804(b)(3).

beyond a reasonable doubt. The judgment of the Court of Appeals is reversed, and this case is remanded to the Midland Circuit Court for the reinstatement of the conviction and the sentence.

TAYLOR, C.J., and CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

WEAVER, J. (*concurring*). I agree with the result and most of the reasoning of the majority opinion. I write separately because the general principle that " 'questions of constitutionality should not be decided if the case may be disposed of on other grounds,' " *ante,* pp 347-348 n 4 (citation omitted), does not necessarily apply in criminal cases. As I stated in my partial concurrence and partial dissent in *People v McNally,* 470 Mich 1, 10-11; 679 NW2d 301 (2004),

> . . . that general principle does not apply here [in a criminal case]. The phrase used by the majority is a convenient and often-used shorthand for the principle that "[c]onsiderations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress [or the Legislature] unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it." *Ashwander v Tennessee Valley Auth,* 297 US 288, 341; 56 S Ct 466; 80 L Ed 688 (1936) (Brandeis, J., concurring).
>
> One of the earliest applications of this rule in Michigan was in 1874, when this Court said "any consideration of the constitutional question might have been waived, upon the ground that a legislative act should not be declared unconstitutional unless the point is presented in such a form as to render its decision imperative . . . ." *Weimer v Bunbury,* 30 Mich 201, 218 (1874).
>
> The reasons behind such judicial restraint include the delicacy and finality of judicial review of legislative acts, separation of powers concerns raised by ruling on the acts

> of the other two branches of government, and the need to show respect for the other two branches of government. See *Rescue Army v Muni Court of Los Angeles,* 331 US 549, 571; 67 S Ct 1409; 91 L Ed 1666 (1947), and Kloppenberg, *Avoiding serious constitutional doubts: The supreme court's construction of statutes raising free speech concerns*, 30 UC Davis L R 1, 13-14 (Fall, 1996).
>
> These concerns are not implicated here, because the constitutionality of an act of the Legislature or the Governor is not at issue. In deciding whether the defendant's postarrest, pre-Miranda silence was admissible in the prosecutor's case-in-chief, the Court would not be ruling on the validity of a legislative or executive decree, but on a lower court's decision whether to admit certain testimony. See Kloppenberg, *Avoiding constitutional questions*, 35 B C L R 1003, 1054 (1994).

But I agree that in *this* case it is not necessary to address the constitutional issue when the Court has concluded that the admission of the evidence was harmless.

CAVANAGH, J. (*dissenting*). I dissent on the grounds that such an important, and recurring, issue should not be decided by opinion per curiam. I would either hold this case in abeyance for this Court's decision in *People v Jackson*, Docket No. 125250, or grant leave to appeal.

KELLY, J., concurred with CAVANAGH, J.

J & J FARMER LEASING, INC v
CITIZENS INSURANCE COMPANY OF AMERICA

Docket No. 125818. Decided May 24, 2005. On application by the defendant for leave to appeal, the Supreme Court, after hearing argument on whether the application should be granted and in lieu of granting leave, vacated the judgment of the Court of Appeals in part and remanded the case to the circuit court for further proceedings.

J & J Farmer Leasing, Inc.; Farmer Brothers Trucking Company, Inc.; Calvin Orange Rickard, Jr.; and James W. Riley, personal representative of the estate of Sharyn Ann Riley, deceased, brought an action in the Washtenaw Circuit Court against Citizens Insurance Company of America, alleging bad-faith failure to settle with regard to an underlying wrongful death action by the estate against the Farmer parties. The underlying action resulted in a jury award in excess of $3 million, of which Citizens, the insurer of the Farmer parties, paid its policy limit of $750,000 plus costs, fees, and interest, leaving the Farmer parties liable for the balance of the judgment. The Farmer parties and the estate then entered an agreement to initiate a joint lawsuit against Citizens on the basis of an alleged bad-faith failure to settle. The agreement provided that the remainder of the judgment from the underlying lawsuit would be paid from any proceeds from the action alleging bad-faith failure to settle. The agreement also provided that in return for the Farmer parties' cooperation in bringing the action, the estate would forbear action to collect the excess of the underlying judgment from the Farmer parties. Citizens moved for summary disposition on the basis that the agreement functioned as a release by the estate against the Farmer parties, and therefore the estate cannot recover from Citizens because the Farmer parties will not actually suffer a loss for which Citizens can be held liable. The court, David S. Swartz, J., denied the motion. Citizens appealed by leave granted. The Court of Appeals, SAWYER, P.J., and HOEKSTRA and MURRAY, JJ., affirmed, holding that the agreement was a release because it operated to release Farmer from the underlying excess judgment. 260 Mich App 607 (2004). The Supreme Court, in lieu of granting leave to appeal, heard oral argument on whether to grant the application or take other peremptory action. 471 Mich 940 (2004).

In a unanimous opinion per curiam, the Supreme Court *held*:

There is a material difference between a covenant not to sue and a release. A release immediately discharges an existing claim or right, while a covenant not to sue is merely an agreement not to sue on an existing claim that does not extinguish the claim or cause of action. The agreement in this case was a covenant not to sue, conditioned on the covenantee performing certain duties before the covenant becomes absolute. The Court of Appeals incorrectly concluded that the covenant not to sue was a release and it needlessly relied on *Frankenmuth Mut Ins Co v Keeley (On Rehearing)*, 436 Mich 372 (1990), in reaching its determination. The parts of the Court of Appeals opinion that dealt with the release and covenant not to sue issue and its analysis regarding *Keeley* must be vacated. The circuit court correctly denied the motion for summary disposition on the basis that the agreement was a covenant not to sue. The matter must be remanded to the circuit court for further proceedings.

Court of Appeals judgment vacated in part and case remanded to the circuit court.

CONTRACTS — RELEASES — COVENANTS NOT TO SUE.

A material difference exists between a covenant not to sue and a release; a release immediately discharges an existing claim or right, while a covenant not to sue is merely an agreement not to sue on an existing claim and it does not extinguish the claim or cause of action.

Logeman, Iafrate & Pollard, P.C. (by *Robert E. Logeman* and *James A. Iafrate*), for the plaintiffs.

Plunkett & Cooney, P.C. (by *Jeffrey C. Gerish, Charles W. Browning*, and *Stephen P. Brown*), for the defendant.

Amici Curiae:

Willingham & Coté, P.C. (by *John A. Yeager* and *Kara Henigan*), for Insurance Institute of Michigan.

Maurice A. Borden for Michigan Defense Trial Counsel.

Dykema Gossett, PLLC (by *Lori McAllister* and *Kurt*

D. Gallinger), for the American Insurance Association, the National Association of Mutual Insurance Companies, and the Michigan Insurance Coalition.

PER CURIAM. At issue is whether a covenant not to sue a party is indistinguishable from a release and, thus, results in a bar to suits against a covenantee's tortfeasor by a covenantee's assignee. The Court of Appeals concluded that the instruments are indistinguishable and, accordingly, that a covenantee's assignee (the covenantor) would be barred in a suit against the tortfeasor. We disagree and vacate that part of the judgment. The Court of Appeals correctly concluded for other reasons that the covenantor was not released. Yet the Court unnecessarily relied on a misapplication of *Frankenmuth Mut Ins Co v Keeley (On Rehearing),* 436 Mich 372; 461 NW2d 666 (1990), so we vacate that portion of the Court's analysis. This case is remanded to the Washtenaw Circuit Court for further proceedings consistent with this opinion.

I

Sharyn Riley was killed when her vehicle was struck by a truck owned by J & J Farmer Leasing, Inc. (or Farmer Brothers Trucking Company, Inc.),[1] operated by their employee Calvin Rickard, Jr., and insured by Citizens Insurance Company. Rickard was at fault. James Riley, as the personal representative of Sharyn Riley's estate,[2] sued Farmer under a wrongful death theory and Citizens assumed Farmer's defense. Riley obtained a jury verdict of $3.2 million against Farmer, which exceeded the $750,000 limits of the Citizens

[1] For ease of reference, we will refer to these parties jointly as "Farmer."

[2] For ease of reference, we will refer to Sharyn Riley's estate as "Riley."

policy. Thus, Farmer, after Citizens tendered its policy limits, remained liable for the $2.45 million balance of the judgment.

Farmer, believing that the case could have settled for the policy limits but for Citizens' bad faith in pursuing settlement negotiations, assigned to Riley its cause of action against Citizens for bad-faith failure to settle.[3] As part of the agreement between Riley and Farmer, Riley agreed not to sue to collect the excess judgment of $2.45 million from Farmer as long as Farmer cooperated in the suit against Citizens.[4]

After Riley and Farmer filed suit, Citizens moved for summary disposition, MCR 2.116(C)(10), arguing that under the agreement Riley had released its underlying claim against Farmer for the excess judgment and, thus, Farmer's surety, Citizens, was also released. That is, because the principal was released, so was the surety. The circuit court denied the motion, reasoning that the joint agreement was in the nature of a covenant not to sue and not a release because, under certain conditions, Riley could proceed against Farmer to collect the underlying judgment.

The Court of Appeals granted Citizens' application for leave to appeal and subsequently affirmed on a

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[3] Michigan recognizes an insured's claim against its insurer for bad faith in refusing to settle. See *Commercial Union Ins Co v Liberty Mut Ins Co,* 426 Mich 127; 393 NW2d 161 (1986); *Wakefield v Globe Indemnity Co,* 246 Mich 645; 225 NW 643 (1929).

[4] In particular, as relevant here, the agreement sets out Farmer's desire to pursue a bad-faith claim and Riley's desire to recover the full judgment. It continues by stating that the parties will pursue a joint lawsuit against Citizens, Riley will control the lawsuit, Farmer will cooperate fully or the agreement may be rendered null and void, any recovery will go to Riley (with an exception for $20,000 for attorney fees incurred by Farmer), and Riley will in return "forever forbear" from collecting any judgment from Farmer.

different basis than the trial court. While the Court held that the trial court reached the right result because of its understanding of the intent and purpose of our decision in *Frankenmuth Mut Ins Co v Keeley (On Rehearing),* 436 Mich 372; 461 NW2d 666 (1990), the panel held that the agreement itself was a release because it "operates to release" Farmer from the underlying excess judgment.[5]

Citizens applied for leave to appeal in this Court. It argued that the covenant not to sue in the agreement effectively operated as a release. Therefore, under *Keeley, supra,* plaintiffs' claim must fail because Farmer had not suffered any pecuniary loss as a result of Citizens' alleged bad faith in failing to settle the underlying lawsuit. We entertained oral argument on this matter in lieu of granting leave to appeal under MCR 7.302(G)(1)[6] and now resolve Citizens' application for leave to appeal.

II

We review a summary disposition ruling de novo to determine whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). We view the evidence in the light most favorable to the party opposing the motion. *Id.* at 120.

III

There is a material difference between a covenant not to sue and a release. A release immediately discharges an existing claim or right. In contrast, a cov-

[5] *J & J Farmer Leasing, Inc v Citizens Ins Co of America,* 260 Mich App 607, 621; 680 NW2d 423 (2004).

[6] 471 Mich 940 (2004).

enant not to sue is merely an agreement not to sue on an existing claim. It does not extinguish a claim or cause of action. The difference primarily affects third parties, rather than the parties to the agreement. *Theophelis v Lansing Gen Hosp,* 430 Mich 473, 492 n 14; 424 NW2d 478 (1988) (GRIFFIN, J.); *Industrial Steel Stamping, Inc v Erie State Bank,* 167 Mich App 687, 693; 423 NW2d 317 (1988).

As the circuit court concluded, the agreement in this case is a covenant not to sue. Additionally, the covenant not to sue is not absolute but, rather, is conditioned on the covenantee, Farmer, performing certain duties in the litigation against Citizens. Only if Farmer performs these duties does Riley's covenant not to sue on the underlying excess judgment become absolute and release Farmer of all liability to Riley.

This analysis resolves this matter. No resort to *Keeley* to reach the same conclusion was necessary.

IV

In conclusion, the Court of Appeals incorrectly held that the covenant not to sue was a release and it needlessly relied on *Keeley*. Accordingly, the Court of Appeals opinion, insofar as it dealt with the release and covenant not to sue issue, is vacated. Its analysis regarding *Keeley* is also vacated. The circuit court correctly found that the joint agreement was a covenant not to sue and, therefore, summary disposition was appropriately denied. This matter is remanded to the circuit court for further proceedings.

TAYLOR, C.J., and CAVANAGH, WEAVER, KELLY, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

DEPARTMENT OF NATURAL RESOURCES v
CARMODY-LAHTI REAL ESTATE, INC

Docket No. 124413. Argued October 5, 2004 (Calendar No. 8). Decided May 27, 2005.

The Department of Natural Resources brought an action in the Houghton Circuit Court against Carmody-Lahti Real Estate, Inc., seeking a determination regarding the parties' rights with respect to a "right of way" granted in a deed in 1873. The plaintiff is the successor in interest of the railroad company that was the grantee. The defendant is the successor in interest of the mining company that was the grantor. The court, Roy D. Gotham, J., granted summary disposition in favor of the plaintiff and ordered the defendant to remove a fence it had placed on the property that blocked its use as a snowmobile and recreational trail. The defendant appealed, alleging that the plaintiff's predecessor abandoned the easement granted in the deed. The Court of Appeals, SMOLENSKI, P.J., and GRIFFIN and O'CONNELL, JJ., affirmed, holding that the grantor had not conveyed the easement for any particular purpose and that the termination of rail service through the right-of-way by the railroad that succeeded the original grantee was not an abandonment of the easement. The panel determined that the plaintiff's predecessor in interest had a legitimate property interest to convey to the plaintiff. Unpublished opinion per curiam, issued June 3, 2003 (Docket No. 240908). The Supreme Court granted the defendant's application for leave to appeal and denied the plaintiff's application for leave to file a cross-appeal. 470 Mich 868 (2004). The Supreme Court thereafter heard oral arguments and requested briefing on the question whether the 1873 deed conveyed a fee simple or an easement. 687 NW2d 298 (2004).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR, and Justices CAVANAGH, WEAVER, CORRIGAN, and MARKMAN, the Supreme Court *held*:

The Court of Appeals correctly held that the 1873 deed conveyed an easement rather than a fee simple estate. The Court of Appeals erred in holding that the easement was neither limited to a specific purpose nor abandoned by the plaintiff's predecessor in interest. The deed conveyed an easement for railroad purposes

only. The easement was abandoned when the plaintiff's predecessor in interest unambiguously manifested its intent to relinquish any use of the right-of-way for railroad purposes and took action consistent with that intent. The defendant has an unencumbered fee simple in the land formerly subject to the easement. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the circuit court for entry of an order of summary disposition in favor of the defendant.

1. The objective in interpreting a deed is to give effect to the intent of the parties as manifested in the language of the deed.

2. Where a grant is not of the land but is merely of its use as a right-of-way, the grant conveys an easement only.

3. The granting clause of the deed in this case conveyed only a right-of-way, an easement, not a fee simple.

4. The language of the deed clearly shows the intent of the parties that an easement be conveyed for a railroad. The easement conveyed by the 1873 deed is limited to railroad purposes. An easement limited to a particular purpose terminates when such purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment.

5. In both seeking federal permission to abandon its railroad and removing the rails themselves, the plaintiff's predecessor in interest manifested an intent to abandon the underlying easement (which was limited to railroad purposes) and took action consistent with that intent. The predecessor in interest did not have a valid property interest in the right-of-way when it thereafter attempted to convey its interest to the plaintiff.

Reversed and remanded to the circuit court.

Justice KELLY, dissenting, although agreeing with the conclusion of the majority that the plaintiff's property interest is an easement rather than a fee simple, stated that the parties that created the interest did not intend to limit its use to a rail line but, rather, created a right-of-way for a transportation corridor that can be used as a recreational trail.

There is no evidence that the easement was abandoned pursuant to the federal regulatory process for abandonment. It appears that the rail line remains under the jurisdiction of the Surface Transportation Board. If so, the defendant may not circumvent federal jurisdiction by obtaining a state court judgment of abandonment. Even if abandonment of the line were consummated with the Surface Transportation Board, the Soo Line never abandoned the underlying easement before conveying it to the plaintiff for a trail.

Recreational use of the right-of-way does not substantially increase the burden on the plaintiff's estate over its use as a railroad. Rail-to-trail conversions do not constitute abandonment of a property right under state law. Nonuse of the right-of-way for railroad purposes here did not extinguish the right-of-way. The judgments of the trial court and the Court of Appeals should be affirmed.

1. EASEMENTS — RAILROADS — DEEDS.

A written instrument conveys only an easement where the grant is not of the land but is merely of its use as a right-of-way; where the land itself is conveyed, although for railroad purposes only, without specific designation of a right-of-way, the conveyance is in fee and not an easement.

2. EASEMENTS — RAILROADS — ABANDONMENTS.

An easement limited to a particular purpose terminates as soon as its purpose ceases to exist, it is abandoned, or it is rendered impossible of accomplishment; an easement holder abandons a railroad right-of-way when nonuse is accompanied by acts on the part of the owner of either the dominant or servient tenement that manifest an intention to abandon, and that destroy the object for which the easement was created or the means of its enjoyment; both an intent to relinquish the property and external acts putting that intention into effect must be shown to prove abandonment; nonuse, by itself, is insufficient to show abandonment; rather, nonuse must be accompanied by some act showing a clear intent to abandon.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Harold J. Martin* and *John F. Szczubelek*, Assistant Attorneys General, for the plaintiff.

Bridges and Bridges (by *Caroline Bridges*) for the defendant.

YOUNG, J. In 1873, the Quincy Mining Company conveyed an interest in real property located in Houghton County, Michigan, to the Mineral Range Railroad Company. The parties labeled this interest a "right of way" in the written deed. The precise nature of this right-of-way—whether it was an easement or a fee

estate, whether it was limited to railroad purposes and, if so, what such a limitation would mean—is the subject matter of this appeal.

Plaintiff, the Michigan Department of Natural Resources, is the successor in interest of the Mineral Range Railroad Company. It asserts that it owns a fee simple interest and is therefore entitled to use the right-of-way as a snowmobile and recreation trail. Defendant, Carmody-Lahti Real Estate, Inc., is the successor in interest of the Quincy Mining Company and maintains that plaintiff's predecessor in interest enjoyed only an easement, which it abandoned before purporting to convey it to plaintiff.

We conclude that the Court of Appeals correctly determined that the 1873 deed conveyed an easement rather than a fee simple. However, we conclude that the panel erred in holding that the easement was neither limited to a specific purpose nor abandoned by plaintiff's predecessor in interest. Properly construed, the instrument conveyed an easement for railroad purposes only. Thus, when plaintiff's predecessor in interest unambiguously manifested its intent to relinquish any use of the right-of-way for railroad purposes and took action consistent with that intent, the easement was abandoned. Defendant, as successor in interest to the original grantor, now has an unencumbered fee simple interest in the land formerly subject to the easement.

We therefore reverse the judgment of the Court of Appeals and remand to the circuit court for entry of summary disposition in defendant's favor.

I. FACTS AND PROCEDURAL HISTORY

In 1873, Quincy Mining conveyed a "right of way" to Mineral Range through a written instrument that provided:

This indenture made this twentyfirst day of October in the Year of Our Lord [1873] between the Quincy Mining Company . . . and The Mineral Range Railroad Company . . . witnesseth that [Quincy Mining] for and in consideration of the sum of one dollar to it in hand paid by [Mineral Range], the receipt whereof is hereby . . . acknowledged has granted, bargained, sold, remised, aliened and confirmed and by these presents does grant, bargain, sell, remise, release, alien and confirm unto [Mineral Range] its successors and assigns forever a right of way for the railroad of [Mineral Range] as already surveyed and located by the engineer of [Mineral Range] and according to the survey thereof on file in the Office of the Registrar of Deeds for the County of Houghton, Michigan to consist of a strip of land one hundred feet in width being fifty feet on each side of said surveyed line across the following described tracts or parcels of land situated in said county of Houghton: [describes parcels/plats].

Also a right of way for said railroad surveyed and located as aforesaid and according to the survey thereof on file as aforesaid to consist of a strip of land one hundred feet in width being twenty feet in width on the north side of said surveyed line and eighty feet in width on the south side of said surveyed line across the tract or parcel of land known . . . as [describes parcels/plats].

Reserving to [Quincy Mining] and to its successors and assigns all ore and minerals on said strip of land and the right to mine the same from underneath the surface in such manner as not to interfere with the construction or operation of said railroad. Provided that [Quincy Mining] shall not in any case mine within fifteen feet of the surface of the [rock?] without the consent in writing of [Mineral Range] together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appearing to have and to hold the said strip of land with the appurtenances, for the purpose and uses above stated and subject to the reservations aforesaid unto [Mineral Range] its successors and assigns forever In Witness Whereof [Quincy Mining] has caused its corporate seal to be affixed

> and these presents to be executed by its President and Secretary the day and year first above written. Signed, sealed and delivered . . . .

Quincy Mining, the grantor, subsequently transferred its remaining interest in the Houghton County property to the Armstrong-Thielman Lumber Company, which, in turn, sold its interest to defendant Carmody-Lahti Real Estate, Inc. Mineral Range later conveyed its right-of-way to the Soo Line Railroad Company, which, until the early 1980s, continued to utilize the right-of-way for railroad purposes.

Although the railroad industry was central to the economic vitality of our nation in the mid-nineteenth century, its dominance began to wane in the late nineteenth and early twentieth centuries—the years following the initial transfer of the Houghton County right-of-way.[1] But even as railroading itself declined in importance, the United States Congress determined that the rail corridors themselves might prove vital for future economic growth.[2] Accordingly, Congress enacted the Transportation Act of 1920, which required, among other things, that railroad companies seek and obtain the permission of the Interstate Commerce Commission (ICC) before abandoning any extant rail line.[3] Congress has since amended this procedure with the

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[1] See, generally, Wright & Hester, *Pipes, wires, and bicycles: Rails-to-Trails, utility licenses, and the shifting scope of railroad easements from the nineteenth to the twenty-first centuries*, 27 Ecology L Q 351 (2000).

[2] See *Preseault v Interstate Commerce Comm,* 494 US 1, 5-6; 110 S Ct 914; 108 L Ed 2d 1 (1990). See also Wild, *A history of railroad abandonments,* 23 Transp L J 1 (1995).

[3] Transportation Act, 41 Stat 456 (1920). See Wild, *supra,* p 4 (noting that the Transportation Act was largely concerned with "railroad rate policies"). Abandonment is to be distinguished from mere discontinuance of service. See *Preseault, supra* at 6 n 3. The former involves relinquishing rail lines and underlying property interests. Discontinuance, on the

Railroad Revitalization and Regulatory Reform Act (RRRRA) of 1976,[4] and again with the Staggers Rail Act of 1980.[5]

In September 1982, Soo Line, which then owned the right-of-way originally granted to the Mineral Range Railroad in 1873, sought federal permission to abandon the railway. The ICC granted this request in a written order on September 29, 1982. The order placed specific conditions on Soo Line's abandonment of its railway:

> Soo Line shall keep intact all of the right-of-way underling [sic] the track, including all the bridges and culverts, for a period of 120 days from the decided date of this certificate and decision to permit any state or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of the right-of-way. In addition, Soo Line shall maintain the Houghton Depot for 120 days from the decided date of this certificate and decision. During this time, Soo Line shall take reasonable steps to prevent significant alteration or deterioration of the structure and afford to any public agency or private organization wishing to acquire the structure for public use the right of first refusal for its acquisition.

Six years after the ICC granted its request to abandon the railway, Soo Line conveyed the right-of-way to

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other hand, "allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future." *Id.*

[4] Railroad Revitalization and Regulatory Reform Act of 1976, PL 94-210, 90 Stat 31 (1976). See Wild, *supra,* pp 7-8.

[5] Staggers Rail Act of 1980, PL 96-448, 94 Stat 1895 (1980). See also Wild, *supra,* p 9. Congress abolished the ICC in 1995, ICC Termination Act of 1995, 109 Stat 803, and vested authority over railroad abandonment in the Surface Transportation Board, 49 USC 10903. See *RLTD R Corp v Surface Transportation Bd,* 166 F3d 808, 810 (CA 6, 1999). After Soo Line abandoned its Houghton County right-of-way in 1982, Congress amended the National Trails System Act, 16 USC 1241 *et seq.,* to create a "railbanking" program. See 16 USC 1247(d).

plaintiff, the Michigan Department of Natural Resources (MDNR). By that time, the railroad tracks that originally occupied the right-of-way had been largely removed. The record reveals that, by 1988, there were no railroad tracks on the thirty-foot strip of land at issue in this case and there were only remnants of track scattered along the easement. Thus, the task of reconstructing the path of the railroad for litigation purposes was a difficult one. The parties offered on this issue the testimony of several surveyors, and each described a painstaking process in which they consulted a number of maps and searched for remaining physical evidence of the railroad.

The MDNR used the right-of-way as a snowmobile and recreation trail until 1997, when defendant installed a fence that blocked a portion of the right-of-way, substantially interfered with its recreational use, and spawned the present litigation.

In December 1997, plaintiff filed a complaint seeking an order to enjoin defendant from blocking the right-of-way with its fence. Plaintiff argued that it had an unlimited right to use the right-of-way for any purpose because the 1873 deed conveyed to Mineral Range Railroad, its predecessor in interest, a fee simple estate. Defendant argued in response that the deed had conveyed only an easement limited to railroad purposes. The MDNR exceeded the scope of the easement, defendant argued, and had thereby extinguished the right-of-way.

The trial court initially granted summary disposition in plaintiff's favor, concluding that the 1873 instrument conveyed a fee estate rather than an easement and that plaintiff was therefore permitted to use the right-of-way as a snowmobiling trail. The Court of Appeals reversed and remanded the matter to the trial court. Unpub-

lished opinion per curiam, issued June 5, 2001 (Docket No. 222645). The panel held that the 1873 deed conveyed an easement rather than a fee simple and, accordingly, remanded to the circuit court for a determination whether the easement had been extinguished.

When the matter returned to the trial court, defendant filed a motion for summary disposition, arguing that the right-of-way had been extinguished by abandonment or by a 1920 tax sale of the servient estate. The trial court rejected both claims, granted summary disposition to plaintiff, and ordered the injunctive relief —removal of defendant's fence—sought by plaintiff.

Defendant appealed this judgment to the Court of Appeals. There, defendant no longer asserted that Soo Line had abandoned the easement as a result of the 1920 tax sale. Rather, defendant maintained that plaintiff's predecessor abandoned the easement. The Court of Appeals, like the trial court, rejected this argument. The panel affirmed the judgment of the trial court, holding that Quincy Mining had not conveyed the easement for any "particular purpose" and, therefore, that Soo Line's termination of rail service through the right-of-way was not an abandonment of its easement. Unpublished opinion per curiam, issued June 3, 2003 (Docket No. 240908).

Assessing the specific language of the 1873 instrument, the Court of Appeals stated:

> [W]e believe that the phrase in the 1873 deed, "a right of way for the railroad of [the Mineral Range Railroad]," cannot be construed as a defeasance clause or as granting the easement for a particular purpose only. In making this determination, *Quinn* [*v Pere Marquette R Co,* 256 Mich 143; 239 NW 376 (1931)] is instructive. The phrase is akin to a statement of purpose. The declaration that the easement was for the Mineral Range Railroad's construction of a railroad was "merely an expression of the intention of the

> parties that the deed is for a lawful purpose." *Quinn, supra* at 151. Thus, Soo Line's cessation of rail service and subsequent sale of the easement to be used for non-railroad purposes did not automatically extinguish the easement. [Slip op at 6-7.]

The panel also rejected the argument that Soo Line's abandonment application to the ICC in 1982 constituted an abandonment of the easement.[6] In the end, the panel determined that Soo Line had a legitimate property interest to convey to plaintiff and that plaintiff was therefore entitled to summary disposition.

This Court granted defendant's application for leave to appeal on June 3, 2004, and solicited amicus briefs.[7] We initially denied plaintiff's application for leave to cross-appeal from the first Court of Appeals opinion (holding that the 1873 deed conveyed an easement). However, after hearing oral arguments, we requested additional briefing on the question whether the 1873 deed conveyed a fee simple or an easement.[8]

II. STANDARD OF REVIEW

A trial court's decision to grant or deny summary disposition under MCR 2.116(C)(10) is subject to review de novo.[9] Under this court rule, a party is entitled to summary disposition when "there is no genuine issue as

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[6] The Court stated:

> In regards to the ICC certificate of abandonment, the ICC only regulates and approves cessation of railroad operations, it "does not determine abandonment." [*Id*. at 9 (citation omitted).]

[7] *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc,* 470 Mich 868 (2004).

[8] *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc,* 687 NW2d 298 (2004).

[9] *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

to any material fact, and the moving party is entitled to judgment . . . as a matter of law."[10]

III. ANALYSIS

Plaintiff, the Michigan Department of Natural Resources, asserts the right to use of a former railroad right-of-way in Houghton County, Michigan, as a public snowmobile and outdoor recreation trail. Defendant, Carmody-Lahti Real Estate, Inc., purports to own the land underlying the trail in fee simple and claims the legal right to bar public recreational use of the right-of-way. At first blush, then, this case seems to concern land use policy. Moreover, it is a policy question on which both our federal and state legislatures have spoken: Congress has enacted the National Trails System Act,[11] which codifies a federal policy of preserving our nation's rail corridors; the Michigan Legislature has enacted the State Transportation Preservation Act in 1976, which declares a legislative preference for using dormant railways as recreational trails.[12]

But the question of how the land *ought* to be used is not before us. Instead, this appeal presents us with the more modest task of discerning the meaning of a late-nineteenth century deed. In order to determine whether plaintiff is entitled to the injunctive relief granted on remand by the trial court, we must determine, first, whether the "right of way" conveyed by the 1873 deed in question is an easement or a fee simple. If the right-of-way is an easement, we must then establish whether plaintiff has exceeded the scope of the easement or has abandoned it.

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[10] MCR 2.116(C)(10).

[11] 16 USC 1241-1249.

[12] MCL 474.51 *et seq.*

A. RIGHT-OF-WAY AS FEE SIMPLE OR EASEMENT

Our initial task is to establish the precise contours of the property interest conferred upon Mineral Range Railroad, plaintiff's predecessor in interest. According to plaintiff, the 1873 deed conveyed the land *itself* to Mineral Range Railroad. Thus, plaintiff argues that, as Mineral Range's successor in interest, it owns the land described by the 1873 deed in fee simple. Defendant argues, however, that the deed transferred only an easement—the right to *use* the land—rather than the land itself.

An inquiry into the scope of the interest conferred by a deed such as that at issue here necessarily focuses on the deed's plain language,[13] and is guided by the following principles:

> (1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise ascertainable.[14]

These four principles stand for a relatively simple proposition: our objective in interpreting a deed is to give effect to the parties' intent as manifested in the language of the instrument.

The instrument's granting clauses are a natural

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[13] *Quinn, supra* at 150.

[14] *Purlo Corp v 3925 Woodward Avenue, Inc*, 341 Mich 483, 487-488; 67 NW2d 684 (1954) (citations omitted).

starting point for discerning the parties' intent.[15] The deed purports to convey a "right of way" that "consist[s]" of a "strip of land . . . across [the parcels described in the deed]." As we recognized over seventy years ago in *Quinn,* a deed *granting* a right-of-way typically conveys an easement, whereas a deed granting *land itself* is more appropriately characterized as conveying a fee or some other estate:

> Where the grant is not of the land but is merely of the use or of the right of way, or, in some cases, of the land specifically for a right of way, it is held to convey an easement only.
>
> Where the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way, the conveyance is in fee and not of an easement.[16]

Here, the deed's granting clause conveys only a right-of-way. The plain language of the deed, as well as the rule of construction articulated in *Quinn,* therefore indicate that the deed conveyed an easement rather than a fee simple.

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[15] Although it may look at first glance as though the deed grants two separate rights-of-way, the instrument grants only a *single* right-of-way, one that is positioned slightly differently within the first and second sets of plats described in the deed. The entire right-of-way is measured from a single line surveyed across a series of plats. For the first set of plats, the right-of-way is one hundred feet total in width, measured fifty feet on either side of the survey line. For the second set of plats, the right-of-way is still one hundred feet total in width, but it is measured twenty feet on one side of the surveyed line and eighty feet on the other.

[16] *Quinn, supra* at 150-151 (citations omitted). A similar distinction was made in *Jones v Van Bochove,* 103 Mich 98, 100; 61 NW 342 (1894):

> We think the court below was correct in holding that the deed conveyed an easement only, and not a fee. It does not purport to convey a strip of land 40 feet wide, etc., but the right of way over a strip 40 feet wide. Cases, undoubtedly, can be found in which the operative words of the grant relate to the land itself; but such construction cannot be given to this deed.

Plaintiff relies on *Quinn* for the proposition that the term "right-of-way" "has two meanings in railroad parlance: the strip of land upon which the track is laid, and the legal right to use such strip."[17] The former meaning, in plaintiff's view, is an estate in real property, whereas the latter—the right to *use* property—is an easement only. Because "right-of-way" may be defined in two ways, plaintiff contends that the 1873 deed is ambiguous.

The initial flaw with this argument is this: although "right-of-way" is susceptible to two meanings, it does not follow that the phrase is equally susceptible to either meaning in this case. As already noted, application of the principles articulated in *Quinn* shows that this deed—which grants a "right of way" rather than, for example, a strip of land to be used as a right-of-way—conveys an easement only.

Moreover, it would make little sense to read the phrase "right of way" as referring to a strip of land. Recall that the deed conveys a right-of-way, and subsequently describes that right-of-way as "consist[ing] of a strip of land . . . ." If "right of way" is to be interpreted as conveying the land itself rather than passage *over* a strip of land, then the instrument must be interpreted as transferring *"[a strip of land] . . . to consist of a strip of land . . . .*" This reading produces a redundancy and violates the principle that "all the language of a deed must be harmonized and construed so as to make all of it meaningful . . . ."[18] Accordingly, it is an interpretation we must reject.

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[17] *Quinn, supra* at 150. See also anno: *Deed to railroad company as conveying fee or easement,* 6 ALR 3d 973 (1966); 65 Am Jur 2d, Railroads, § 40, p 234.

[18] *Purlo, supra* at 487-488.

According to the granting clause, the right-of-way to which the deed refers appears to be "the legal right to use the . . . strip"—or, in other words, an easement.[19] The deed contains no language that belies this conclusion or affirmatively indicates that the parties intended to convey a fee simple. Although the deed refers to "strips of land," even a cursory reading of the deed reveals that these references are merely descriptive of the right-of-way,[20] the object of the granting clauses, and are not an attempt to convey an interest in the land itself.

Indeed, one need only examine the language describing the right-of-way as consisting of a "strip of land . . . *across*" the described parcels to confirm this fact. That the parties described the interest as going "across" the land reveals that they understood the right-of-way as being distinct from the land itself. As in *Westman v Kiell,*[21] "[t]his language evidences an intent to convey a use or right of way upon and across the land, or, in other words, an easement."[22]

The language of the habendum clause is also consistent with conveyance of an easement. This clause states that Mineral Range Railroad was "to have and to hold the said strip of land with the appurtenances, for the purpose and uses above stated and subject to the reservations aforesaid . . . forever . . . ." The reference in the habendum clause to the "purpose and uses above stated and . . . the reservations aforesaid" dem-

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[19] See *Quinn, supra* at 150 (noting that "[w]here the grant is not of the land but is merely of the use or of the right of way . . . it is held to convey an easement only").

[20] Compare *Jones v Van Bochove*, 103 Mich 98; 61 NW 342 (1894) (described earlier in this opinion).

[21] 183 Mich App 489; 455 NW2d 45 (1990).

[22] *Id.* at 494.

onstrates the parties' intent to convey only the limited property interest previously described in the deed. Although the habendum clause refers to a "strip of land," the context of this phrase—particularly the references to "strip[s] of land" in clauses that precede the habendum clause—shows that this reference describes the geographical placement of the easement rather than the nature of the property interest conveyed.

Plaintiff contends that Quincy Mining's reservation of mineral rights indicates that the parties intended the deed to convey a fee simple rather than an easement. This argument is unpersuasive. Indeed, plaintiff's assertion that this reservation would have been unnecessary if Quincy Mining had conveyed only an easement overlooks the key difference between railroad easements and ordinary easements.

Typically, the owner of a servient estate may continue to use land encumbered by an easement.[23] Railroad easements, however, are "essentially different from any other [easement]."[24] As one commentator recently noted, "a railroad right-of-way easement granted by a landowner cannot be used by the landowner for any reason, even if the use does not interfere with the use by the easement holder."[25] For this reason, grantors of railroad rights-of-way have included language in deeds to delineate their continuing use rights in the portion of their fee estate burdened by a railroad easement. In *Michigan Limestone & Chemical Co v Detroit & M R Co,* for example, a railway enjoyed a

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[23] *Harvey v Crane,* 85 Mich 316, 323; 48 NW 582 (1891).

[24] 65 Am Jur 2d, Railroads, § 71, p 254. See also Sennewald, *The nexus of federal and state law in railroad abandonments,* 51 Vand L R 1399, 1412 (1998).

[25] Sennewald, *supra,* p 1411.

"right of way *through* plaintiff's property"[26]—an easement according to the standards articulated in *Quinn*.[27] Yet the deed expressly reserved for the grantor the right to build a road, pipeline, or conduit across the railroad right-of-way to ensure that the grantor's quarry had continued access to Lake Huron.[28] Therefore, there is nothing incongruous about the grantor's reservation of mineral rights and our conclusion that the right-of-way conveyed in 1873 was an easement. Rather, such a reservation might be expected in a deed conveying a railroad right-of-way, particularly when the grantor is a mining company and has a strong interest in protecting its mining interests.

Although our sole concern is the intent of the parties as manifested in the plain language of the deed at issue here, it is worth noting that this analysis of the deed is consistent with our prior jurisprudence in this area. In general, this Court has construed deeds that purport to convey a right-of-way as transferring an easement. In fact, we have been unable to discover a *single* case in which this Court construed a deed conveying a "right of way" as transferring a fee estate, and plaintiff has directed us to none.

In *Jones v Van Bochove*,[29] for example, we considered a deed with a granting clause that conveyed

> "[a]ll that certain piece or parcel of land situate * * * and described as follows, to wit: The right of way for a railroad,

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[26] 238 Mich 221, 223; 213 NW 221 (1927) (emphasis added).

[27] *Quinn, supra* at 150 ("Where the grant is not of the land but is merely of the use or of the right of way . . . it is held to convey an easement only.").

[28] *Limestone & Chemical Co, supra* at 223. See also *Mahar v Grand Rapids Terminal R Co,* 174 Mich 138, 143; 140 NW 535 (1913), noting that a deed conveying an easement "reserve[d] to the [grantors] the right of sewage and drainage across the premises."

[29] 103 Mich 98; 61 NW 342 (1894).

> running from the marl bed of said cement company to their works, on the west side of the Kalamazoo river, and described as follows: 'A strip of land 40 feet wide * * * and 952 feet in length.['] "[30]

We held that this granting clause conveyed an easement rather than a fee, noting that the deed "does not purport to convey a strip of land 40 feet wide, etc., but *the right of way over a strip 40 feet wide.*"[31] Likewise, in *Mahar, supra,* we determined that the following language conveyed an easement rather than a fee estate:

> "That the said parties of the first part, for and in consideration of the future construction, continued maintenance and operation of a first-class, standard-gauge steam railroad (over which shall be transported passengers and freight) within the time, limits and conditions hereinafter to be defined, . . . have granted, bargained, sold and conveyed and by these presents do grant, bargain, sell, convey and quitclaim unto the party of the second part, his successors or assigns*, for a right of way for a railroad forever . . . .*"[32]

In contrast, deeds that this Court and the Court of Appeals have read as conveying a fee rather than an easement typically contain language that unambiguously conveys an estate in land and are therefore readily distinguishable from that at issue here. In *Quinn,* this Court held that a deed conveying a " 'parcel of land' " " 'to be used for railroad purposes only' " conveyed a fee estate.[33] Not only did that deed omit any reference to a "right of way," but it specifically conveyed "*all the*

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[30] *Id.* at 100. See also *Westman v Kiell,* 183 Mich App 489, 494; 455 NW2d 45 (1990), holding that a deed conveying a " 'right of way *upon* and *across* lands of Henry Salee . . . for the uses and purposes of said Railroad Company' " transferred an easement rather than a fee. (Emphasis in original.)

[31] *Jones, supra* at 100 (emphasis added).

[32] *Mahar, supra* at 139-140 (emphasis added).

[33] *Quinn, supra* at 146.

estate, right, title, claim and demand whatsoever of the [grantor], both legal and equitable, in and to the said premises . . . ."[34] This language unambiguously showed the grantors' intent to convey their *entire* estate.

Similarly, the Court of Appeals held that the deed in *O'Dess v Grand Trunk W R Co*[35] concerned a fee. In that case, the deed at issue conveyed "*all the estate, right, title, claim, and demand of the party of the first part, both legal and equitable*." Again, this language unequivocally manifested an intent to convey *all* the grantor's rights to the property.

This Court also held that the instrument at issue in *Epworth Assembly v Ludington & Northern Railway*[36] conveyed a fee determinable. That conveyance purported to be a "quitclaim" deed:

> "Provided, however, if, for any reasons, the property . . . above described shall, for one year or longer, cease to be used for railroad purposes and trains shall not be run over the railroad track built or to be built on the land described, then and in that case all of the land herein described, together with all and singular the hereditaments and appurtenances belonging or in anywise appertaining thereto shall revert to the Epworth Assembly, of Ludington, Michigan, its heirs and assigns, and *this quitclaim deed* become null and void and of no effect and all rights, title and interest in and to the lands above described remain the same as would have been the case if this *quitclaim deed* had never been executed."[37]

A quitclaim deed is, by definition, "[a] deed that conveys a grantor's *complete interest or claim in certain real property* but that neither warrants nor professes

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[34] *Id.* (emphasis added).

[35] 218 Mich App 694; 555 NW2d 261 (1996).

[36] 236 Mich 565; 211 NW 99 (1926).

[37] *Id.* at 573 (emphasis added).

that the title is valid."[38] Again, then, the deed at issue in *Epworth* showed the grantor's intent to convey *all* its interest in the property and lacked any language indicating that the grantor intended to convey merely an easement.

In short, we have consistently held that deeds conveying a right-of-way transferred an easement. And we have reached a contrary conclusion only in cases in which the deed unmistakably expressed the grantor's intent to convey a fee simple. As shown above, the deed at issue here falls squarely within the first group.

B. THE NATURE OF THE GRANTEE'S RIGHT-OF-WAY

Although we have determined that the 1873 deed conveyed an easement rather than a fee estate, our inquiry into the scope of the interest conveyed to Mineral Range Railroad, plaintiff's predecessor in interest, is not yet complete. An easement is, by nature, a limited property interest. It is a right to "*use* the land burdened by the easement" rather than a right to "occupy and possess [the land] as does an estate owner."[39] Accordingly, an easement, whether appurtenant[40] or in

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[38] Black's Law Dictionary (7th ed) (emphasis added). See also *Putnam v Russell,* 86 Mich 389; 49 NW 147 (1891).

[39] Bruce & Ely, The Law of Easements and Licenses in Land, § 1:1 (2004). See also *Rusk v Grande,* 332 Mich 665, 669; 52 NW2d 548 (1952), quoting *Morrill v Mackman,* 24 Mich 279, 284 (1872), and *McClintic-Marshall Co v Ford Motor Co,* 254 Mich 305, 317; 236 NW 792 (1931) (" 'An easement is a right which one proprietor has to some profit, benefit or lawful use, out of, or over, the estate of another proprietor. * * * It does not displace the general possession by the owner of the land, but the person entitled to the easement has a qualified possession only, so far as may be needful for its enjoyment.' ").

[40] An easement appurtenant is one "created to benefit another tract of land, the use of easement being incident to the ownership of that other tract." Black's Law Dictionary (7th ed).

gross,[41] is generally confined to a specific purpose.[42]

In order to determine whether the easement at issue here is limited to a specific purpose, we must discern the parties' intent as shown by the plain language of the

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[41] An easement in gross is one "benefiting a particular person and not a particular piece of land." Black's Law Dictionary (7th ed).

[42] See *St Cecelia Society v Universal Car & Service Co,* 213 Mich 569, 576-577; 182 NW 161 (1921), quoting 9 RCL, Easements, § 2 (" 'An easement has been defined as a liberty, privilege or advantage in land without profit, existing distinct from the ownership of the soil. It is a right which one person has to use the land of another for a specific purpose.' "); 28A CJS, Easements, § 2, pp 166-167 ("Generally, an easement is a right that one has to use another's land for a specific purpose that is not inconsistent with the other's ownership interest . . . ."); 25 Am Jur 2d, Easements and Licenses, § 71, p 568 ("The rights of any person having an easement in the land of another are measured and defined by the purpose and character of the easement.").

The dissent asserts that "[w]e infer also that the parties intended that the permitted use of an easement will change over time absent language to the contrary in the deed." *Post* at 404. For this proposition, it cites Restatement Property, 3d, § 4.10, p 592. This passage provides:

> Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.

This passage suggests that the "manner, frequency, and intensity" of the grantee's use of the easement may change through time; this is an assertion with which we have no quarrel. But, where a deed grants an easement limited to railroad purposes, it is only the "manner, frequency, and intensity" of *railroad uses* that may change over time. The Restatement does not suggest that the fundamental nature of an easement may change through time. Moreover, while the dissent acknowledges that specific language in the deed may curb the extent to which an easement adapts to changing circumstances, *post* at 404, it fails to recognize the limits imposed by the specific language in the deed at issue here.

deed.[43] Here, the parties conveyed a right-of-way "for the railroad" of the original grantee. This language shows quite clearly that the parties intended to convey an easement *for a railroad*. Even the paragraph reserving the grantor's rights to extract minerals from the strip of land at issue states that such extraction must be performed "in such manner as not to interfere *with the construction or operation of said railroad*." Finally, the deed's habendum clause expressly states that the right-of-way is the grantee's "to have and to hold . . . *for the purpose and uses above stated and subject to the reservations aforesaid* . . . ." The only purpose and use mentioned in the instrument is the construction and operation of a railroad. We conclude, therefore, that the easement conveyed by the 1873 deed is limited to railroad purposes.[44]

Plaintiff maintains that the interest conveyed by the 1873 deed is not limited to railroad purposes, referring us to *Quinn, supra,* as support for its argument. In *Quinn,* we held that the landowners had conveyed a fee simple (rather than an easement) to the defendant railway company and, thus, that the defendant was entitled to drill for oil and gas in the subject property. Justice FEAD, writing for the Court, reasoned, "Where the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way, the conveyance is in fee and not of an easement."[45] He

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[43] *Purlo, supra* at 487-488.

[44] The dissenting opinion concludes that "the deed created a right-of-way for a transportation corridor" where the grantee could run a railroad. *Post* at 404. We can find no mention of a "transportation corridor" in the deed, and cannot locate any "broad language," *id.* at 405, that would support such a reading (nor does the dissent cite any such language). We simply see no principled way to justify the dissent's reading in light of the applicable rules of construction.

[45] *Quinn, supra* at 150-151.

then rejected the proposition that the fee was limited to a specific use: "Had the grant contained a reverter clause the title would have been a determinable fee upon condition subsequent."[46] Plaintiff argues, therefore, that the *lack* of a defeasance clause in the 1873 deed indicates, as shown by *Quinn,* that the interest conveyed was not intended to be limited to railroad purposes.

Plaintiff's reliance on *Quinn* is misplaced, for that case is distinguishable in an important sense from the case at bar. At issue in *Quinn* was a fee simple—an *estate* in land. Here, we are concerned with the scope of an easement—an *interest* in land.[47] Fee simple estates revert to the grantor only if they contain language providing for reversion. Easements, on the other hand, are *inherently* limited estates in land.[48] Thus, the principles applicable to the fee simple in *Quinn* do not translate to the easement under consideration in this case.

We conclude, therefore, that the plain language of the 1873 deed limited the easement conveyed to the original grantee to railroad purposes.

C. ABANDONMENT OF THE EASEMENT

Finally, we turn to the question whether plaintiff has a valid interest in this easement limited to railroad purposes. This easement, limited as it is to a particular purpose, will "terminate[] as soon as such purpose

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[46] *Id.* at 152.

[47] See *Kitchen v Kitchen,* 465 Mich 654, 659; 641 NW2d 245 (2002). The dissenting opinion makes similar errors, first relying on *Quinn* to (mis)interpret the language of the deed at issue here, *post* at 402, and then citing the absence of "defeasance or reverter language" to argue that the easement was not limited to railroad purposes. *Id.* at 405.

[48] See note 33.

ceases to exist, is abandoned, or is rendered impossible of accomplishment."[49] In this case, defendant alleges that the easement was terminated because of the actions of plaintiff's predecessor in interest. Thus, we must determine whether plaintiff's predecessor in interest abandoned its interest in the Houghton County right-of-way.

Before determining whether plaintiff's predecessor in interest abandoned the easement, however, a brief overview of federal and state rails-to-trails legislation is necessary. The Sixth Circuit Court of Appeals succinctly summarized the applicable federal legislation in *RLTD R Corp v Surface Transportation Bd*:[50]

> In the Transportation Act of 1920, Congress gave the Interstate Commerce Commission ("ICC") jurisdiction over railroad track abandonments. Pursuant to the ICC Termination Act of 1995, the ICC ceased to exist. Authority over abandonment applications is now held by the [Surface Transportation Board (STB)].
>
> Prior to the enactment of the Transportation Act, state and local authorities constrained railroad companies in their efforts to abandon unprofitable tracks. In giving the ICC/STB authority to grant or deny applications for abandonment, Congress sought to balance the railroad companies' need to dispose of trackage that was no longer profitable with the public's need for a working interstate track system. If a railroad track falls within its jurisdiction, the ICC/STB has exclusive authority to determine whether abandonment will be permitted. The ICC/STB may approve an abandonment after a full administrative proceeding, or it may authorize abandonment by granting an exemption from the section 10903 process for "out-of-service" rail lines. The ICC/STB loses its jurisdiction over a rail line once the line is abandoned pursuant to an ICC/STB authorization. Actual

[49] 25 Am Jur 2d, Easements and Licenses, § 96, p 594.

[50] 166 F3d 808 (CA 6, 1999).

> abandonment pursuant to authorization is known as "consummation."[51]

The 1976 Michigan State Transportation Preservation Act (MSTPA) works in concert with the federal legislation. It declares that the "preservation of abandoned railroad rights of way for future rail use and their interim use as public trails" is a "public purpose."[52] The act therefore requires railroad companies wishing to abandon a railway to notify the state Department of Transportation and authorizes the Department of Transportation or the MDNR to acquire abandoned railways.[53] If a right-of-way is acquired under the MSTPA, the acquiring department "may preserve the right-of-way for future use as a railroad line and, if preserving it for that use, shall not permit any action which would render it unsuitable for future rail use."[54]

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[51] *Id.* at 810-811 (citations omitted). In 1983, Congress amended the National Trails System Act to create a "railbanking" program. See 16 USC 1247(d); *Wright and Hester, supra* at 356-357 ("The rails-to-trails program was born after President Johnson signed the National Trails System Act in 1968 and Congress, responding to the alarming increase in railroad abandonments and the growing need for alternative transportation corridors, implemented what has come to be called its "railbanking" policy through its amendment of the Trails Act in 1983."). Federal law, as the Sixth Circuit Court of Appeals noted, now

> allows a railroad wishing to cease operations along a stretch of track to negotiate with the state, municipality, or private group concerning the transfer of financial and managerial responsibility for the railroad corridor and the maintenance of the corridor for possible future rail use—called "railbanking". Railbanking is an alternative to abandonment. With railbanking, the railroad maintains ownership of the rail corridor, a third party makes interim use of the rail corridor, and the ICC/STB's jurisdiction over the rail corridor continues. When a track is abandoned, however, ICC/STB jurisdiction ceases, and, in the usual case, reversionary interests in the rail corridor become effective. [*RLTD R Corp, supra* at 810-811.]

[52] MCL 474.51(3).

[53] MCL 474.56, 474.58.

[54] MCL 474.60(11).

With this background in the applicable federal and state law, we turn now to the question whether Soo Line, plaintiff's predecessor in interest, abandoned the right-of-way at issue here.

On September 29, 1982, the ICC authorized Soo Line's abandonment, for purposes of federal law, of the railway at issue in this case. The ICC "certificate and decision" reports that the Michigan Department of Transportation originally provided financial assistance to Soo Line on terms established by the ICC. After the financial assistance agreement expired on October 1, 1982, the ICC granted Soo Line permission to abandon the railway. The ICC's decision included the following terms:

> Soo Line shall keep intact all of the right-of-way underling [sic] the track, including all the bridges and culverts, for a period of 120 days from the decided date of this certificate and decision to permit any state or local government agency or other interested party to negotiate the acquisition for public use of all or any portion of the right-of-way. In addition, Soo Line shall maintain the Houghton Depot for 120 days from the decided date of this certificate and decision. During this time, Soo Line shall take reasonable steps to prevent significant alteration or deterioration of the structure and afford to any public agency or private organization wishing to acquire the structure for public use the right of first refusal for its acquisition.

Soo Line followed the procedures necessary to abandon the railroad and, after the 120-day period ordered by the ICC, was free to abandon its right-of-way. That is not to say, however, that the easement, a creature of state law distinct from the rail that physically occupied the right-of-way, was necessarily abandoned at the end of the 120-day period prescribed by the ICC.

An easement holder abandons a railroad right-of-way when "non-user is accompanied by acts on the part of the owner of either the dominant or servient tenement which manifest an intention to abandon, and which destroy the object for which the easement was created or the means of its enjoyment . . . ."[55] This principle was recently summarized by the Court of Appeals in *Ludington & Northern Railway v Epworth Assembly*:

> To prove abandonment, both an intent to relinquish the property and external acts putting that intention into effect must be shown. Nonuse, by itself, is insufficient to show abandonment. Rather, nonuse must be accompanied by some act showing a clear intent to abandon.[56]

In this case, it is clear that the railway is no longer used. The question, therefore, is whether Soo Line manifested an intent to abandon the underlying *easement* and not simply the railway that utilized the easement.

This intent cannot *necessarily* be inferred from the fact that a railroad company sought and obtained permission from the ICC/STB to abandon a railway and took action consistent with that federal authorization.[57]

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[55] *Van Bochove, supra* at 101.

[56] 188 Mich App 25, 33; 468 NW2d 884 (1991) (citations omitted).

[57] On this point, we agree with the dissent. We part company, of course, in assessing the legal significance of Soo Line's petition to abandon its railroad under Michigan real property law.

The majority and dissent also differ on a related point. The dissenting opinion presumes that we may rely on the views of Congress and federal agencies on questions of state real property law such as abandonment. See *post* at 397 ("Congress has made clear that use of a rail line as a recreational trail after the issuance of a certificate of abandonment should not be equated with abandonment of the easement."). Assuming the dissent's assertions about the views of Congress are correct, we believe that Justice KELLY's reliance on those views is misplaced. Unless federal law expressly or implicitly preempts state law in this area, we see

A railway located on an easement is analytically distinct, after all, from the easement itself. But as already shown, the easement in this case is *itself* limited to railroad purposes under the 1873 deed. Therefore, in both seeking federal permission to abandon its railroad and removing the rails themselves, Soo Line manifested an intent to abandon the underlying easement (which was limited to railroad uses) and took action consistent with that intent.[58]

The United States District Court for the Western District of Michigan reached a similar conclusion in *Belka v Penn Central Corp.*[59] In *Belka,* the plaintiffs argued that the easement possessed by Penn Central was limited to railroad purposes[60] and, therefore, that

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no reason to defer to Congress in determining when an easement is abandoned for purposes of Michigan's common law of real property. See *Crosby v Nat'l Foreign Trade Council,* 530 US 363, 372-373; 120 S Ct 2288; 147 L Ed 2d 352 (2000) (describing federal preemption principles).

[58] Plaintiff's argument to the contrary relies largely on the Court of Appeals opinion in *Strong v Detroit & M R Co*, 167 Mich App 562; 423 NW2d 266 (1988). Read carefully, *Strong* does little to advance plaintiff's cause. In that case, there was no indication that the easement was limited to railroad purposes as was the right-of-way at issue here. It is not surprising that the Court of Appeals would not hold that mere removal of a railroad track constituted abandonment of an underlying property interest when the interest was not limited to railroad purposes. Moreover, the easement holder in *Strong* filed notice of its easement under the marketable record title act, MCL 565.103. This filing "indicated that [the easement holder] intended to preserve its interest." *Strong, supra* at 569.

[59] 1993 US Dist LEXIS 15836 (WD Mich, 1993) (unpublished), aff'd without opinion 74 F3d 1240 (CA 6, 1996).

[60] The conveyance at issue in *Belka* provided:

> This indenture, Made this day of A.D. 18 , BETWEEN of in the County of , and State of Michigan, of the first part, and the Kalamazoo, Allegan and Grand Rapids Rail Road Company, of the second part, Witnesseth, That the said parties of the first part, in consideration of the sum of , to them in hand paid, the receipt whereof is

Penn Central abandoned the underlying easement when it manifested its intent to abandon all railroad operations. The court held that, in abandoning its easement with STB permission, removing its tracks, and attempting to sell its easement, Penn Central had abandoned its railway under state property law. Penn Central's contention that it intended to keep the underlying easement, even as it abandoned the railway, was rejected:

> This argument has superficial appeal, but it breaks down under scrutiny. The flaw in this argument is that while Defendants claim no intent to abandon their "property interest" they do not specify what that property interest is. Whether Defendants intended to abandon their property rights cannot be determined without consideration of the nature of that property interest. Defendants did not own a fee simple interest in the railroad corridor. They had an easement to use it "for railroad purposes."

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hereby acknowledged, do grant, bargain, sell and confirm unto the said party of the second part, and to their assigns FOREVER, a RIGHT OF WAY in and over a certain strip of LAND, situate, lying and being in [legal description] reference being made, for more certain description of said strip, to the map of the route of said Company, on file in the offices of the Register of Deeds for the Counties of Kalamazoo and Allegan and Kent respectively, for the said party of the second part, and their assigns and their servants and agents to build, construct and maintain a Rail Road in and over the said strip of land, and at all times freely to pass and re-pass by themselves, their servants, agents and employees, with their engines, carts, horses, cattle, carts, wagons and other vehicles, and to transport freight and passengers, and to do all other things properly connected with or incident to the location, building, maintaining, and running the said Road, and to use the earth and other materials within said strip of land, for that purpose, TO HAVE AND TO HOLD the said easements and privileges to the said party of the second part, and to their assigns, FOREVER. And the said parties of the first part for themselves and their heirs, doth covenant and agree that they will WARRANT AND DEFEND the above granted RIGHT OF WAY in the peaceable and quiet possession of the said party of the second part, and their assigns, FOREVER. [*Id*. at *2 n 2.]

> Accordingly, the issue for this Court is not whether Defendants intended to abandon some nebulous concept of "property rights", but whether they intended to abandon their right to use the property "for railroad purposes".[61]

We find the district court's analysis in *Belka* persuasive. The easement originally granted to Mineral Range Railroad, subsequently transferred to Soo Line Railroad, and finally conveyed to plaintiff was limited to railroad purposes. Therefore, Soo Line's decision to seek federal permission to cease all rail operations on the right-of-way, its subsequent cessation of those activities after the 120-day period prescribed by the ICC, and its removal of all railroad tracks on the strip of land constituted an abandonment of the underlying property interest.

We have determined, therefore, that the 1873 deed conveyed an easement limited to railroad uses and that Soo Line abandoned that easement for state property law purposes when it sought, obtained, and acted on the ICC's permission to abandon the railway in 1982. Consequently, Soo Line did not have a valid property interest in the Houghton County right-of-way to convey to plaintiff in 1988. Defendant has an unencumbered fee simple interest in the right-of-way and, as any property owner in Michigan may do with its property, may limit its use as it sees fit.

D. RESPONSE TO THE DISSENT

The dissenting opinion insists that we should not have entertained defendant's appeal at all because the ICC/STB has exclusive jurisdiction over what is left of Soo Line's railroad in this area.[62] The dissent's argument, in essence, is this:

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[61] *Id.* at *14-*15.

[62] *Post* at 397.

> The record in this case contains nothing showing that the Soo Line ever advised the ICC that it had completed abandonment as the certificate explicitly required. It appears that no notice of consummation was filed with the ICC or the STB. Consequently, in 1983, a year after the certificate was issued, the abandonment authorization would have expired. The rail line cannot be abandoned without a new proceeding.[63]

As an initial matter, we note that the dissent does not argue that Soo Line *actually* failed to notify the ICC, but argues instead that the record contains no evidence that Soo Line provided notice. Of course, it would be just as accurate to say that the record contains no evidence that Soo Line *failed* to provide notice because, in fact, neither party has raised the notice issue on which the dissent now relies. It is hardly surprising, therefore, that there is a gap in the evidentiary record on this question.[64] We would be unwise indeed to draw sweeping inferences from this sort of evidentiary "gap."

Even if there were a factual basis for the dissent's argument, its legal rationale is deeply flawed. First and foremost, the dissenting opinion relies on a provision of the Code of Federal Regulations that was enacted almost *fifteen years* after Soo Line's application to abandon its railroad and is, therefore, inapplicable here.[65]

The dissent also relies on the fact that the ICC had a "practice"[66] of requesting notice of abandonment in the

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[63] *Post* at 396.

[64] That is not to say that the parties may waive or concede the question of subject-matter jurisdiction. To the contrary, subject-matter jurisdiction cannot be waived. *Travelers Ins Co v Detroit Edison Co,* 465 Mich 185, 204; 631 NW2d 733 (2001).

[65] See *post* at 396, citing 49 CFR 1152.29(e)(2). 49 CFR 1152.29, which provides that notice to the STB is necessary in order to consummate a railway abandonment, did not exist until 1997. See, e.g., *Becker v Surface Transportation Bd,* 328 US App DC 5, 6 n 2; 132 F3d 60 (1997).

[66] See *Consolidated Rail Corp v Surface Transportation Bd*, 320 US App DC 130, 135; 93 F3d 793 (1996), citing *St Louis Southwestern R*

early 1980s[67] and that the ICC operated on the belief that it lacked jurisdiction once a notice of abandonment had been filed. We believe that the dissent misconstrues the legal significance of this "practice."

While the ICC has determined that its jurisdiction terminated once notice of abandonment was filed, neither the ICC nor the STB has ever concluded, as the dissent does, that state courts *lack* jurisdiction as a matter of law until notice of abandonment is filed or until the ICC/STB has declared that its jurisdiction has ended.[68] Indeed, even now that notice is actually required by STB regulations, notice of abandonment is not *necessary* to terminate the STB's jurisdiction.[69] It is simply conclusive evidence that the railroad has consummated its abandonment.[70] Abandonment may occur

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Co—Abandonment—in Smith & Cherokee Cos, TX, 9 ICC 2d 406, 410 n 8 (1992) (noting that the "practice" of requiring notice ended in 1984).

[67] *Post* at 396 n 5, citing 363 ICC 132, 142 n 2 (1980). The authority cited is an ICC opinion that states: "When a rail line has been fully abandoned, it is no longer rail line and the transfer of the line is not subject to our jurisdiction." *Id.* at 135. The opinion provides in footnote 2 that "[a] line is fully abandoned after a certificate of public convenience and necessity has been issued, and when operations have ceased, tariffs have been canceled and a letter has been filed with the Commission that the abandonment has been consummated."

[68] Although the STB "retains exclusive, plenary jurisdiction to determine whether there has been an abandonment sufficient to terminate its jurisdiction," *Lucas* v *Bethel Twp,* 319 F3d 595, 603 (CA 3, 2003), plaintiff has not requested such a determination from the STB and the STB itself has not intervened in this case.

[69] See 49 CFR 1152.29(e)(2) ("Notices will be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation . . . .").

[70] See, e.g., *Consolidated Rail Corp, supra,* at 798 ("In its October 5, 1995 Decision, the ICC also suggested that Conrail's failure to notify the Commission that the line had been abandoned was *evidence of Conrail's uncertainty of purpose [regarding abandonment].*") (emphasis added); 61 FR 11174, 11177-11178, which included the following explanation of the proposed rule that became 49 CFR 1152.29:

—and, thus, the STB's jurisdiction may terminate—even in the absence of written notice.[71]

In short, the dissent has offered neither a factual nor legal basis to support its assertion that the STB has exclusive jurisdiction over the present dispute. We conclude, therefore, that the dissenting opinion's jurisdictional argument is in error.

IV. CONCLUSION

We conclude that the Court of Appeals erred in holding that plaintiff is entitled to summary disposition. The limited easement owned by plaintiff's predecessor in interest had been abandoned by the time the predecessor purported to sell that property interest to plaintiff. We therefore reverse the judgment of the Court of Appeals and remand the matter to the trial court for entry of summary disposition in defendant's favor.

TAYLOR, C.J., and CAVANAGH, WEAVER, CORRIGAN, and MARKMAN, JJ., concurred with YOUNG, J.

> [U]nder our proposal, notices that are filed would be deemed conclusive on the point of consummation if there are no legal or regulatory barriers to consummation . . . . If no notice of consummation of abandonment has been filed, we would continue to look at the other facts and circumstances to determine if consummation of the abandonment had occurred.

[71] See 49 CFR 1152.29(e)(2) (providing that notice is "deemed conclusive" on the point of consummation in the absence of "legal or regulatory barriers to consummation." See also *Lucas v Bethel Twp*, 319 F3d 595, 603 n 11 (CA 3, 2003) ("Historically, the STB determined whether an abandonment was consummated by evaluating the carrier's objective intent to cease permanently or indefinitely all transportation service on the line. This test leaves a great deal of uncertainty as to the rail line's status, however. Since 1997, the STB has taken steps to alleviate this problem by renewing a requirement that railroads file with the agency a letter confirming consummation of abandonment.") (citation omitted).

KELLY, J. (*dissenting*). I agree with the majority's conclusion that plaintiff's property interest is an easement rather than a fee simple. However, I conclude that this Court should not find that the easement was abandoned.

Defendant has not shown that plaintiff's predecessor, the Soo Line Railroad Company, completed the federal regulatory process for abandonment. Therefore, it appears that the rail line remains under the jurisdiction of the Surface Transportation Board[1] for future reinstatement of service. If that is the case, defendant may not circumvent federal jurisdiction by obtaining a state court judgment of abandonment.

Even if abandonment of the line were consummated with the ICC, we should conclude that the Soo Line never abandoned the underlying easement before conveying it to plaintiff for a trail. The mere fact of the sale demonstrates that the Soo Line intended to retain dominion over the easement until disposing of it. If the company believed in 1982 that it was abandoning this property interest, it would not have sold a portion of it to plaintiff in 1985.

Moreover, the parties who originally created the easement did not intend to limit its use to a rail line. Rather, they created a right-of-way to last forever, one that can be used today as a recreational trail.

Therefore, the result reached by the trial court and the Court of Appeals should be affirmed.

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[1] The Surface Transportation Board (STB) assumed the functions of the Interstate Commerce Commission (ICC) effective January 1, 1996. 49 USC 10101-16106; 49 USC 10903; 49 USC 10501(a)(1). *Railroad Ventures, Inc v Surface Transportation Bd*, 299 F3d 523, 530 (CA 6, 2002). For simplification, I refer to them both as the ICC because that was the agency that governed the Soo Line at the time in question.

FACTUAL BACKGROUND

In 1873, the Quincy Mining Company granted an easement for a right-of-way to the Mineral Range Railroad Company. Defendant now owns a portion of the mining company's former property through which this right-of-way runs.

The Mineral Range Railroad built and for many years operated a rail line on the right-of-way. It then transferred the rail line and right-of-way to the Soo Line Railroad. In the 1980s, the Soo Line discontinued running trains on the rail line. Sometime after 1986, it removed some of the tracks and, in 1988, sold the right-of-way to plaintiff Michigan Department of Natural Resources. Plaintiff maintained the former railway grade as a recreational trail. But, nine years later, defendant installed a fence across the trail, blocking its use as a trail.

PROCEEDINGS BELOW

Plaintiff filed suit seeking an injunction to force removal of the fence. The trial court initially held that Mineral Range had an unrestricted fee simple interest that it passed to plaintiff by deed. The Court of Appeals reversed that holding and remanded the case. Unpublished opinion per curiam, issued June 5, 2001 (Docket No. 222645). It held that the deed conveyed an easement, not a fee simple interest, and remanded the case to the circuit court for a determination whether the easement remained in existence.

On remand, the circuit court granted plaintiff's motion for summary disposition. It held that the easement was not limited to use as a rail line. Moreover, it found that the Soo Line had not abandoned the easement. Thus, plaintiff was entitled to maintain the right-of-

way as a recreational trail. The Court of Appeals affirmed that decision. Unpublished opinion per curiam, issued June 3, 2003 (Docket No. 240908). We granted defendant's application for leave to appeal. 470 Mich 868 (2004).

STANDARD OF REVIEW

The existence of an easement is a question of law. *Mahar v Grand Rapids T R Co,* 174 Mich 138, 142; 140 NW 535 (1913); *Epworth Assembly v Ludington & Northern Railway,* 236 Mich 565; 211 NW 99 (1926). In contrast, the permissible use of an easement is a question of fact. *Hanselman v Grand Trunk W R Co,* 163 Mich 496, 499; 128 NW 732 (1910); 65 Am Jur 2d, Railroads, § 60, pp 247-248.

Trial courts may draw inferences of fact. MCR 7.316(A)(6). They are presumed correct[2] and may not be set aside unless found to be clearly erroneous. MCR 2.613(C). We review actions to establish title de novo. *Farmer v Fruehauf Trailer Co,* 345 Mich 592, 595; 76 NW2d 859 (1956).

A STATE COURT MAY NOT DECLARE A RAILROAD EASEMENT ABANDONED BEFORE ABANDONMENT OF THE RAIL LINE HAS BEEN CONSUMMATED WITH THE ICC

Under federal transportation law involving rail lines, abandonment has a specific meaning. *Bingham Twp v RLTD R Corp*, 463 Mich 634, 635-636; 624 NW2d 725 (2001), citing *RLTD R Corp v Surface Transportation Bd*, 166 F3d 808, 810-811 (CA 6, 1999). It refers to removal of a rail line from the national transportation system. *Nat'l Ass'n of Reversionary Prop Owners v Surface Transportation Bd*, 332 US App DC 325, 327;

[2] *Beason v Beason,* 435 Mich 791, 804; 460 NW2d 207 (1990).

158 F3d 135 (1998) *(NARPO)*, citing *Preseault v Interstate Commerce Comm*, 494 US 1, 5-6 n 3; 110 S Ct 914; 108 L Ed 2d 1 (1990) (unanimous).

Under the federal Transportation Act,[3] a rail carrier may not remove a rail line from national service until it obtains a certificate of abandonment from the ICC. 49 USC 10903(a)(1)(B). *Hayfield N R Co v Chicago & N W Transportation Co*, 467 US 622, 628; 104 S Ct 2610; 81 L Ed 2d 527 (1984) (unanimous). The certificate verifies that future public convenience and necessity will accommodate cessation of the company's rail service on the line. *Id*. It reflects the ICC's determination that the line is no longer needed for interstate rail service. *Railroad Ventures, Inc v Surface Transportation Bd*, 299 F3d 523, 531 n 4 (CA 6, 2002), citing *Preseault* at 6 n 3.

Years ago, the ICC developed a mechanism to retain jurisdiction over a rail line if a carrier did not realize its stated intent to abandon the line. It imposed conditions on its issuance of a certificate of abandonment,[4] maintaining jurisdiction over the rail line until the conditions were met. *Preseault* at 8. A line no longer in use, but not officially abandoned, could be reactivated later. In the meantime, it was termed "discontinued." *NARPO* at 328.

In this case, the Soo Line sought, and in 1982 was issued, a certificate of abandonment. It expressly stated:

> 1. This certificate and decision is effective October 1, 1982. . . .

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[3] Transportation Act of 1920, ch 91, § 402(18)-(22), 41 Stat 477-478, recodified at 49 USC 10903(a) (1976 ed, Supp III).

[4] The ICC could even impose postabandonment conditions. *Hayfield* at 633.

2. If the authority granted by this certificate and decision is exercised, Soo Line shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

3. If the authority granted in this certificate and decision is not exercised within one year from its effective date, it shall be of no further force and effect. [ICC Certificate and Decision, *Soo Line Railroad Company*, Docket No. AB-57 (Sub-No. 7) (Decided September 29, 1982).]

The majority erroneously states that the "Soo Line followed the procedures necessary to abandon" the rail line. *Ante* at 384. The record in this case contains nothing showing that the Soo Line ever advised the ICC that it had completed abandonment as the certificate explicitly required. It appears that no notice of consummation was filed with the ICC or the STB.[5] Consequently, in 1983, a year after the certificate was issued, the abandonment authorization would have expired. The rail line cannot be abandoned without a new proceeding. 49 CFR 1152.29(e)(2);[6] *NARPO* at 329 n 7.[7]

[5] As early as 1980, an ICC Notice of Final Rules and Exemptions made clear that the ICC retains jurisdiction of a rail line for which the notification of abandonment has not been submitted. 363 ICC 132, n 2 (1980). For a period in the mid-1980s, the ICC did not require the notice of consummation of abandonment. This period was after the abandonment certificate in this case expired. Also, the ICC later reinstated and codified the requirement to eliminate uncertainty over whether a line has been abandoned and is no longer under the jurisdiction of the ICC. This served to preclude a rail carrier from holding a track indefinitely in an uncertain status. *Becker v Surface Transportation Bd,* 328 US App DC 5; 132 F3d 60, 61 n 2, 63 n 4 (1997). See 49 CFR 1152.24(f), 1152.29(e)(2), 1152.50(e).

[6] The majority asserts that I rely "First and foremost" on this provision. *Ante* at 389. Actually, I rely primarily on the explicit terms of the certificate issued to the Soo Line. I cite the regulation to substantiate my conclusion that, because the authorization to abandon granted to the Soo Line appears to have lapsed, a new proceeding is required.

[7] I note that the federal railbanking program was but a glimmer in

Moreover, defendant may not divest the ICC of its jurisdiction over the rail line through a collateral state court proceeding. *Phillips Co v Southern Pacific R Corp*, 902 F Supp 1310, 1317 (D Colo, 1995). ICC jurisdiction over a rail line precludes a state court from making a finding that a state property law interest has been extinguished by evidence of abandonment. *Preseault* at 8.

Therefore, it appears that this Court lacks jurisdiction to find that the Soo Line abandoned its easement.

EVEN IF THE SOO LINE ABANDONED THE RAIL LINE, IT DID NOT ABANDON THE EASEMENT

However, the majority is unpersuaded and finds that the Soo Line did abandon the easement. I believe that, even if the Soo Line consummated abandonment of the rail line with the ICC, it did not abandon the easement on which the line was built.

Abandonment, like the scope of an easement, is a question of fact. *McMorran Milling Co v Pere Marquette R Co*, 210 Mich 381, 391, 393-394; 178 NW 274 (1920). Whether it has occurred is determined by the actions of the parties. *Van Slooten v Larsen,* 410 Mich 21, 50; 299 NW2d 704 (1980), app dis sub nom *Craig v Bickel*, 455 US 901 (1982).

Congress has made clear that use of a rail line as a recreational trail after the issuance of a certificate of abandonment should not be equated with abandonment of the easement. The ICC's regulatory authority over rail corridors includes conserving them for future use for commerce and for current use as recreational trails.

Congress's eye when the STB issued its certificate of abandonment to the Soo Line in 1982. The Soo Line could not have used this program at that time because it did not exist.

The Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)[8]

> provided for mandatory transfers of corridors proposed for abandonment to other carriers, and directed the ICC to impose conditions barring the disposition of railroad rights-of-way for 180 days in order to allow for possible transfers for public use, including for trails. [H R Subcomm on Com and Admin L of the Jud Comm, *Litigation and Its Effect on the Rail-to-Trails Program*, 107th Cong at 57 (June 20, 2002) (statement of Andrea Ferster, General Counsel, Rails-to-Trails Conservancy).]

See *Preseault* at 5-6.

The Rails-to-Trails Act[9] gave the ICC oversight authority in the conversion of railroad rights-of-way to recreational trails when a rail carrier seeks permission from the ICC to cease service. *Id.* at 59-60. This authority extends to rights-of-way that are not in use for railroad transportation. *Preseault* at 6; *Caldwell v United States*, 391 F3d 1226, 1229-1230 (CA Fed Cir, 2004).

The United States Supreme Court has stated that, when a railroad company "abandons" a line, it does nothing more than divest the ICC of authority over the line. The Court said that Congress intended, when writing the act,

> that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the

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[8] Pub L 94-210, 90 Stat 144, as amended, 49 USC 10906 (1982 ed).

[9] National Trails System Act Amendments of 1983, Pub L 98-11, § 208, 97 Stat 42, 48 (1983) (codified as amended at 16 USC 1247(d) (Supp II, 1996).

> formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment. [*Preseault* at 8, citing H R Rep No. 98-28, pp 8-9 (1983); S Rep No. 98-1, p 9 (1983).]

The Court opined that every rail line is "a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable." *Preseault* at 19. Thus, rail-to-trail conversions do not constitute abandonment of a property right under state law, even if the easement was specifically created for railroad purposes only. *Preseault* at 8.[10]

The majority states that the Rails-to-Trails Act requires a railroad company to "bank" its right-of-way in order to preserve its property interest. This is untrue. *Buffalo Twp v Jones*, 571 Pa 637, 651; 813 A2d 659 (2002), cert den *Jones v Buffalo Twp*, 540 US 821 (2003). Authorization by the ICC to put a railway right-of-way into interim use as a trail is not required as a matter of law. *Citizens Against Rails-to-Trails v Surface Transportation Bd*, 347 US App DC 382, 391; 267 F3d 1144 (2001); *Southern Pacific Transportation*

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[10] Accordingly, courts have not considered the ICC's certification of a railroad company's abandonment of a line as evidence that the company abandoned its easement. See *Rail Abandonments–Use of Rights-of-Way as Trails; Rail Abandonments–Use of Rights-of-Way as Trails–Supplemental Trail Act Procedures*, 5 ICC 2d 370, *3 (1989) ("Once a carrier exercises the authority granted in a regular abandonment certificate the line is no longer part of the national transportation system."); *Barney v Burlington N R Co, Inc,* 490 NW2d 726, 729, 730 (SD, 1992), cert den sub nom *Kaubisch v South Dakota*, 507 US 914 (1993); *Chevy Chase Land Co v United States*, 355 Md 110, 169-171; 733 A2d 1055 (1999), cert den 531 US 957 (2000); *State of Minnesota, by Washington Wildlife Preservation, Inc v Minnesota*, 329 NW2d 543, 548 (Minn, 1983), cert den 463 US 1209 (1983).

Co—Exemption—Abandonment of Service in San Mateo Co, Ca, 1991 WL 108272 (ICC, 1991).

THERE IS ABUNDANT EVIDENCE THAT THE SOO LINE DID NOT ABANDON THE EASEMENT

The trial court found that the Soo Line had no intent to give up its easement. Because there was ample evidence supporting this ruling, it was not clearly erroneous.

The Soo Line did not immediately remove its tracks. They remained in place on this parcel at least through 1986 when it was appraised. Some of the tracks remain today, as do other structures elsewhere on the right-of-way, such as bridges.

The facts of the *Belka v Penn Central Corp*[11] decision cited by the majority, and *Becker*, contrast with the facts in this case. In *Belka,* the transportation corridor was no longer intact. The land had been broken into segments that could not be restored for future rail service. *Belka* at 18-19.

In contrast, the right of way in this case remained a viable transportation corridor in use by recreational vehicles until defendant erected its fence. Although its path may have been difficult for some to identify during the litigation, *ante* at 366, it is without question that plaintiff identified and maintained it as a corridor for recreational vehicles.

In *Becker*, the rail carrier refused to negotiate to sell the rail line. It preferred to walk away from its property interest. The Soo Line's conduct, on the other hand, demonstrates an intent not to abandon its property interest in the right-of-way. Three years after filing its

[11] 1993 US Dist LEXIS 15836 (WD Mich, 1993) (unpublished), aff'd without opinion 74 F3d 1240 (CA 6, 1996).

notice of abandonment with the ICC, the Soo Line sold a utility easement over the land to the Michigan Bell Telephone Company.

In other cases, perhaps in this one, a rail line would file a notice of abandonment with the ICC as a first step in obtaining financial assistance. The intent might be to secure a means of maintaining operation rather than abandoning it. *Chevy Chase Land Co v United States*, 355 Md 110, 172-173; 733 A2d 1055 (1999).

Intent to abandon is ascertained by examining the totality of the circumstances.[12] The Soo Line stopped using the right-of-way for a period in this case. However, that may not have signified an intent to abandon it. *McMorran* at 394. Ceasing operation, removing track, and canceling tariffs are consistent with an intent to retain the right to resume service. *Becker* at 62, quoting *Birt v Surface Transportation Bd,* 319 US App DC 357, 362-363; 90 F3d 580 (1996). See also *Strong v Detroit & M R Co*, 167 Mich App 562, 569; 423 NW2d 266 (1988). More is needed in order to conclusively prove an intent to abandon a property right. That evidence is lacking here. Because there was ample evidence supporting the trial court's factual findings, they should be upheld.

THE EASEMENT WAS NOT PERPETUALLY RESTRICTED TO USE AS A RAIL LINE

Even if the Soo Line retained its property interest in the easement until conveying it to plaintiff, the ease-

[12] In *Glosemeyer v United States*, 45 Fed Cl 771 (2000), the United States Court of Federal Claims held that an application to the ICC for authority to abandon was clear evidence of intent to abandon an easement only if "confirmed by conduct." *Id.* at 777. The Pennsylvania Supreme Court has also held that filing a certificate "must be coupled with external acts in furtherance of abandonment." *Buffalo Twp v Jones*, 571 Pa 637, 647; 813 A2d 659 (2002).

ment cannot be used for a trail unless its scope includes trails. The majority finds that the easement was for railroad purposes only. It is incorrect.

Where an easement is granted and the scope of its use is in question, we attempt to discern the parties' intent. Intent is determined by applying principles similar to those used when contracts are construed. 1 Restatement Property, 3d, § 4.1, comment *d*, p 499. First, the terms of the conveyance itself are examined. *Epworth* at 575; *Quinn v Pere Marquette R Co,* 256 Mich 143, 150; 239 NW 376 (1931).

In this case, the conveyance was by deed. Under its terms, Quincy gave Mineral Range and "its successors and assigns forever a right of way for the railroad of" Mineral Range. It later stated that Mineral Range would have and hold the strip of land "for the purpose and uses above stated . . . ."

This Court has held that such a statement of purpose in a conveyance for a railroad does not mean that the land can be used only for a railroad. In *Quinn,* a warranty deed conveyed a parcel " 'to be used for railroad purposes only.' " *Id.* at 146. Like the deed in this case, the deed in *Quinn* did not contain a reverter clause. After considering the circumstances surrounding the conveyance, the Court concluded that the statement in the deed was merely a declaration of the purpose of the grant. It did not prevent the right-of-way from being used later for other purposes. *Id.* at 151. Accord 65 Am Jur 2d, Railroads, § 61, p 248, and § 68, p 252.

By contrast, a right-of-way can be limited to use only for a railroad where it is explicitly stated in the conveyance. In *Epworth, supra* at 568*,* the deed to the railroad recited that the parcel was " 'to be used for railroad purposes only.' " It continued, " 'If, for any reason, the

property . . . shall . . . cease to be used for railroad purposes and trains shall not be run over the railroad track,' " then the property reverts to the grantor. *Id.* at 573. In that case, the Court held that the parties clearly intended the property never to be used for anything other than a railroad.

These principles apply also to deeds creating easements. In *Hickox v Chicago & C S R Co*,[13] the deed for a right-of-way stated that if the property ceased " 'to be used and operated as a railroad . . . then . . . the right-of-way . . . shall terminate.' " *Id.* at 619. The Court held that the land had to be used to operate a railway, even though it was not limited to running trains, or the easement ceased. *Id.* at 620-621.[14]

It is not uncommon for a deed creating an easement to describe the scope of the easement in general terms. When a controversy over scope of usage arises, it falls to courts to determine whether the parties intended to allow the land to be put to uses not specified in the deed. 1 Restatement Property, 3d, § 4.1, comment *b*, pp 498-499.

As a general statement, the easement holder is said to enjoy all rights reasonably necessary and proper to fully use the easement. *Unverzagt v Miller,* 306 Mich 260, 265; 10 NW2d 849 (1943), citing 9 RCL, p 784; 1 Restatement Property, 3d, § 4.10, p 592; 5 Restatement Property, § 450, comment *e*, pp 2904-2905.

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[13] 78 Mich 615; 44 NW 143 (1889).

[14] See also *MacLeod v Hamilton*, 254 Mich 653; 236 NW 912 (1931). In that case, a right-of-way to build a drain was granted " 'for no other purpose whatever . . . .' " *Id.* at 656. When it ceased to be used for a drain, the right-of-way ceased to exist. *Id.* at 656-657. Contrary to the majority's assertion, before today's decision, this Court has consistently applied these principles both to deeds for fee simple interests and to easement interests. *Ante* at 381.

If the wording in a deed is not definitive, we infer from the circumstances surrounding the conveyance what unspecified uses the parties intended to allow. *Newaygo Mfg Co v Chicago & W M R Co,* 64 Mich 114, 122-123; 30 NW 910 (1887); 1 Restatement Property, 3d, § 4.10, comment *a*, p 592, and comment *d*, p 595. We bear in mind that easements are permanent rights. 1 Restatement Property, 3d, § 4.1, comment *b*, p 498. Also, the rights of the easement holder are superior to those of the owner in fee simple. *Cantieny v Friebe*, 341 Mich 143, 146; 67 NW2d 102 (1954), quoting *Hasselbring v Koepke*, 263 Mich 466, 475; 248 NW 869 (1933), quoting *Harvey v Crane,* 85 Mich 316, 322; 48 NW 582 (1891), citing *Herman v Roberts,* 119 NY 37; 23 NE 442 (1890), *East Tennessee, V & G R Co v Telford's Executors,* 89 Tenn 293; 14 SW 776 (1890), and *Kansas C R Co v Allen,* 22 Kan 285 (1879).

We infer also that the parties intended that the permitted use of an easement will change over time absent language to the contrary in the deed. This inference effectuates the intent, which we presume the parties entertained, that the right-of-way remain viable. 1 Restatement Property, 3d, § 4.10, p 592.

In this case, the deed created a right-of-way for a transportation corridor, a kind of highway available for public use. See Elliott on Roads and Streets, § 1, *Marthens v B & O R Co,* 170 W Va 33, 38; 289 SE2d 706 (1982), citing *Eckington & Soldiers' Home R Co v McDevitt,* 191 US 103; 24 S Ct 36; 48 L Ed 112 (1903), and *United States v Trans-Missouri Freight Ass'n,* 166 US 290; 17 S Ct 540; 41 L Ed 1007 (1897).[15] The deed assigned the right-of-way "forever," thus creating a

[15] Thus, it would have been redundant for the parties to describe the easement as both a right-of-way and as a transportation corridor, as the majority seems to require. *Ante* at 380 n 44.

permanent interest. Its initial purpose was to permit the Mineral Range Railroad to build and run a railroad artery. It contains no defeasance or reverter language suggesting that the parties intended to forever limit the use of the right-of-way to a railroad.

The parties had to know that easements are transferable and binding on subsequent owners. The fact that they used broad language suggests that they intended to create a corridor that over time might accommodate modes of transportation other than railroads.[16] Thus, I would hold that this deed created a right-of-way that the parties intended not to limit to a railroad.[17] It was not extinguished as a matter of law when it ceased to be used for railroad purposes.

PLAINTIFF'S RIGHT-OF-WAY MAY BE USED AS A RECREATIONAL TRAIL

This Court has held that, where broad language in an easement permits uses not stated, those uses must not impose an additional or increased burden on the servient estate. *Crew's Die Casting Corp v Davidow,* 369 Mich 541, 546; 120 NW2d 238 (1963), quoting *Delaney v Pond,* 350 Mich 685, 687; 86 NW2d 816 (1957). Use for recreational travel may include foot travel, bicycles, horses, and recreational vehicles. All have been adjudged to be within the scope of a right-of-way. See *WWP, supra.*

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[16] This is similar to the concept that a right-of-way for a road to be used by horse-drawn buggies might later be used by automobiles. "[A]n easement holder may utilize such technological improvements as are reasonably necessary to carry out the purpose of the grant . . . ." 25 Am Jur 2d, Easements and Licenses, § 76, p 575 (2004).

[17] Defendant likely understood this at the time it acquired the servient estate. It did not object later when the Soo Line granted a utility easement in the right-of-way. Nor did it object during the first nine years that plaintiff used the right-of-way as a recreational trail.

Uses of a right-of-way interfere with the enjoyment of servient estates to varying degrees. With respect to recreational uses, hikers, equestrians, and bicyclists pose little interference. Snowmobiles and other off-road vehicles are more intrusive. But the most intrusive of recreational vehicles is less intrusive than trains. Trains may travel all hours of the day or night.

Defendant's argument that the easement is more heavily used as a recreational trail than it was as a railroad misunderstands the scope of the easement. Defendant assumes that trains may run intermittently merely because that had been the custom. However, the easement here put no restrictions on the scheduling of Mineral Range's trains. They could have run incessantly and still been within the scope of the easement.

Trains are loud and cause damaging vibration. Snowmobiles and recreational vehicles are less noisy and cause less vibration. Also, they are used on a seasonal basis. Other remedies are available to address problems associated with excessive speed or traffic volume on a recreational trail, such as speed limits and permit requirements.

Trains have at least as great a capacity as have recreational vehicles to serve as a means of transportation for lawbreakers. Trains can be boarded or departed from at locations where they must pass slowly. This case involves such a location, in a town near a bridge. A public recreational trail represents no greater safety hazard to adjacent landowners than trains that vagrants ride. Trains do not impose a substantially different burden on adjacent landowners than highways or harbors. Hence, recreational use of the right-of-way here does not substantially increase the burden on plaintiff's estate over its use by a railroad.

CONCLUSION

From the record in this case, it appears that the section of the Soo Line railway corridor involved remains under the jurisdiction of the Surface Transportation Board. As a consequence, this Court is without jurisdiction to determine whether the easement on which it was built has been abandoned.

Moreover, even if the Soo Line consummated abandonment of the line through the STB's predecessor, it does not follow that it abandoned the underlying easement. The trial court made the finding based on ample evidence that it did not. The Court of Appeals agreed. I have reached the same conclusion.

In addition, I agree with the lower courts that the easement was not restricted to use for a railroad. Quincy Mining Company and the Mineral Range Railroad intended to create a perpetual easement for a right-of-way. Initially, it was for a rail line, but it was not explicitly limited to that use. Also, the deed did not provide that the property right would revert to Quincy or its successor if the railroad abandoned its line. Consequently, I would find that the parties intended to create a transportation corridor that would remain viable "forever" as the easement holder's transportation needs developed.

Today's use of the right-of-way for recreational travel is consistent with its former use as a railway. The burden on the servient estate was not increased when the change occurred. In fact, recreational travel imposes a lesser burden.

Thus, I would affirm the result of the trial court and the Court of Appeals and hold that plaintiff may use the right-of-way for its trail.

ELEZOVIC v FORD MOTOR COMPANY

Docket No. 125166. Argued December 8, 2004 (Calendar No. 4). Decided June 1, 2005.

Lula and Joseph Elezovic brought an action in the Wayne Circuit Court against Ford Motor Company and Daniel P. Bennett, seeking, under the Civil Rights Act (CRA), MCL 37.210 *et seq*., damages for alleged sexual harassment resulting from a hostile work environment. The plaintiffs alleged that Bennett, a supervisor at the Ford plant where Lula Elezovic (plaintiff) worked, exposed himself to the plaintiff, requested oral sex, and repeatedly engaged in other sexually offensive conduct. The court, Kathleen Macdonald, J., granted the defendants' joint motion in limine to exclude evidence of Bennett's prior criminal misdemeanor conviction of indecent exposure, which involved conduct that did not occur on Ford property and did not involve Ford employees. The court later granted directed verdicts in favor of the defendants. The Court of Appeals, JANSEN, P.J., and NEFF, J. (KELLY, J., concurring), affirmed. 259 Mich App 187 (2003). The Court of Appeals held that it was bound to follow the decision in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464 (2002), that a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff's civil rights. The Court stated that, were it not bound by MCR 7.215(J)(1) to follow *Jager*, it would reach the opposite result. The Court also found that Ford did not have sufficient notice of the alleged harassment. The plaintiff appealed. 470 Mich 892 (2004).

In an opinion by Chief Justice TAYLOR, joined by Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

An agent of an employer may be held individually liable under the CRA. Ford did not have sufficient reasonable notice of the alleged harassment. The judgment of the Court of Appeals must be reversed in part and affirmed in part, and the case must be remanded to the circuit court for further proceedings regarding Bennett.

1. The CRA defines an "employer" as a "person," which is defined to include a corporation. The CRA also states that an "employer" includes an "agent of that person." The Legislature,

by including "agent" within the definition of "employer" did not intend to only provide vicarious liability for the agent's employer, but also created individual liability for an employer's agent. Bennett may be sued individually under the CRA.

2. Federal decisions construing Title VII of the federal civil rights act and holding that there is no individual liability under the federal act should not be followed because it would lead to a result contrary to the text of the CRA. The history of amendments of the CRA does not preclude a finding of individual liability on the part of an agent of an employer.

3. The fact that the plaintiff told two low-level supervisors, in confidence, that Bennett had exposed himself did not constitute reasonable notice to Ford. Letters sent to Ford by the plaintiff's psychologist and attorney mentioning "harassment" or "hostile environment" were insufficient to give Ford reasonable notice of sexual harassment, given the plaintiff's prior complaints against Bennett that were not sexual in nature. A reasonable employer would not, under the totality of the circumstances in this case, have been on notice of a substantial probability that sexual harassment was occurring.

4. The trial court did not abuse its discretion in precluding evidence of Bennett's prior indecent exposure conviction. The conviction had been expunged before the trial in this matter and under MCL 780.623(5) the evidence was not admissible. The trial court did not err in holding that the prejudice to Ford that would result from the evidence would substantially outweigh any probative value it might have.

5. The opinion in *Jager* must be overruled. The part of the judgment of the Court of Appeals that affirmed the directed verdict in favor of Ford must be affirmed and the part of the judgment that affirmed the directed verdict in favor of Bennett must be reversed. The matter must be remanded to the trial court for further proceedings regarding Bennett and consistent with the Supreme Court's opinion.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part, dissented from the opinion of the majority with regard to the issues whether the CRA provides for individual liability against an agent of an employer and whether sufficient evidence was presented to allow the jury to decide whether Ford had notice of the alleged sexual harassment. The CRA does not provide for individual liability against an agent of an employer, and the plaintiff provided sufficient evidence to allow the jury to decide the notice issue. The majority reached the correct result in this case when it determined that the trial court did not abuse its

discretion by excluding evidence of the alleged sexual harasser's expunged indecent exposure conviction.

Justice WEAVER, concurring in part and dissenting in part, concurred in the majority's conclusions that the trial court's ruling on the defendants' motion in limine was not an abuse of discretion and that the trial court's decision to exclude the evidence of Bennett's expunged conviction should be affirmed. She dissents, however, from the majority's conclusion that the CRA provides for individual liability against an agent of an employer and from its conclusion that Ford was entitled to a directed verdict because the plaintiff failed to establish that Ford had notice of the sexual harassment.

The Legislature included the word "agent" in the definition of "employer" to denote respondeat superior liability, not individual liability. The conclusion of the Court of Appeals that there is no individual liability under the act should be affirmed. The opinion in *Jager v Nationwide Truck Brokers, Inc*, should not be overruled.

Considering all the evidence and the reasonable inferences that may be drawn from it, there are factual questions about which reasonable jurors could differ regarding whether Ford had notice of the sexual harassment. Therefore, the directed verdict in favor of Ford with regard to the question of notice should be reversed.

Affirmed in part, reversed in part, and remanded.

CIVIL RIGHTS — WORKPLACE SEXUAL HARASSMENT — SUPERVISORS.

An agent of an employer may be held individually liable under the Civil Rights Act for sexually harassing an employee in the workplace (MCL 37.2101 *et seq*.).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Edwards & Jennings, P.C.* (by *Alice B. Jennings*), for the plaintiff.

Kienbaum Opperwall Hardy & Pelton, P.L.C. (by *Elizabeth Hardy* and *Julia Turner Baumhart*) (*Patricia J. Boyle*, of counsel), for the defendants.

Amici Curiae:

Scheff & Washington, P.C. (by *George B. Washington* and *Miranda K.S. Massie*), for Justine Maldonado, Milissa McClements, and Pamela Perez.

Carol Hogan for Michigan Conference of the National Organization for Women.

TAYLOR, C.J. At issue in this case is (1) whether the Michigan Civil Rights Act (CRA)[1] provides a cause of action against an individual agent of an employer and (2) whether plaintiff's employer, Ford Motor Company, was entitled to a directed verdict in plaintiff's sexual harassment lawsuit against it.

We hold that an agent may be individually sued under § 37.2202(1)(a)[2] of the CRA. Thus, we overrule *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 485; 652 NW2d 503 (2002), because it held to the contrary,[3] and reverse the Court of Appeals judgment in favor of Daniel Bennett that followed *Jager*.

We also hold, consistently with the lower courts, that Ford was entitled to a directed verdict. Thus, we affirm the trial court and Court of Appeals judgments in favor of Ford.

I. FACTS AND PROCEEDINGS BELOW

Plaintiff filed a lawsuit in November 1999 pursuant to the CRA against Ford Motor Company and Daniel Bennett, a supervisor at Ford's Wixom assembly plant

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[1] MCL 37.2101 *et seq*.

[2] MCL 37.2202(1)(a) provides:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

[3] *Jager* had concluded that "a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff's civil rights." *Id.*

where she worked. As relevant here, her claim was that she had been sexually harassed as a result of a hostile work environment.[4] The CRA allows such a lawsuit against an employer.[5]

Plaintiff's lawsuit named Bennett as an individual defendant consistently with the then-controlling case of *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785; 369 NW2d 223 (1985),[6] which held that individual supervisors could be liable under the CRA.[7]

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[4] As set forth in *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993), the five elements necessary to establish a prima facie case of sexual harassment based on a hostile work environment are:

> (1) the employee belonged to a protected group;
>
> (2) the *employee* was subjected to communication or conduct on the basis of sex;
>
> (3) the *employee* was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to *or* in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior. [Emphasis added.]

See also *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000). Respondeat superior liability *exists* when an employer has adequate notice of the harassment and fails to take appropriate corrective action. *Id.* at 312.

[5] M Civ JI 105.10, Employment Discrimination—Sexual Harassment.

[6] *Jager* overruled *Jenkins* while plaintiff's appeal was pending in the Court of Appeals.

[7] The CRA states that an "employer" includes an "agent" of the employer.

MCL 37.2201(a) provides: " '*Employer'* means a person who has 1 or more employees, and *includes an agent of that person."* (Emphasis added.)

Regarding the specifics in her complaint, plaintiff alleged that, while she was on the job in the summer of 1995, Bennett exposed himself to her while masturbating and requested she perform oral sex. Further, she claimed that after that he repeatedly continued to harass her by grabbing, rubbing, and touching his groin and licking his lips and making sexually related comments.

Before trial, defendants filed a joint motion in limine to exclude from evidence an unrelated, prior criminal misdemeanor conviction of Bennett for indecent exposure. Defendants pointed out that the incident did not occur on Ford property and involved non-Ford employees. Plaintiff, however, argued that the indecent exposure conviction was evidence of a scheme or plan Bennett had of exposing himself to women and that it provided notice to Ford that Bennett engaged in inappropriate sexual acts. The trial court ruled that the indecent exposure conviction was inadmissible with regard to Bennett under MRE 404(b)(1)[8] because it was not offered for any purpose other than to show that he had a propensity to expose himself. The court also held it was inadmissible with regard to Ford pursuant to

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MCL 37.2103(g), in turn, provides: " 'Person' means an individual, agent, association, [or] corporation . . . ."

[8] MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 403[9] because any probative value would be substantially outweighed by the danger of unfair prejudice.

The case was tried before a jury for three weeks. Plaintiff testified consistently with the allegations in her complaint against Bennett. While it was uncontested that she had not filed a formal written complaint of sexual harassment pursuant to Ford's anti-harassment policy, plaintiff attempted to establish that Ford was otherwise aware, or on notice, of the sexual harassment for several reasons. She claimed that she told two first-line supervisors (friends of hers who were under Bennett in the chain of command) that Bennett had exposed himself to her, but admitted that she had pledged them to secrecy. She also introduced two letters her psychologist had written to the Wixom plant physician, one indicating that in his view plaintiff was descending into mental illness "[d]ue to the harassment she perceived from Mr. Bennett" and a second stating that plaintiff continued "to feel uncomfortable with Dan Bennett." These letters were offered with a third letter from the same psychologist to the Wixom plant manager regarding complaints against a different coworker in which it was said "there has been harassment going on for the past year and a half at her Wixom plant job." Also introduced was testimony from an employee to a Ford Labor Relations Department representative to the effect that the employee would remain on medical leave until someone did something about the situation between plaintiff

[9] MRE 403 provides:

> Although relevant, evidence may be excluded 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.

and Bennett. Finally, reference was made to a letter from plaintiff's attorney (her son-in-law) to the Ford Labor Relations Department in which he asserted he might take legal action "to insure that our client [plaintiff] is not subjected to working in a hostile environment."

At the close of plaintiff's proofs, defendants filed a joint motion for a directed verdict, arguing that plaintiff had not presented a prima facie case against them.[10] Ford emphasized that plaintiff had not established that it had notice of the alleged sexual harassment by Bennett and, thus, it could not be held liable for any improper acts by him.

The trial court took the joint motion under advisement, with defendants continuing to present their cases to the jury. Bennett testified that he had not sexually harassed the plaintiff and that her claims were false. Ford presented evidence showing that the only time plaintiff had ever filed a sexual harassment complaint was in 1991, involving a UAW committeeman, and that none of the several grievances and complaints plaintiff filed against Bennett had mentioned *sexual* harassment. Rather, with regard to Bennett, her complaints concerned having her shift changed from days to afternoons and disputes regarding overtime. She also filed a complaint alleging that a female coworker had physically threatened her.

Upon the close of defendants' proofs, the trial court granted directed verdicts to the defendants. The trial court held that plaintiff had failed to establish a prima facie case of sexual harassment with regard to either defendant and, in particular, found that Ford could not

[10] MCR 2.515 provides: "A party may move for a directed verdict at the close of the evidence offered by an opponent."

be liable because it had no notice of Bennett's alleged harassment.

Plaintiff, asserting that she had established a prima facie case against Bennett and Ford, appealed to the Court of Appeals. That Court, however, affirmed the orders of the trial court in a published opinion.[11] In ruling for Bennett, the majority in *Elezovic* relied on the then-recent holding in *Jager, supra* at 485, that "a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff's civil rights." The *Jager* Court had reached its conclusion by relying largely on federal court holdings that under Title VII of the federal civil rights act, the federal analogue to our CRA, there is no individual liability.[12] While it was obligatory that the majority in *Elezovic* follow *Jager* pursuant to MCR 7.215(J)(1), the majority indicated at the same time that, but for that court rule, it would have reached the opposite result.[13] It was the majority's view that *Jager* was wrongly decided simply because it was not consistent with the actual language of our CRA, which it concluded made

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[11] *Elezovic v Ford Motor Co,* 259 Mich App 187; 673 NW2d 776 (2003).

[12] The *Jager* panel noted that its conclusion that individuals could not be sued under our CRA was consistent with federal court rulings such as *Wathen v Gen Electric Co*, 115 F3d 400 (CA 6, 1997), in which the Sixth Circuit Court of Appeals determined, consistently with numerous other federal courts of appeals, there was no individual liability under Title VII of the federal civil rights act.

[13] Under MCR 7.215(J)(1) a panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals.

The judges of the Court of Appeals were polled pursuant to MCR 7.215(J), but a conflict resolution panel was not convened because a majority of the judges opposed convening such a panel. 259 Mich App 801 (2003).

agents individually liable. Moreover, it believed *Jager* was inconsistent with *Chambers v Trettco, Inc,* 463 Mich 297; 614 NW2d 910 (2000), which it read as recognizing that an individual may be held liable for sexual harassment under the CRA.[14]

With regard to the directed verdict for Ford, the Court of Appeals rejected plaintiff's claim that her evidence regarding notice had been sufficient to enable her to reach the jury. The Court held that plaintiff's report of Bennett's conduct to her supervisors did not constitute actual notice to Ford because of her request at the same time that this information not be conveyed to their supervisor or other appropriate persons. *Elezovic v Ford Motor Co*, 259 Mich App 187, 194; 673 NW2d 776 (2003). As for the letters that had been sent to Ford, the Court of Appeals concluded that these also did not provide notice because, importantly, none of them referred to *sexual* conduct. The Court held that this fact, when viewed in the context that plaintiff's previous harassment complaints had not been sexual in nature, but were explicitly nonsexual concerning Bennett and others (with the exception of the 1991 complaint against a UAW committeeman that plaintiff did not rely on as part of her case), meant Ford would not reasonably have been put on notice. *Id*. at 195. Finally, the Court also affirmed the trial court's decision to exclude evidence regarding Bennett's indecent exposure conviction. It was the Court's conclusion that plaintiff failed to establish that the evidence was offered for a proper purpose because Bennett's act of indecent

[14] In making this point, the majority noted that *Chambers* held that certain language in the CRA " 'allows this Court to determine whether the sexual harasser's *employer*, in addition to the sexual harasser *himself*, is to be held responsible for the misconduct.' *Chambers, supra* at 320 (emphasis in original)." *Elezovic, supra* at 201.

exposure outside the workplace was not sufficiently similar to sexually harassing an employee in the workplace to establish a common plan, scheme, or system. *Id*. at 206. The Court further concluded that the trial court had not abused its discretion, concerning defendant Ford, in holding that the probative value of this evidence would have been substantially outweighed by the danger of unfair prejudice.[15] *Id.* at 207-208.

Plaintiff applied for leave to appeal in this Court, and we granted leave to appeal and directed the parties to include among the issues briefed whether a supervisor engaging in activity prohibited by the Michigan Civil Rights Act, MCL 37.2101 *et seq*., may be held individually liable for violating a plaintiff's civil rights. 470 Mich 892 (2004).

II. STANDARDS OF REVIEW

We review de novo the question whether our CRA authorizes a cause of action against an individual agent for workplace sexual harassment because it is a question of law. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). In reviewing the statute, if its language is clear, we conclude that the Legislature must have intended the meaning expressed, and the statute is enforced as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

We also review de novo a trial court's ruling regarding a motion for a directed verdict, viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186

[15] That is, the marginally probative evidence could be given undue or preemptive weight by the jury.

(2003); *Meagher v Wayne State Univ*, 222 Mich App 700, 707-708; 565 NW2d 401 (1997).

Finally, the decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

III. INDIVIDUAL AGENT LIABILITY UNDER THE CRA

The CRA prohibits an employer from discriminating on account of sex, which includes sexual harassment. MCL 37.2202(1)(a); MCL 37.2103(i) ("Discrimination because of sex includes sexual harassment."). As previously set forth, the statute expressly defines an "employer" as a "person," which is defined under MCL 37.2103(g) to include a corporation, and also states that an "employer" includes an "agent of that person." MCL 37.2201(a).[16]

This statutory language uncontroversially means that Ford Motor Company is an "employer" under the CRA. What is contested is whether an agent of the corporation is also subject to individual liability.

Bennett and Ford have argued that the statutory definition of "employer," which includes an "agent of that person," should not be read as providing individual liability because (1) inclusion of the term "agent" in the statutory definition of "employer" operates solely to confer vicarious liability on the employer, (2) federal courts of appeals have all held that Title VII—the analogous federal sexual discrimination statute with its similar definition of "employer"—does not allow individual liability, and (3) the amendment history of our CRA suggests a different intention on the part of the Legislature.

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[16] These legislatively provided definitions are binding on this Court. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 136; 545 NW2d 642 (1996).

Regarding the first of these arguments, that this statute should not be read to expand the class of potential defendants to include agents, defendants assert that *Chambers, supra* at 310, supports this narrowing conclusion because it held that the inclusion of an "agent" within the definition of an "employer" in MCL 37.2201(a) served to confer vicarious liability on the agent's employer. We disagree with this analysis. While *Chambers* held that this language establishes vicarious liability, our discussion did not limit it to that function. The reason is that, when a statute says "employer" means "a person who has 1 or more employees, and *includes an agent of that person*," it must, if the words are going to be read sensibly, mean that the Legislature intended to make the agent tantamount to the employer so that the agent unmistakably is also subject to suit along with the employer. (Emphasis added.) Indeed, when we said in *Chambers, supra* at 320, that categorizing a given pattern of misconduct allows the Court "to determine whether the sexual harasser's *employer*, in addition to the sexual harasser *himself*, is to be held responsible for the misconduct," we believe we said as much. (Emphasis in original.) Accordingly, we reject the argument that including "agent" within the definition of "employer" serves only to provide vicarious liability for the agent's employer and we conclude that it also serves to create individual liability for an employer's agent.[17]

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[17] Justice WEAVER states in her dissent that we offer "no clear reason for rejecting the conclusion that the phrase 'agent of the employer' denotes respondeat superior liability." *Post* at 438. But, as our discussion above makes clear, we do *not* reject this conclusion. Rather, we hold that the Legislature's use of the words "agent of the employer" denotes respondeat superior liability and *also* that individual liability may exist under the statute.

Justice CAVANAGH argues in his dissent that

With respect to defendants' second argument, which is effectively that we should piggyback on the rationale federal courts have used with Title VII,[18] defendants refer us to numerous federal decisions that, on the basis of the "policy" and "object" of Title VII rather than what the statute actually says, have read Title VII to preclude individual liability.[19] This Court has been clear that the policy behind a statute cannot prevail over

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> the statute means that an employer is a person who has one or more employees and this includes an agent of the employer. This means that an employer still falls within the purview of the statute even if its "employees" are mere agents, such as family members who are helping with the business. To determine employer liability, agents are considered employees. [*Post* at 432.]

We believe Justice CAVANAGH is misreading the statute. The statute says an agent can be an employer—not an employee. The reference in the statute to "agent" modifies "employer." It does not expand the scope of "employee." This is evident from the parallel verbs:

> "Employer" *means* a person who has 1 or more employees, and *includes* an agent of that person. [MCL 37.2201(a) (emphasis added).]

[18] Title VII defines "employer" to mean "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and *any agent of such a person* . . . ." 42 USC 2000e(b). (Emphasis added.) Thus, while the definition of "employer" under Title VII is similar to that of our CRA, as pointed out in *Chambers,* unlike the federal law, the CRA expressly establishes a cause of action for sexual harassment and employer liability based on traditional agency principles. *Chambers, supra* at 311, 315-316, 326.

[19] For example, in *Wathen, supra* at 405, the Sixth Circuit Court of Appeals determined there was no individual liability under Title VII of the federal civil rights act, even though a reading of the language contained in Title VII would lead to the conclusion that an individual could, in fact, be held liable for acts of discrimination. The Sixth Circuit, however, citing the "object" and "policy" behind Title VII instead of its language, ultimately rendered a decision in conflict with that language. Similarly, in *Tomka v Seiler Corp*, 66 F3d 1295, 1314 (CA 2, 1995), the Second Circuit ruled individual liability was not available under Title VII even though what it grudgingly referred to as "a narrow, literal reading

what the text actually says. The text must prevail. In fact, in *Chambers,* when an invitation to follow "policy" over "text" was presented with regard to the CRA, we said:

> We are many times guided in our interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute. However, we have generally been careful to make it clear that we are not compelled to follow those federal interpretations. Instead, our primary obligation when interpreting Michigan law is always "to ascertain and give effect to the intent of the Legislature, . . . 'as gathered from the act itself.' " . . . [W]e cannot defer to federal interpretations if doing so would nullify a portion of the Legislature's enactment. [*Chambers, supra* at 313-314 (citations omitted).]

As in *Chambers*, we again decline to follow the tendered "policy" over "text" federal court interpretations of Title VII for the same reason: it would be contrary to the very wording of our CRA. Because MCL 37.2201(a) provides that an "employer" includes an "agent" of the employer, an agent can be held individually liable under the CRA. [20]

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of the agent clause" in Title VII "does imply that an employer's agent is a statutory employer for purposes of [Title VII] liability . . . ." As in *Wathen,* the Second Circuit went on to read Title VII not on the basis of its language, but on the basis of what it viewed as the real "intentions of the legislators."

[20] Justice WEAVER states in her dissent that our holding may be a "shallow victory" for plaintiffs because sexual harassers may not be "agents" if they were acting outside the scope of their authority. We neither agree nor disagree with any aspect or premise of this proposition, and do not address it here, because this issue has not been raised or argued by the parties. Further, whether or not some later holding by this Court may prove to be a "shallow victory" is in sharp contrast with the "certain defeat" that plaintiffs in sexual harassment cases against individuals would suffer under Justice WEAVER's "common sense" interpretation of the statute. *Post* at 439. Justice WEAVER further claims that under our opinion a supervisor, but not a coemployee, may face individual

Moreover, several federal courts in Michigan have anticipated our holding that, under our CRA, individual agent liability exists even if it did not exist under Title VII. This can be seen in *Hall v State Farm Ins Co*, 18 F Supp 2d 751, 764 (ED Mich, 1998), in which the United States District Court for the Eastern District of Michigan explained:

> ELCRA [Elliot-Larsen Civil Rights Act] covers any employer "who has 1 or more employees." Mich. Comp. Laws § 37.2201(a). Thus, ELCRA undeniably envisions placing liability on individuals, such as two-member business entities where one person is the principal and the other person serves as the employee. Moreover, ELCRA's remedy provision authorizes "person[s] alleging a violation of this act [to] bring a civil action for appropriate injunctive relief or damages, or both," with "damages" being awarded for an "injury or loss caused by each violation of this act, including reasonable attorney's fees." Mich. Comp. Laws §§ 37.2801(1), (3). These ELCRA remedies further distinguish it from Title VII because damages can be obtained from individuals as well as employers.

Similarly, another judge of the same federal district court also questioned the *Jager* Court's conclusion that individual liability did not exist under Michigan's CRA, stating that

> the language "includes an agent of that employer," could, under principles of strict statutory construction, well be read as extending liability to individuals. Otherwise, this phrase is merely surplusage, as it adds nothing to the definitional scope of "employer," which itself defines the term "employer" as a person. [*United States v Wayne Co*

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liability. This also is a proposition that has no basis in our opinion. All we have said is, if the individual was an agent of the employer, individual liability may exist. Whether a distinction can be drawn under the statute between supervisory and nonsupervisory employees has again not been raised or argued in this case.

Comm College Dist, 242 F Supp 2d 497, 507 n 11 (ED Mich, 2003).][21]

We conclude, then, that while federal courts have the power to construe Title VII as they will, that does not compel us to follow them, especially if the language being construed is at loggerheads with the purported policy.

With respect to the third argument regarding the amendment history of our CRA, defendants assert that it precludes a finding of individual liability. They advance this by positing that when the CRA was first enacted in 1976, it defined "employer" to mean "a person who has 4 or more employees, and includes an agent of that person." 1976 PA 453. This meant, as defendants read it, that an agent could not be individually liable because the CRA did not apply at all unless there were at least four employees. With that predicate of no agent liability under the 1976 act understood, they then turn to the amended statute, which reflects the 1980 amendment[22] that broadened the protection of the CRA by sweeping under its aegis companies with only one employee, but left unchanged the definition of "employer" to include an "agent," and argue that even though the old theory of nonliability of agents cannot be

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[21] *Millner v DTE Energy Co*, 285 F Supp 2d 950, 964 n 16 (ED Mich, 2003), also expressed the same qualms as those indicated in *Wayne Comm College*.

We also note that, in *Poches v Electronic Data Systems Corp*, 266 F Supp 2d 623, 627 (ED Mich, 2003), and *Rymal v Baergen*, 262 Mich App 274, 296-297; 686 NW2d 241 (2004), the courts distinguished *Jager* and allowed retaliation claims against individuals to go forward because the antiretaliation provision of the CRA, MCL 37.2701, is broader than the antidiscrimination provision of the CRA, MCL 37.2202.

[22] In 1980, the Legislature amended the statute to say that an "employer" means "a person who has 1 or more employees, and includes an agent of that person." 1980 PA 202.

sustained under the new language, we should read it in anyway. This we cannot do. The Legislature is held to what it said. It is not for us to rework the statute. Our duty is to interpret the statute as written. The binding nature of this responsibility was reiterated by this Court recently in *Lansing Mayor v Pub Service Comm,* 470 Mich 154, 161; 680 NW2d 840 (2004), in which we said:

> Our task, under the Constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitably think unwise. This dispute over the wisdom of a law, however, cannot give warrant to a court to overrule the people's Legislature.

Thus, what this comes down to is that perhaps the Legislature's policy choice can be debated, but the judiciary is not the constitutional venue for such a debate. The Legislature is the proper venue. It is to that body that the defendants should make their argument. Accordingly, we reject the claim that the amendment history of our CRA precludes a finding of individual liability where the actual wording of the statute as currently written unambiguously provides that an agent may be individually liable.[23]

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[23] Notwithstanding Justice WEAVER's view that the Legislature could have acted in a more "straightforward manner" in communicating its intentions, we cannot think of a more clear-cut statement on its part concerning liability under the statute. While Justice WEAVER would prefer to rely on her own "common sense," *post* at 439, in interpreting "employer" to exclude from coverage individual employees, the majority would prefer to rely on the statute itself, which states that "[e]mployer . . . includes an agent of that person." It is a caricature of the concept of "judicial restraint" (which concept she invokes on her own behalf, *post* at 439) for Justice WEAVER to assert that her "common sense" should be allowed to override the language of the statute.

Because we find that (1) inclusion of an "agent" within the definition of the word "employer" is not limited to establishing vicarious liability for the agent's employer, but in fact means agents are considered employers, (2) federal decisions construing Title VII should not be followed because it would lead to a result contrary to the text of our CRA, and (3) the amendment history of the CRA does not preclude a finding of individual liability, we conclude that liability under our CRA applies to an agent who sexually harasses an employee in the workplace.

IV. PLAINTIFF'S CLAIM AGAINST FORD

It is the case in this area of the law that employer responsibility for sexual harassment can be established only if the employer had reasonable notice of the harassment and failed to take appropriate corrective action. *Chambers, supra* at 312. In *Chambers*, we also held that "notice of sexual harassment is adequate if, by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability that sexual harassment was occurring." *Id.* at 319. Thus, actual notice to the employer is not required; rather, the test is whether the employer knew or should have known of the harassment. *Radtke, supra* at 396 n 46.[24] As is apparent, the issue is whether Ford knew or reasonably should have known, under the totality of the circumstances, of Bennett's harassment of plaintiff.

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[24] Justice WEAVER agrees with the majority that an employer must have notice before it can be liable. *Post* at 441. But, she later arguably undercuts this by citing *Meritor Savings Bank, FSB v Vinson,* 477 US 57, 72; 106 S Ct 2399; 91 L Ed 2d 49 (1986) (a case construing Title VII), for the proposition that the "absence of notice to an employer does not necessarily insulate that employer from liability." As for this language from *Meritor,* we note that it has been interpreted to mean that "employers are liable for

Plaintiff claims she made a prima facie showing of notice when she told two low-level supervisors of Bennett's exposure, and that Ford was also put on notice by the letters her psychologist and son-in-law sent to Ford. We agree with the trial court and the Court of Appeals that plaintiff's notice evidence was insufficient to allow the case to be submitted to the jury.

We first consider whether plaintiff's telling two low-level supervisors in confidence that Bennett had exposed himself to her constituted notice to Ford. We find that it did not. It must be recalled that, if an employee is sexually harassed in the workplace, it is that employee's choice whether to pursue the matter. In other words, the victim of harassment "owns the right" whether to notify the company and start the process of investigation. Until the employee takes appropriate steps to start the process, it is not started. As stated in *Perry v Harris Chernin, Inc*, 126 F3d 1010, 1014 (CA 7, 1997):

> [T]he law against sexual harassment is not self-enforcing. A plaintiff has no duty under the law to complain about discriminatory harassment, but the employer in a case like this one will not be liable if it had no reason to know about it.

Thus, when an employee requests confidentiality in discussing workplace harassment, and the request for confidentiality is honored, such a request is properly considered a waiver of the right to give notice.[25]

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failing to remedy or prevent a hostile or offensive work environment of which management-level employees *knew, or in the exercise of reasonable care should have known*." *Equal Employment Opportunity Comm v Hacienda Hotel*, 881 F2d 1504, 1515-1516 (CA 9, 1989) (emphasis added). Thus, the language from *Meritor* should be understood to mean *actual* notice is not required. This is consistent with Michigan law because the test is whether the employer knew or should have known of the harassment. *Radtke, supra* at 396 n 46.

[25] An employer, of course, remains free to discipline a supervisor for failing to report a sexual harassment complaint to the proper persons as

Thus, we conclude that plaintiff's telling two supervisors in confidence about one instance of Bennett's improper conduct does not constitute notice, notwithstanding Ford's policy that required the supervisors to report the information to human resources personnel.[26] Our holding is consistent with other courts that have considered this issue. For example in *Hooker v Wentz*, 77 F Supp 2d 753, 757-758 (SD W Va, 1999), the court held there was no notice to the employer where the plaintiff confided in her immediate supervisor about sexual advances but asked that he not report it to others. And, in *Faragher v Boca Raton*, 111 F3d 1530 (CA 11, 1997), rev'd on other grounds 524 US 775 (1998), the court held that, for vicarious-liability purposes, notice to a manager does not constitute notice to management when the complainant asks the manager, as a friend, to keep the information confidential.

With regard to the letters that were sent to Ford, we concur with the Court of Appeals that where the evidence showed that plaintiff had filed numerous grievances and labor relations complaints over the years against Bennett and others that were unrelated to sexual harassment,[27] the mentioning of the word "harassment" alone or the phrase "hostile environment" in the letters was insufficient to give Ford notice that *sexual* harassment was being claimed. This is especially true where plaintiff was aware, and the employer was aware that she was aware, of the terminology at issue

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required by the employer's policy. But, that is a different issue, and it does not mean that a confidential report of sexual harassment to a supervisor constitutes notice to the employer.

[26] Accord *Hooker v Wentz*, 77 F Supp 2d 753, 757-758 (SD W Va, 1999) (where the plaintiff confided in her immediate supervisor about sexual advances, but asked that he not report it to others, there was no notice to the employer).

[27] There were several disputes regarding plaintiff's shift assignment.

because she had previously filed a written complaint asserting that her UAW committeeman had sexually harassed her.[28] Accordingly, even viewing the evidence in a light most favorable to plaintiff, we conclude that Ford was entitled to a directed verdict because, under the totality of the circumstances, a reasonable employer would not have been on notice of a substantial probability that *sexual* harassment was occurring.[29]

Plaintiff argues in the alternative that, even if her evidence of notice to Ford was insufficient, it would have been sufficient if the trial court had not erroneously granted the motion in limine that precluded introduction of evidence of Ford's knowledge of Bennett's indecent exposure conviction. This conviction had been expunged before the trial in this matter. We conclude that the trial court's ruling was not an abuse of discretion.

First, we note that MCL 780.623(5) provides:

> Except as provided in subsection (2) [pertaining to certain law enforcement purposes], a person, other than the applicant, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.

Pursuant to this statute, evidence of Bennett's expunged misdemeanor conviction was not admissible.

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[28] Justice WEAVER's dissent advocates what might be characterized as a "near miss" theory of notice, i.e., if a male employee had problems at work with female employees or was accused of harassing someone in a nonsexual way, this somehow constitutes notice that such an employee was a sexual harasser. The perils of such an approach are apparent and we decline to adopt it.

[29] A directed verdict is proper where no prima facie showing of liability is made. *Locke v Pachtman*, 446 Mich 216, 222-223; 521 NW2d 786 (1994).

While this statute clearly made evidence of the conviction inadmissible, that leaves the question whether the facts that led to the conviction, which occurred while Bennett was not at work and involved individuals with no connection to Ford, were admissible to establish that Ford knew or should have known that Bennett was sexually harassing plaintiff. The trial court ruled that the evidence was inadmissible because the prejudice to Ford would substantially outweigh any probative value the evidence might have. The trial court did not abuse its discretion.[30] Indeed, we question how Ford's knowledge of Bennett's improper off-site behavior involving nonemployees could constitute notice to Ford that plaintiff's work environment was sexually hostile. Context is important; improper behavior of a given type is not an inevitable predictor of other types of improper behavior especially where, as here, they occur at entirely different locales and under different circumstances. *Tomson v Stephan*, 705 F Supp 530, 536 (D Kan, 1989).

And, as we stated in *Chambers, supra* at 315-316, an employer can be vicariously liable for a hostile work environment only if it "failed to take prompt and adequate remedial action upon reasonable notice of the creation of a hostile *[work] environment* . . . ." (Emphasis added.) Here, the trial court and the Court of Appeals properly held that plaintiff's notice evidence was insufficient to allow the case to be submitted to the jury.

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[30] See, e.g., *Tomson v Stephan,* 705 F Supp 530, 536 (D Kan, 1989) (excluding evidence that the defendant made sexual advances outside the employment setting because the advances were not made toward an employee); *Longmire v Alabama State Univ*, 151 FRD 414, 417 (MD Ala, 1992) (the defendant's "activities outside the work place are irrelevant" to determining the existence of a hostile work environment).

V. CONCLUSION

Because employers can be held liable under the CRA, and because agents are considered employers, agents can be held liable, as individuals, under the CRA. Thus, we accept the invitation of the Court of Appeals and reverse that part of the Court of Appeals opinion that relied on *Jager* in holding that agents may not be held individually liable under our CRA.

We affirm the judgment of the Court of Appeals that Ford was entitled to a directed verdict and that the trial court's pretrial ruling on the motion in limine was not an abuse of discretion.

Reversed in part, affirmed in part, and remanded to the circuit court for further proceedings regarding Bennett and consistent with this opinion.

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I believe that the Civil Rights Act (CRA), MCL 37.2101 *et seq*., does not provide for individual liability against an agent of an employer; therefore, I respectfully dissent from the majority on this issue. I also dissent from the majority on the issue of notice. As discussed by Justice WEAVER in her partial dissent, I likewise believe that plaintiff provided evidence of notice to defendant Ford Motor Company (Ford) that was sufficient to allow the issue to be decided by a jury. Finally, I concur with the result reached by the majority regarding the trial court's decision to grant defendants' motion in limine to preclude evidence of Ford's knowledge of the alleged sexual harasser's expunged indecent exposure conviction.

I. INDIVIDUAL LIABILITY UNDER THE CIVIL RIGHTS ACT

This issue involves the proper interpretation of the CRA. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The first step is to review the language of the statute. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible.

MCL 37.2201(a) states the following: " 'Employer' means a person who has 1 or more employees, and includes an agent of that person." According to the statute, "that person" refers to the employer.[1] Simply, the statute means that an employer is a person who has one or more employees and this includes an agent of the employer. This means that an employer still falls within the purview of the statute even if its "employees" are mere agents, such as family members who are helping with the business. To determine employer liability, agents are considered employees. Thus, an employer cannot escape liability because the alleged sexual harasser is not officially an employee, but is instead, for example, a family member who is "helping out" with the business. If the sexual harasser is an employee or agent of the employer, the employer is liable if it had notice and failed to act reasonably. See *Radtke v Everett*, 442 Mich 368, 396; 501 NW2d 155 (1993).

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[1] MCL 37.2103(g) states the following:

> "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity.

According to the unambiguous language selected by the Legislature, the plain text of the statute provides for employer liability for the acts of its employees and agents, but it does not provide for individual liability. Because policy considerations cannot be taken into account in this case, I offer no position on whether it would be best for plaintiffs in sexual harassment cases to also hold an alleged sexual harasser individually liable under the CRA. That decision is solely for the Legislature to determine.

II. NOTICE TO FORD OF SEXUAL HARASSMENT

I concur with part II of Justice WEAVER's partial dissent. I believe Justice WEAVER outlines sufficient evidence to support plaintiff's claim that Ford had notice of plaintiff's allegations of sexual harassment. While plaintiff requested confidentiality from two supervisors whom she told about the alleged sexual harassment, it is critical to note that the supervisor of labor relations had notice of plaintiff's allegations of sexual harassment from one of plaintiff's coworkers and from the *alleged sexual harasser himself*. In addition to the other facts presented by plaintiff, because the supervisor of labor relations had notice of plaintiff's allegations of sexual harassment, I believe that this issue should be determined by a jury.

III. EXCLUDING EVIDENCE OF THE ALLEGED SEXUAL HARASSER'S EXPUNGED CONVICTION FOR INDECENT EXPOSURE

I concur with the result reached by the majority that the trial court did not abuse its discretion when it granted defendants' motion in limine to preclude evidence of Ford's knowledge of the alleged sexual harasser's expunged indecent exposure conviction. I also concur with the majority's conclusion that, in this case, the

facts that led to the conviction were not sufficient to put Ford on notice of sexual harassment. However, I note that there certainly may be instances where the facts of a conviction, even one that occurs off-site and involves nonemployees, may lead to notice because of the context in which the incident occurred and the totality of the circumstances.

IV. CONCLUSION

Because the CRA does not provide for individual liability against an agent of an employer, I respectfully dissent from the majority on this issue. I also dissent from the majority on the issue of notice and, accordingly, I concur with Justice WEAVER because I believe that plaintiff provided evidence of notice to Ford that was sufficient to allow the issue to be decided by a jury. Finally, I concur with the result reached by the majority regarding the trial court's decision to grant defendants' motion in limine to preclude evidence of Ford's knowledge of the alleged sexual harasser's expunged indecent exposure conviction.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*concurring in part and dissenting in part*). I concur in the majority's conclusions that the trial court's ruling on the defendants' motion in limine was not an abuse of discretion and that its decision to exclude the evidence of defendant Daniel Bennett's expunged conviction should therefore be affirmed. But I write separately because I respectfully dissent both from the majority's conclusion that Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq.,* provides for individual liability against an agent of an employer and from its conclusion that defendant Ford Motor Com-

pany was entitled to a directed verdict because plaintiff failed to establish that Ford had notice of the sexual harassment.

Instead, I would conclude that the Legislature included the word "agent" in the definition of "employer" in MCL 37.2201(a) to denote respondeat superior liability, not individual liability. Accordingly, I would not overrule *Jager v Nationwide Truck Brokers, Inc,* 252 Mich App 464; 652 NW2d 503 (2002), and I would affirm the Court of Appeals conclusion in this case that there is no individual liability under the statute. Further, I would conclude that plaintiff offered sufficient evidence during trial to allow the question of notice to go to the jury. Therefore, I would reverse the Court of Appeals decision that the trial court properly granted a directed verdict in Ford's favor because plaintiff failed to show that she provided notice of her sexual harassment claim.

I

The CRA provides, in pertinent part, that "[a]n employer shall not do any of the following":

> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term,

> condition, or privilege of employment, including, but not limited to, a benefit plan or system. [MCL 37.2202.]

The CRA defines discrimination because of sex to include sexual harassment. MCL 37.2103(i). It defines "sexual harassment" to mean "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions":

> (i) Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.
>
> (ii) Submission to or rejection of the conduct or communication by an individual is used as a factor in decisions affecting the individual's employment, public accommodations or public services, education, or housing.
>
> (iii) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [MCL 37.2103(i).]

The term "employer" is defined as "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a).

The majority concludes that because the definition of the word "employer" includes an "agent" of the employer, "an agent can be held individually liable under the CRA." *Ante* at 422. I disagree and, instead, agree with the conclusion reached by the Court of Appeals in *Jager*, *supra* at 484, that by defining "employer" to include an "agent" of the employer, the Legislature "meant merely to denote respondeat supe-

rior liability[1] rather than individual liability."[2] Thus, I would not overrule the *Jager* decision.

Had the Legislature intended the CRA to impose liability on the individuals who commit harassment, it would likely have done so in a more straightforward manner than by defining "employer" to include an "agent" of the employer.[3] Relying on the word "agent" to impose individual liability would, under the majority's interpretation, only allow individual liability against supervisors and others in similar positions who, under agency law, might be considered "agents" of the employer.[4] But it would not permit coemployees who harass a victim to be held individually liable. If the Legislature truly intended to impose individual liability under the CRA on those who commit sexual harassment, one would expect that it would choose language that would allow all individuals who commit the harassment to be held liable, regardless of their status as a supervisor or coemployee.

Further, the "round-aboutness" of the majority's

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[1] Respondeat superior "means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent." Black's Law Dictionary (6th ed). It is an element of a prima facie case of sexual harassment based on hostile work environment. *Radtke v Everett,* 442 Mich 368, 383; 501 NW2d 155 (1993). For all five elements, see pp 440-441 of this opinion.

[2] See also *Miller v Maxwell's Int'l Inc,* 991 F2d 583 (CA 9, 1993), and *Wathen v Gen Electric Co,* 115 F3d 400 (CA 6, 1997), which interpret the phrase as used in Title VII.

[3] For example, the Legislature could have said in MCL 37.2202 that an "employer *or employee* of the employer shall not . . .," or it could have included a separate section in the statute addressing individual liability.

[4] An agent has been defined as a "person authorized by another (principal) to act for or in place of him; one intrusted with another's business" or "[o]ne who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons." Black's Law Dictionary (6th ed).

approach becomes more evident when one realizes that recognizing individual liability under the CRA may be a very shallow "victory" for plaintiff and may actually result in very few individuals being held liable. In this case, the majority assumes that Mr. Bennett was an "agent" of Ford without analyzing the issue. But if the issue whether the perpetrator of the harassment was an agent of the employer were analyzed under strict agency principles, in many cases, it may be concluded that the perpetrator of the harassment cannot be held individually liable as an agent because the perpetrator did not have actual or apparent authority from the employer to harass employees of the employer; therefore he cannot be considered an "agent" of the employer because he was acting outside the scope of his authority.[5] It does not seem reasonable that the Legislature would create individual liability using language that might, in actuality, foreclose most individuals from being held individually liable under the CRA.

The majority offers no clear reason for rejecting the conclusion that the phrase "agent of the employer" denotes respondeat superior liability. Rather, it simply concludes that the phrase "includes an agent of that person" must mean "if the words are going to be read sensibly" that agents are subject to individual liability

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[5] See, e.g., *AMCO Builders & Developers, Inc v Team Ace Joint Venture,* 469 Mich 90, 103-104; 666 NW2d 623 (2003) (YOUNG, J., concurring) (stating that agency principles are applicable to the attorney-client relationship and that a client may be bound by the acts of his agent when the agent is acting within the scope of his authority); *James v Alberts,* 464 Mich 12, 15; 626 NW2d 158 (2001) (noting that "a principal is bound by an agent's actions within the agent's actual or apparent authority").

In light of this, I now question the correctness of our decision in *Chambers v Trettco, Inc*, 463 Mich 297, 312, 316; 614 NW2d 910 (2000), which concluded that the CRA is firmly "rooted in traditional agency principles." While agency principles may be a helpful guide in applying the CRA, I question whether they should be rigidly applied in this setting.

under the statute. *Ante* at 420. Thus, the majority's reasoning amounts to little more than it must mean this because we say it does. But, as suggested above, rather than a "sensible" reading of the statute, this seems a very round-about way to create individual liability.

I also disagree with the majority's suggestion that concluding that the word "agent" denotes respondeat superior liability and not individual liability places "policy" over the "text" of the statute. *Ante* at 421-422. Interpreting the text of the statute does not mean that we read a phrase in the statute in isolation from the act as a whole or from the purpose of the act. Interpreting a statute with judicial restraint and common sense may, in fact, require us to consider the act as a whole and its purpose while we endeavor to understand what the Legislature intended by including a particular phrase.

In this case, a purpose of MCL 37.2202 is to prohibit employers from sexually discriminating against employees. By imposing liability on employers for sexual harassment, employers will be encouraged to take steps to prevent sexual harassment from occurring in the workplace. But often in a large company or corporation, there is not one "person" that could be considered the "employer" for purposes of determining whether an "employer" discriminated against an employee. The employer is an entity. Thus, it is reasonable for the Legislature to include in the definition that an "employer" includes an "agent." Including this respondeat superior aspect in the statute ensures that employees can hold employers liable for harassment while still balancing the interests of the employer by limiting employer liability to those who can be considered the employer's "agents" and incorporating respondeat superior principles that require notice to the employer of the

alleged harassment.[6] Considering this "policy" behind the provision does not place policy over "text." Rather, it is another way a judge exercises common sense and judicial restraint while attempting to reach a reasonable interpretation of what the Legislature intended the words to mean.

Therefore, until the Legislature clearly creates individual liability under the statute, I would conclude that plaintiff does not have a cause of action against Mr. Bennett under the CRA.[7]

II

The majority also concludes that the trial court properly granted a directed verdict in favor of defendant Ford Motor Company because plaintiff failed to establish that Ford had notice of the harassment. I disagree and would allow the jury to determine, under the totality of the circumstances, whether Ford had notice of the alleged sexual harassment.

The elements required to establish a prima facie case of sexual harassment based on hostile work environment are:

> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of sex;

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[6] As noted in footnote 5 of this opinion, I question whether agency principles should be rigidly applied to the CRA rather than used as a general guideline for interpreting the CRA, and I do not mean to suggest that by using the word "agent" to denote respondeat superior liability, the Legislature clearly intended to incorporate any and all principles of agency law into the CRA.

[7] I note that although I would conclude that plaintiff does not have a claim against Mr. Bennett under the CRA, she can pursue any traditional tort claims that she may have against him.

> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior. [*Radtke v Everett,* 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

As further explained, under the fifth element, an employer may avoid liability if, upon notice of the hostile work environment, it adequately investigated and took prompt remedial action. *Id.* at 396 (quoting *Downer v Detroit Receiving Hosp,* 191 Mich App 232, 234; 477 NW2d 146 [1991]). An employer must have notice of the alleged harassment before it can be held liable, and it does not have a duty to investigate and take prompt remedial action until it has actual or constructive notice. *Radtke, supra* at 396-397 and n 44.

In this case, the trial court granted a directed verdict in Ford's favor on plaintiff's hostile work environment claim on the basis that there was no notice to Ford.[8] The trial court stated:

> The fact of the matter is that there was no notice to Ford. This 1998 letter to Mr. Rush, if it went to him, from the son-in-law, the defendant never made mention of any sexual harassment. And again, the only people she told were supervisors. Under normal circumstances I would agree that that would be enough. But in this case it was told to them in confidence. She asked them not to repeat it. And again, she complained that she couldn't come forward because of her culture.

The Court of Appeals affirmed the trial court's ruling.

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[8] Defendant Ford moved for summary disposition of plaintiff's hostile work environment claim only on the issue of notice.

This Court reviews de novo the grant of a motion for a directed verdict. *Cacevic v Simplimatic Engineering Co (On Remand),* 248 Mich App 670, 679; 645 NW2d 287 (2001); see also *Craig v Oakwood Hosp,* 471 Mich 67, 77; 684 NW2d 296 (2004) (stating that a decision on a motion for judgment notwithstanding the verdict is reviewed de novo). In reviewing the trial court's decision on the motion, "we examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party." *Hord v Environmental Research Institute of Michigan (After Remand),* 463 Mich 399, 410; 617 NW2d 543 (2000). "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Cacevic, supra* at 679-680; see also *Wilkinson v Lee,* 463 Mich 388, 391; 617 NW2d 305 (2000) (stating that a directed verdict is appropriate only if the evidence, when considered in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law). Thus, while not insurmountable, the threshold for obtaining a directed verdict is high. *Hord, supra* at 410.

In my opinion, considering all the evidence and the reasonable inferences that may be drawn from it, there are factual questions about which reasonable jurors could differ regarding whether Ford had notice. Therefore, the issue of notice is not one that the trial court can properly decide as a matter of law; instead, it is a question of fact to be decided by the jury. Consequently, I would reverse the Court of Appeals affirmance of the trial court's grant of a directed verdict in Ford's favor and remand this case to the trial court.

Plaintiff testified that in 1995, she told her supervisor, Gary Zuback, that Mr. Bennett had been sexually harassing her. She also testified that around the same

time, she told another supervisor, Butch Vaubel, who said that he would talk to Mr. Bennett, and that on different occasions, she told her coworkers Dan Welch, Dave Perry, and Brad Goatee. She admitted that when she told Mr. Zuback and Mr. Vaubel, she told them confidentially. Dan Welch testified that he did not tell anyone about the first incident of harassment that plaintiff described to him, but that he later spoke to Jerome Rush, the supervisor of labor relations, in October 1998, as well as Ron Mester and perhaps Richard Greenfield about the situation. Mr. Goatee testified that he was called down to labor relations in 1996 or 1997 to discuss Mr. Bennett. Mr. Rush testified that before plaintiff's lawsuit was filed, Mr. Bennett told him that plaintiff was trying to set Mr. Bennett up on a sexual harassment claim and that Ford, therefore, knew about the lawsuit before it was filed.

Labor relations notes written by Pete Foley to Jerome Rush on August 25, 1998, indicate that plaintiff was very upset and felt that Mr. Bennett and another worker, Tammy Holcomb, were looking at her and laughing. Notes dated August 28, 1998, state the plaintiff told Pete Foley that Mr. Bennett came near her when no one was around and that she was scared. Notes from Jerome Rush dated September 30, 1998, stated that plaintiff told him that Mr. Bennett was "harassing" her.

Letters from plaintiff's treating psychologist, Fran Parker, on September 19, 1997, and November 10, 1997, reference plaintiff's discomfort with Mr. Bennett, A letter sent by plaintiff's son-in-law, Paul Lulgjuraj, who is an attorney, on April 9, 1998, to Mr. Rush states that his office was investigating "ongoing acts of discrimination and retaliation," references threats made by Tammy Holcomb, and advises that his office may be

taking actions "to insure that our client is not subjected to working in a hostile environment." On December 17, 1998, Dr. Parker wrote to Mr. Rush to explain that Rush had misunderstood Parker's phone call on October 6, 1998, to Rush to tell Rush that plaintiff had homicidal and suicidal thoughts. Parker's letter stated that Parker did not tell Mr. Rush that plaintiff intended to kill Dan Bennett, but that the call was meant to ask Mr. Rush to intervene on plaintiff's behalf because the stress of plaintiff's job was "breaking her down."

The majority, in affirming the trial court's grant of a directed verdict in Ford's favor, improperly creates a rule of automatic waiver. Under the majority's analysis, any time an employee requests confidentiality when reporting sexual harassment, the employee will have waived notice. *Ante* at 427-428. While a request of confidentiality is certainly something that the jury should consider in determining whether the employer had notice, such a request should not constitute an automatic waiver of notice. Rather, all the evidence presented and the totality of the circumstances must be considered when determining whether the employer had actual or constructive notice. See, e.g., *Meritor Savings Bank, FSB v Vinson,* 477 US 57, 72; 106 S Ct 2399; 91 L Ed 2d 49 (1986), where in rejecting a rule of automatic liability for employers for sexual harassment by supervisors, the United States Supreme Court also stated that the "absence of notice to an employer does not necessarily insulate that employer from liability."

Considering all the evidence presented in this case in the light most favorable to the plaintiff, there are issues of fact to be decided by the jury about whether defendant Ford Motor Company had notice that plaintiff was being sexually harassed. While it is true that plaintiff may have requested confidentiality from her supervi-

sors and that many of the letters and documents mentioning "harassment" generally do not detail the specific instances of sexual harassment on which plaintiff's lawsuit is based, evidence was also presented that she told coworkers of the harassment and that the coworkers in turn spoke with employees in the labor relations department. Further, considering all the documentation in the light most favorable to plaintiff, there is certainly evidence that plaintiff complained to Ford that Mr. Bennett was "harassing" her and doing something to make her job very stressful.

Therefore, I would conclude that the question of notice is not one that can be decided as a matter of law by the trial court, but one that must be decided by the jury after it considers the entire record and weighs the conflicting evidence.

PEOPLE v TOMBS

Docket No. 125483. Argued December 8, 2004 (Calendar No. 1). Decided June 1, 2005.

Russell D. Tombs was convicted by a jury in the Macomb Circuit Court, Mary A. Chrzanowski, J., of distributing or promoting child sexually abusive material, possession of child sexually abusive material, and using the Internet or a computer to communicate with people for the purpose of possessing the material. The Court of Appeals, CAVANAGH, P.J., and GAGE and ZAHRA, JJ., reversed the conviction and sentence for distributing or promoting child sexually abusive material and affirmed the remaining convictions and sentences. 260 Mich App 201 (2003). The Supreme Court granted the prosecution's application for leave to appeal the reversal by the Court of Appeals. 470 Mich 889 (2004).

In separate opinions, the Supreme Court *held*:

In order to convict a defendant of distributing or promoting child sexually abusive material under MCL 750.145c(3), the prosecution must prove that the defendant distributed or promoted child sexually abusive material, knew the material to be child sexually abusive material at the time of distribution or promotion, and distributed or promoted the material with criminal intent. The mere acquisition and possession of child sexually abusive material through the use of the Internet does not constitute a violation of MCL 750.145c(3). In this case, there was insufficient evidence for the defendant's conviction of distributing or promoting child sexually abusive material.

Justice KELLY, joined by Justices CAVANAGH and MARKMAN, stated that there was insufficient evidence for a jury to conclude beyond a reasonable doubt that the defendant distributed or promoted child sexually abusive material with criminal intent. Defendant returned his employer-provided computer with the expectation that child sexually abusive material on the computer and that had been obtained on the Internet would not be viewed because all the computer files would be routinely erased by the employer without first examining them. But the employer examined the computer files and discovered the child sexually abusive material. These facts were insufficient to prove the defendant possessed criminal

intent to distribute or promote the material by returning the computer. Since this incident formed the basis for the conviction, the Court of Appeals properly reversed it.

Chief Justice TAYLOR concurred in the result and the analysis of the lead opinion except part VI(B) of that opinion, and wrote separately to explain his reasons for concluding that reversal of the defendant's conviction for "distributing or promoting" child sexually abusive material was proper. The statute required an intent to distribute or promote the child sexually abusive material. As the lead opinion concluded, there was insufficient evidence to prove that the defendant had this intent under two of the three theories offered by the prosecution, which involved distinct incidents. While there was barely sufficient evidence to support the third prosecution theory, the jury was not instructed that all jurors must agree on which incident included all elements of the crime. Although the defendant did not request an instruction on unanimity, it is impossible to determine if the outcome would have been the same had the jury been properly instructed. This instructional error was a plain error that affected the defendant's substantial rights and that requires reversal of the conviction.

Justice CORRIGAN, joined by Justices WEAVER and YOUNG, concurring in part and dissenting in part, stated that the majority correctly concluded that the distribution of child sexually abusive material must be an intentional act. The Legislature articulated in MCL 750.145c(3) only one express intent requirement, knowledge that the distributed material contains child sexually abusive material. The uncontroverted evidence shows that the defendant's distribution of the material was intentional. Neither the Constitution nor the statute supports the majority's heightened requirement that the defendant intend the recipient to discover or view the prurient material in order to distribute the material. The decision of the Court of Appeals should be reversed and the defendant's conviction should be reinstated.

Affirmed.

CRIMINAL LAW — DISTRIBUTING OR PROMOTING CHILD SEXUALLY ABUSIVE MATERIAL — INTENT.

A conviction for distributing or promoting child sexually abusive material requires evidence that the defendant distributed or promoted child sexually abusive material, knew the material to be child sexually abusive material at the time of distribution or promotion, and distributed or promoted the material with criminal intent; the mere acquisition and possession of child sexually

abusive material through the use of the Internet does not constitute distributing or promoting such material (MCL 750.145c[3]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Carl J. Marlinga*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Lawyer, and *Beth Naftaly Kirshner*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for the defendant.

KELLY, J. This case requires us to consider whether MCL 750.145c(3), which prohibits the distribution or promotion of child sexually abusive material, requires that the distribution or promotion be performed with criminal intent. If criminal intent is an element of the offense, we must determine also whether the prosecutor presented sufficient evidence to prove that defendant possessed it.

We agree with the Court of Appeals that MCL 750.145c(3) requires that an accused be shown to have had criminal intent to distribute or promote. We also agree that the evidence presented to the trial court was insufficient to prove that intent. Therefore, we affirm the decision of the Court of Appeals that reversed defendant's conviction for distributing and promoting child sexually abusive material.

I. FACTS AND PROCEDURAL HISTORY

Defendant was a field technician for Comcast OnLine, an organization that sells cable Internet access to business and residential customers. Field technicians install Internet cable service and perform troubleshooting when a customer encounters difficulty in accessing the Internet.

Comcast furnished defendant with a company van and a laptop computer for employment-related use. Before the laptop was issued to defendant, the hard drive was reformatted so that it contained only company-sanctioned software programs.

On August 9, 2000, a Wednesday, defendant quit his employment with Comcast. He told Christopher Williams, another Comcast employee, that he would return the company's equipment and van on the weekend. Williams initially told defendant that this would be acceptable, but called defendant a second time and advised him that the equipment had to be returned that day.

Williams retrieved the items from defendant approximately an hour after the telephone conversation. He returned the laptop to Comcast's office and began to reformat it. Although it was not required in the formatting, he ran a search for JPG files, files containing pictures, "[j]ust to see what was on it." He found several and opened one. It contained adult pornography. Williams looked further and came across a picture of a partially naked young girl.

Because of his discovery, Williams gave the computer to Carl Radcliff, a data support technician for Comcast. Radcliff also ran a search for JPG files. He eventually found "a series of child pornography." Radcliff indicated that the pornographic material was not in a readily available location, but was "buried inside of what's known as a user profile."

The laptop was later turned over to the police. Detective Edward Stack of the St. Clair Shores Police Department testified that he and another detective found images of child pornography on it. Sergeant Joseph Duke, the supervisor of the Computer Crimes Unit of the Oakland County Sheriff's Department,

counted over five hundred images on the computer that he believed qualified "as either child sexually abusive material or child erotica."

Sergeant Duke believed that the photographs had been downloaded from the Internet. He indicated that the files had been difficult for him to find because they were buried in subfolders seven directory levels down. He testified that "[a]s an investigator and as an examiner, it's kind of a red flag when I have to go down through 7 directory levels to get to evidence." When asked why this raises a red flag, Sergeant Duke said it indicates that the data are being hidden.

Because of the discovery of child pornography, and because there were two minor children living in defendant's home, David Joseph, a children's protective services worker with the Family Independence Agency,[1] interviewed defendant. Joseph testified that defendant told him that, when a Comcast employee leaves employment, new programs are installed in that employee's computer. Defendant indicated that he did not think anybody would go through the files he had created there. He presumed that the hard drive would simply be wiped clean before installation of new software.

Defendant admitted to Joseph that he had obtained the photographs "from the Internet and from sharing with others." Joseph also said that it was his impression from talking with defendant that defendant had taken part in an Internet club that exchanged child pornography.

A jury convicted defendant of (1) distributing or promoting child sexually abusive material, MCL 750.145c(3); (2) possessing the material, MCL

[1] Family Independence Agency is now the Department of Human Services.

750.145c(4); and (3) using the Internet or a computer to communicate with people for the purpose of possessing the material, MCL 750.145d.[2] In a published opinion, the Court of Appeals reversed defendant's conviction for distributing or promoting child sexually abusive material under MCL 750.145c(3) and affirmed his other convictions. 260 Mich App 201; 679 NW2d 77 (2003). The prosecutor appeals the reversal to this Court. 470 Mich 889 (2004).

II. STANDARD OF REVIEW AND STATUTORY CONSTRUCTION

Issues of statutory interpretation, like questions of law, are reviewed de novo. *People v Koonce*, 466 Mich 515, 518; 648 NW2d 153 (2002). In interpreting a statute, our goal is to ascertain and give effect to the Legislature's intent. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Where the language of the statute is unambiguous, the Court presumes that the Legislature intended the meaning expressed. *Id.*

Accordingly, to determine whether a statute imposes strict liability or requires proof of a guilty mind, the Court first searches for an explicit expression of intent in the statute itself. See *People v Quinn*, 440 Mich 178, 185; 487 NW2d 194 (1992).

Normally, criminal intent is an element of a crime. *People v Rice*, 161 Mich 657, 664; 126 NW 981 (1910). Statutes that create strict liability for all their elements are not favored. *Quinn*, 440 Mich at 187. Hence, we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, even if it was left unstated.

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[2] On appeal to us, defendant did not challenge his convictions under MCL 750.145c(4) or MCL 750.145d. Therefore, this Court takes no position on whether the facts are sufficient to support convictions under those provisions.

III. CRIMINAL INTENT IS AN ELEMENT OF MCL 750.145c(3)

The statutory provision under consideration, MCL 750.145c(3), reads in relevant part:

> A person who distributes or promotes, or finances the distribution or promotion of, or receives for the purpose of distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00, or both, if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. This subsection does not apply to the persons described in section 7 of 1984 PA 343, MCL 752.367.

The question presented is whether, to be convicted under the statute, a defendant must possess the criminal intent to distribute or promote child pornography.

Considering solely the statute's words, it is apparent that criminal intent, *mens rea*, is not explicitly required. The only specific knowledge requirement is that the defendant knew that the sexually abusive material included or appeared to include a child.

IV. UNITED STATES SUPREME COURT PRECEDENT

The United States Supreme Court has addressed the issue whether a criminal intent element should be read into a statute where it does not appear. *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952). In *Morissette*, the defendant took spent shell casings from a government bombing range and sold them for salvage. The defendant was convicted of con-

verting government property despite evidence suggesting that he had no criminal intent to steal anything and thought the property abandoned. The trial court instructed the jury that a lack of criminal intent was not a defense to the charge. *Id.* at 247-249.

In reviewing the case, the *Morissette* Court began with the proposition that criminal offenses that do not require a criminal intent are disfavored. Liability without criminal intent will not be found in the absence of an express or implied indication of congressional intent to dispense with the criminal intent element. *Id*. at 250-263. *Morissette* stated:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a "vicious will." Common-law commentators of the Nineteenth Century early pronounced the same principle . . . .
>
> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.

> Courts, with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law. The unanimity with which they have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element. However, courts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as "felonious intent," "criminal intent," "malice aforethought," "guilty knowledge," "fraudulent intent," "wilfulness," "*scienter*," to denote guilty knowledge, or "*mens rea*," to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes. [*Id.* at 250-252.]

The Court then considered the history and purpose of the federal statute at issue and determined that there was no indication that Congress wanted criminal intent eliminated from the offense. *Id*. at 265-269.

The *Morissette* Court noted the longstanding presumption that all crimes require criminal intent. It held that Congress's failure to include a criminal intent element did not signal a desire to preclude the need to prove criminal intent. Rather, the omission of any mention of criminal intent was not to be construed as eliminating the element from the crime. *Id*. at 272-273.

Since the *Morissette* decision, the United States Supreme Court has reiterated that offenses not requiring criminal intent are disfavored. The Court will infer the presence of the element unless a statute contains an express or implied indication that the legislative body wanted to dispense with it. Moreover, the Court has expressly held that the presumption in favor of a

criminal intent or *mens rea* requirement applies to each element of a statutory crime.

In *Staples v United States*,[3] the Court interpreted a federal statute that makes it a crime to possess an unregistered weapon capable of automatic firing. The Court noted that silence with respect to criminal intent does not, by itself, "necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal." *Staples,* 511 US at 605.

The Court observed that the existence of *mens rea* " 'is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' " *Id.,* quoting *United States v United States Gypsum Co*, 438 US 422, 436; 98 S Ct 2864; 57 L Ed 2d 854 (1978). It held that silence did not suggest that Congress intended to eliminate a *mens rea* requirement from the National Firearms Act. *Staples* said:

> On the contrary, we must construe the statute in light of the background rules of the common law, in which the requirement of some *mens rea* for a crime is firmly embedded. . . .
>
> There can be no doubt that this established concept has influenced our interpretation of criminal statutes. Indeed, we have noted that the common-law rule requiring *mens rea* has been "followed in regard to statutory crimes even where the statutory definition did not in terms include it." Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime. [*Staples*, 511 US at 605-606 (citations omitted).]

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[3] 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994).

In *United States v X-Citement Video, Inc*,[4] the United States Supreme Court applied the *mens rea* rule to a federal statute prohibiting child pornography. The statute made it illegal to "knowingly transport[] or ship[]" or "knowingly receive[] or distribute[]" any visual depiction involving the use of a minor engaging in sexually explicit conduct. 18 USC 2252. The Court was required to determine whether the term "knowingly" as used in the section also modified the phrase "use of a minor." The Court undertook to determine whether the defendant must knowingly transport the material and must know that it depicted a minor engaged in sexually explicit conduct.

The *X-Citement Video* Court presumed that *mens rea* must be shown to obtain a conviction, there being no clear congressional intent that strict liability should be imposed. It held that Congress must have intended that an accused transported the material knowingly and had knowledge of its nature to be guilty of the crime. *X-Citement Video*, 513 US at 78. The Court noted that this reading was necessary because "some form of scienter is to be implied in a criminal statute even if not expressed" and because "a statute is to be construed where fairly possible so as to avoid substantial constitutional questions." *Id.* at 69.

V. APPLICATION OF PRECEDENT TO RESOLVE THE CRIMINAL INTENT QUESTION

We apply this Supreme Court precedent to the case before us. No *mens rea* with respect to distribution or promotion is explicitly required in MCL 750.145c(3). Absent some clear indication that the Legislature intended to dispense with the requirement, we presume

[4] 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994).

that silence suggests the Legislature's intent not to eliminate *mens rea* in MCL 750.145c(3).

The Court of Appeals correctly reached this conclusion. The most applicable dictionary definition of "distribute" implies putting items in the hands of others as a knowing and intentional act.[5] Likewise, the terms "promote" and "finance," and the phrase "receives for the purpose of distributing or promoting" contemplate knowing, intentional conduct on the part of the accused.

The use of these active verbs supports the presumption that the Legislature intended that the prosecution prove that an accused performed the prohibited act with criminal intent. If we held otherwise, not only would it be illogical, we would create a questionable scheme of punishment: One who, with criminal intent, possessed child sexually abusive material would be subject to a lesser punishment than someone who, without criminal intent, passed along such material to others.[6]

The Court of Appeals holding that the prosecution must prove criminal intent to distribute or promote fully implements the goal of the legislative scheme. It

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[5] "Distribute: to divide and give out in shares; allot. To pass out or deliver: to distribute pamphlets." *The Random House College Dictionary* (2001) "[T]o give out or deliver especially to members of a group <distribute newspapers>." *Merriam-Webster OnLine Dictionary* <http://www.m-w.com> (accessed April 5, 2005). "[T]o divide (something) among several or many people, or to spread or scatter (something) over an area." *Cambridge Dictionary of American English* (Online version) <http://www.dictionary. cambridge.org> (accessed April 5, 2005).

[6] The maximum penalty for violating MCL 750.145c(3), distributing or promoting child sexually abusive material, is seven years in prison and a fine of $50,000. The maximum penalty for possessing child sexually abusive material, MCL 750.145c(4), is four years in prison and a $10,000 fine. When defendant was convicted, MCL 750.145c(4) provided for imprisonment of one year.

also avoids substantial constitutional questions. The fact, standing alone, that the Legislature did not affix the term "knowingly" to the distribution or promotion element does not mean that the Legislature intended a strict liability standard.

As the United States Supreme Court explained in *X-Citement Video*,[7] if there were no *mens rea* element respecting the distribution of the material, the statute could punish otherwise innocent conduct. For instance, a person might accidentally attach the wrong file to an e-mail sent to another. The person might intend to send an innocent photograph, but accidentally send a pornographic photograph of a child instead. Also, the person might not intend that the recipient recognize or even see the material that he transferred.

If the statute contained no *mens rea* element, a person lacking any criminal intent could be convicted and sentenced to seven years in prison and a fine of $50,000. Or, as in the present case, he could be found criminally liable for returning a laptop owned by his employer, intending only that the offending material be destroyed.[8]

If this were the law, Comcast employees who transferred defendant's JPG computer files among them-

[7] 513 US at 69.

[8] The dissent claims that evidence of intent is found in the fact that defendant returned the laptop containing the offending material. There is evidence that defendant intended to distribute the laptop to Comcast, but there is no *evidence* of a criminal intent on his part to distribute child sexually abusive material. In fact, all the evidence points to the contrary conclusion, that defendant did not distribute the material with a criminal intent. He returned the laptop to his former employer as required and with the expectation that his former employer would not search for and find the child sexually abusive material. This is further supported by the fact that the material was hidden in subfolders seven directory levels down.

selves and ultimately to the police, knowing what was in them, would have violated MCL 750.145c(3). It would be immaterial that they had no criminal intent. Such a reading of the statute would frustrate its purpose.[9]

For all of the reasons given, we conclude that the Legislature intended that criminal intent to distribute be an element of MCL 750.145c(3).

VI. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION FOR DISTRIBUTING CHILD SEXUALLY ABUSIVE MATERIAL

The next question is whether the prosecution proved that defendant had the criminal intent to distribute or promote child sexually abusive material. Due process requires proof of intent beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985). When determining if sufficient evidence was presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution. It must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

A. RETURN OF THE LAPTOP TO COMCAST

Although defendant intended to distribute the laptop containing child sexually abusive material to his former

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[9] The dissent insists that these Comcast employees could be convicted under our reading of MCL 750.145c(3), *post* at 474 n 6. It appears to miss the distinction between intent to commit an act, such as returning another's personal property, and intent to commit a crime, a "guilty mind." The Comcast employees intended to report a suspected crime. They did not intend to illegally distribute child sexually abusive material.

The dissent states that, in other statutes, the Legislature has taken steps to prevent the prosecution of people who lack criminal intent. But it fails to show how those statutes are relevant to the issue before us, which is whether MCL 750.145c(3) includes criminal intent as an element.

employer, no evidence suggests that he distributed the material with a criminal intent. There was no evidence that defendant made anyone at Comcast aware, or attempted to make anyone aware, of the presence of the material. To the contrary, there is evidence that defendant neither intended nor expected anyone at Comcast to discover or view the material.

Comcast witnesses acknowledged that the computer hard drive could be erased and reformatted without any of its files being reviewed. Mr. Williams admitted that this was the practice at Comcast and that defendant himself may have previously performed such erasures on returned computers.

Williams admitted that he looked through defendant's files because "I just wanted to see what was on there," not because it was necessary. Williams further testified that he did not tell defendant when he arranged to pick up the computer that he intended to look at any of his files. Another witness testified that the practice at Comcast was simply to wipe the hard drives of all information and reformat them.

From the testimony, one could reasonably conclude that defendant anticipated that no one at Comcast would review his files. His statement to FIA investigators was that he thought the entire hard drive would be merely erased and reformatted. Viewed most favorably to the prosecution, the record contains nothing from which to reasonably infer that defendant intentionally left the material on the laptop for Comcast's employees to discover.

The dissent questions the relevancy of the fact that defendant did not intend anybody to discover or view the material. As explained above, defendant could be convicted of distributing child sexually abusive material only if he distributed the material with a criminal

intent. Obviously, if defendant distributed the material not intending anybody to discover or view it, he did not distribute it with a criminal intent.

Defendant returned the computer, as he was required to do, to individuals who possibly knew how to find the information. This does not change the fact that defendant concealed the images. Nor does it change the fact that, on the basis of past company practice, defendant legitimately believed that those individuals would not search the computer for picture files. That someone had the ability and desire to search for the material defendant purposefully concealed does not affect the analysis of defendant's state of mind. The actions of a third party could not create a criminal intent in the mind of defendant.

In addition to defendant's statement to the FIA, substantiation for the inference that there was no *mens rea* is found in the testimony of prosecution witness Radcliffe. He said that the photos were buried deep in a user profile, not in a readily available location. Likewise, Sergeant Duke testified that, in his opinion, the location, seven directory levels down, indicated that defendant intended to keep the material secret.

Hence, insufficient evidence existed from which the jury could draw an inference beyond a reasonable doubt that, when returning the laptop, defendant distributed child sexually abusive material with criminal intent. We avoid the dissent's error of conflating the criminal intent to distribute child sexually abusive material with the simple intent to return the laptop.

B. DEFENDANT'S INTERNET ACTIVITY

The prosecutor made the alternative argument that defendant distributed child sexually abusive material over the Internet. However, the jury acquitted him of

that crime. It specifically found that defendant did not use a computer or the Internet to communicate with another person to distribute or promote child sexually abusive material. MCL 750.145d. It found him guilty only of using a computer or the Internet to communicate with another person in order to possess child sexually abusive material. *Id*.

We apply the same reasoning regarding this argument as did the Court of Appeals:

> Given the prosecutor's theory that defendant distributed child sexually abusive material by returning to Comcast the computer containing such material and the jury's verdict of acquittal on the charge of using a computer to distribute or promote such material, we conclude that defendant's conviction solely rests upon the theory primarily advanced by the prosecution at trial: that defendant distributed child sexually abusive material by returning to Comcast a computer that contained such material. Accordingly, our review of the sufficiency of the evidence is limited to the theory that resulted in defendant's conviction. [260 Mich App at 208.] [Emphasis added.]

In his concurrence, Chief Justice TAYLOR concludes that there was sufficient evidence for the jury to convict defendant of distributing child sexually abusive material. The basis for the conviction could have been that he shared such material with others on the Internet. The concurrence acknowledges that the jury specifically acquitted defendant of using a computer to distribute such material, but it observes that jury verdicts need not be consistent.

We reason that, although inconsistent jury verdicts may be legally permissible, it does not follow that we should find verdicts inconsistent when it is possible to find them consistent. See *Lagalo v Allied Corp,* 457 Mich 278, 282; 577 NW2d 462 (1998) (" '[i]f there is an interpretation of the evidence that provides a logical

explanation for the findings of the jury, the verdict is not inconsistent.' "). (Citation omitted.)

There is no disagreement that, here, the jury specifically acquitted defendant of using a computer to distribute child sexually abusive material, and it convicted him of distributing such material. It could have found him guilty of distributing the material in one of two ways: (a) finding that he shared the material with others on the Internet, or (b) finding that he distributed it by returning the computer to Comcast. The former would be inconsistent with the jury's verdict concerning the "use of a computer to distribute child sexually abusive material" charge; the latter would not be. Because we presume that the verdicts are consistent, we conclude that the jury convicted defendant of distributing the material by returning the computer to Comcast.[10]

VII. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR PROMOTING CHILD SEXUALLY ABUSIVE MATERIAL

It is without dispute that defendant possessed child sexually abusive material that he had obtained over the Internet. The prosecution contends that possessing the material is the legal equivalent of promoting it for purposes of MCL 750.145c(3).

MCL 750.145c(3) reads:

> A person who *distributes or promotes*, or finances the distribution or promotion of, or receives for the purpose of

[10] The concurring justice mistakes defense of our analysis for a criticism of his unanimity argument. Rather than criticize the argument, we simply find that there is no reason to consider the unanimity issue. The jury specifically acquitted defendant of using a computer or the Internet to distribute child sexually abusive material. This conclusive determination precludes reliance on the rationale that the conviction for distribution was based on defendant's Internet activity. We need go no further.

> distributing or promoting, or conspires, attempts, or prepares to distribute, receive, finance, or promote any child sexually abusive material or child sexually abusive activity is guilty of a felony, punishable by imprisonment for not more than 7 years, or a fine of not more than $50,000.00, or both . . . . [Emphasis added.]

MCL 750.145c(4) reads:

> A person who knowingly *possesses* any child sexually abusive material is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $10,000.00, or both,[11] if that person knows, has reason to know, or should reasonably be expected to know the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child. [Emphasis added.]

Possession is not the same as promotion. The prosecutor blurs the two, asserting that by obtaining the material from the Internet, defendant promoted it. To accept that argument, this Court would have to ignore the express language of the Legislature that created a graduated scheme of offenses and punishments regarding child sexually abusive material.

The Legislature expressly separated the crimes of production of child sexually abusive material,[12] distribution or promotion of the material, and simple possession. It would not have made the distinction had it intended to equate mere possession with promotion.

If the Legislature had wanted end-users of the material to be guilty of promoting such material merely because they possess it, MCL 750.145c(4) would have

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[11] MCL 740.145c(4) was amended after defendant's trial. Formerly, a violation of this provision was punishable as a misdemeanor.

[12] MCL 750.145c(2).

included promotion. Alternatively, the Legislature would have equated possession with both distribution and promotion in MCL 750.145c(3) instead of creating a separate provision for possession in § 145c(4). The statute on its face makes the mere possession of child sexually abusive material a different and less severe offense than either distribution or promotion of the material.

VIII. CONCLUSION

We hold that, to convict a defendant of distribution or promotion under MCL 750.145c(3), the prosecution must prove that (1) the defendant distributed or promoted child sexually abusive material, (2) the defendant knew the material to be child sexually abusive material at the time of distribution or promotion, and (3) the defendant distributed or promoted the material with criminal intent. Also, we hold that the mere obtaining and possessing of child sexually abusive material using the Internet does not constitute a violation of MCL 750.145c(3).

There was insufficient evidence in this case for a jury to conclude beyond a reasonable doubt that defendant distributed or promoted child sexually abusive material with criminal intent. Therefore, we affirm the Court of Appeals decision reversing defendant's conviction of distribution or promotion under MCL 750.145c(3).

CAVANAGH and MARKMAN, JJ., concurred with KELLY, J.

TAYLOR, C.J. (*concurring*). I concur in the result of Justice KELLY's opinion and with her analysis in all but part VI(B). I write separately to explain my own reasons for reaching the conclusion that defendant's conviction

for "distributing or promoting" child sexually abusive material was properly reversed by the Court of Appeals. I agree with Justice KELLY regarding the intent required to establish a violation of this statute. In addition, I believe such an intent is required because without it, otherwise innocent conduct could be criminalized. As a general rule there can be no crime without a criminal intent.[1] *People v Roby*, 52 Mich 577, 579; 18 NW 365 (1884) (COOLEY, C.J.). The United States Supreme Court has spoken extensively on this, holding that when a criminal statute is totally silent about state of mind (as is often the case), courts nonetheless assume that Congress intended to require some kind of guilty knowledge with respect to certain elements of the crime. See *Liparota v United States*, 471 US 419, 426; 105 S Ct 2084; 85 L Ed 2d 434 (1985) (courts should not read criminal statutes as requiring no *mens rea*); *Morissette v United States*, 342 US 246, 255-256, 263; 72 S Ct 240; 96 L Ed 288 (1952).

Under Justice CORRIGAN's interpretation, the only element requiring criminal intent is that the material is child pornography, because this is the element that criminalizes otherwise innocent conduct. However, a person may be aware of the existence of such material without taking the criminal step of distributing it or promoting it. Such a person would be engaging only in innocent conduct until the element of distributing or promoting is met. What Justice CORRIGAN seems to be arguing here is that defendant possessed the material, and then went one step further and handed the computer to Comcast employees, and thus he had not engaged in only innocent conduct before distributing. However, possession is not an element of distributing or

[1] Strict liability crimes present a very limited exception to this rule, but I do not believe this crime is in that category.

promoting, and we must look at the elements of the charged crime, not the facts of the case before us, in determining the required intent. The Court of Appeals correctly applied this law in its analysis, finding that defendant did not "distribute" the material when he returned the computer to Comcast because he did not "intend[] for anyone to see or receive child sexually abusive material." 260 Mich App 201, 217; 679 NW2d 77 (2003).

Thus, I agree with Justice KELLY's conclusion that there was insufficient evidence to prove defendant had this intent when he returned the computer to Comcast. *Ante* at 461. I also agree with her analysis and conclusion that there was insufficient evidence supporting the prosecutor's second theory, i.e., that defendant promoted child sexually abusive material by merely acquiring or possessing it. Justice KELLY properly concludes that acquisition or possession of the material is not legally equivalent to promoting it for the purposes of MCL 750.145c(3). *Ante* at 465.

Finally, while I agree with her conclusion that defendant's conviction for distributing or promoting child sexually abusive material is not supported by the prosecutor's third theory—that defendant committed the crime by uploading or sharing child sexually abusive material through the Internet—I do not find her analysis of this issue persuasive. Although the jury found defendant not guilty of using a computer or the Internet to distribute or promote child sexually abusive material, the elements of the more general distribution crime are also satisfied by defendant's alleged acts of sharing the material, and this is sufficient to convict. When a defendant is convicted under a multicount indictment, we must consider whether the elements of each charge have been met. *People v Vaughn*,

409 Mich 463, 465; 295 NW2d 354 (1980). Each count is regarded as if it were a separate indictment, and jury verdicts rendered on the several counts need not be consistent. *Id*.

In contrast to Justice KELLY's analysis, I believe the evidence supporting this theory is sufficient (but barely) when the evidence presented at trial, and the reasonable inferences taken from it, is viewed in the light most favorable to the prosecution.[2] See *People v Tanner*, 469 Mich 437, 444 n 6; 671 NW2d 728 (2003).

However, the fact is that the prosecutor presented to the jury distinct factual situations, each of which could have been seen by individual jurors as satisfying the *actus reus* of the single charge.[3] This is permissible, but only if the jurors are instructed that they all must unanimously agree that defendant committed at least one of the criminal acts. That unanimity requirement, not having been presented to the jury, is fatal to this conviction. The Michigan Constitution requires the jury's verdict to be unanimous to comply with minimal due process. Const 1963, art 1, § 14; see *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994); *Schad v Arizona*, 501 US 624, 649-652; 111 S Ct 2491; 115 L Ed 2d 555 (1991) (Scalia, J., concurring). Unanimity is not a difficulty if there is a single charged criminal act that could have been committed in various ways. In such a case, jurors need not agree on the mode of commission. Thus, submitting a charge of murder in which the de-

[2] At trial, Mr. David Joseph, the children's protective services worker, testified that defendant admitted "sharing" child pornography through the Internet. When pressed as to what defendant meant by "sharing," Mr. Joseph first admitted he was not an expert, then stated that his "impression" was that defendant was part of a club. He did not testify that defendant "stated" he was part of a club.

[3] That is, although defendant was charged only once, the alleged acts could have resulted in three separate charges.

fendant either killed with premeditation or committed the murder during the course of a felony does not violate due process because the jury still determines what crime was committed as a result of the single, unlawful act. Likewise, "when a statute lists alternative means of committing an offense, which means in and of themselves do not constitute separate and distinct offenses, jury unanimity is not required with regard to the alternate theories." *People v Gadomski*, 232 Mich App 24, 31; 592 NW2d 75 (1998). For example, in *Gadomski*, an instruction on unanimity was not necessary when the jury was required to find that the defendant engaged in a specific act of sexual penetration alleged by the prosecution and that this act was accompanied by one of three alternative aggravating circumstances: (1) that the act occurred during the commission of a home invasion, see MCL 750.520b(1)(c); (2) that it involved aiding and abetting and force or coercion, see MCL 750.520b(1)(d)(ii); or (3) that it caused personal injury to the victim and involved force or coercion, MCL 750.520b(1)(f). *Id*. at 29-31. But if discrete, specific acts were committed, each of which is claimed to satisfy all the elements of the charged crime, the trial court is required to instruct the jury that it must unanimously agree on the same specific act. *Cooks, supra* at 530.

Here, at least two of the alleged criminal acts required materially different evidence. The act of returning the computer to Comcast involved a separate and different set of facts from those concerning defendant's alleged involvement in facilitating the exchange of Internet child pornography. To have a valid conviction, the jurors had to be instructed that they all had to agree on the incident in which all elements of the crime had been established. This was not done, and this deprived

defendant of due process.[4] *Schad, supra* at 650. Complicating this, however, is the fact that the error was unpreserved because defendant did not request such an instruction and did not object to the instructions as given.

MCL 768.29 provides that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such an instruction is requested by the accused," but this statute can only control if enforcing it would not run afoul of the Constitution. In an effort to make such incompatibilities of statutes and the Constitution as infrequent as possible, a canon of construction has developed that constrains us to construe the statute at issue, if possible, in a manner that does not conflict with the Constitution. *People v Bricker*, 389 Mich 524, 528; 208 NW2d 172 (1973). *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999), has outlined our approach to these cases and holds that with unpreserved, constitutional error, such as we have here, the defendant, to secure a reversal, must show that three requirements are met: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 763.

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[4] The lead opinion in responding to this position misunderstands it. My position is that all the jurors must agree on the same incident that establishes the crime. You cannot, to use this case as the example, have some jurors using the facts of one incident (the return of the computer) and others using another incident (the alleged distribution of pornography over the Internet) to establish a crime of distribution. To prevent this, an instruction telling the jurors that they must agree on not only the bottom line but also on which incident establishes the crime was necessary. This was not done here and thus error requiring reversal occurred. My argument is not predicated on the consistency of the several verdicts themselves. Indeed, the verdicts could be consistent and the unanimity requirement still be violated. Nothing in the lead opinion responds to this simple point.

The error here meets all these elements. The jury could have convicted, and most likely did convict, defendant on the basis of his act of turning in the computer. Alternatively, it could have convicted on the theory the prosecutor presented that acquiring and possessing the material equates with "promotion." Finally, it could have convicted him on the basis of a single piece of testimony from which one may infer that defendant distributed the material by uploading it and sending it to others through the Internet. While two of these three theories were impermissible as a matter of law (having no proof of criminal intent) and the third was permissible, as I have discussed, there is simply no showing, nor can there be, that the jurors all agreed on the same incident as the one in which all elements of the crime were shown. This is a violation of the unanimity requirement. Moreover, it is impossible to say that, had the jury been properly instructed, the outcome would be the same. This constitutes plain error that affected defendant's substantial rights and the conviction must be reversed.

For the reasons I have stated, I agree with Justice KELLY's result of affirming the Court of Appeals reversal of defendant's conviction for distributing or promoting child sexually abusive material and I agree with her analysis in all but part VI(B).

CORRIGAN, J. *(concurring in part and dissenting in part).* I agree with the majority that the distribution or promotion of child sexually abusive material must be an intentional act. I respectfully dissent, however, from the majority's application of intentionality. Under the majority view, the intentionality of defendant's act is negated because he allegedly and erroneously believed that Comcast's computer technicians would not "discover or view" the child sexually abusive material. The

majority's erroneous analysis adds a heightened intent element that is not constitutionally required and is not found in the plain language of the statute.

I believe that the prosecution presented sufficient evidence that defendant distributed child sexually abusive material. Defendant distributed child sexually abusive material when he deliberately returned the company-owned computer to his employer, with full knowledge that the computer contained images that he knew to be child sexually abusive material. Accordingly, I would reverse the decision of the Court of Appeals and reinstate defendant's conviction of distributing child sexually abusive material, MCL 750.145c(3).

While the majority properly imputes an intent to the distribution or promotion element contained in the statute, it is undisputed that defendant intentionally distributed the computer to his employer with the knowledge that the computer contained child sexually abusive material. Testimony adduced at trial reveals that, on the day defendant resigned his employment with Comcast, defendant was informed that he would have to return the company automobile and computer the same day. His supervisor, Christopher Williams, testified that he waited "45 minutes to an hour" before proceeding to defendant's residence. While en route to defendant's residence, defendant telephoned Williams and told Williams that "everything was ready." The evidence revealed that, although given less time than requested, defendant voluntarily returned the computer to Comcast.

Moreover, the testimony of David Joseph revealed that defendant was aware that the prurient material was on the computer at the time the computer was returned. Joseph testified that defendant was not concerned that the material would be discovered on the

Comcast computer because defendant "didn't feel as though there would be anybody that would go through those individual files" because defendant believed that "the hard drive would sort of just be wiped out." Defendant further stated to Joseph that he "didn't get the opportunity" to "expunge the material that he knew was offensive."[1] The evidence adduced clearly establishes that defendant deliberately returned the computer to Comcast, knowing that it contained child sexually abusive material. Because the statute requires no more, this should end the inquiry.

The lead opinion casts the issue as whether defendant's distribution of child sexually abusive material must be an intentional act; however, the opinion ignores the uncontroverted evidence that the distribution *was in fact* an intentional act. Instead, the opinion concludes that defendant did not intentionally distribute the child sexually abusive material because "defendant neither intended nor expected anyone at Comcast to *discover* or *view* the material." *Ante* at 460 (emphasis added).

The lead opinion requires a heightened *mens rea* element that is not supported in the language of the statute and that is not constitutionally required. The opinion cites *Morissette v United States*,[2] *Staples v United States*,[3] and *United States v X-Citement Video, Inc*,[4] in support of the claim that this additional element

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[1] While defendant maintained to Joseph that he did not have the "opportunity" to "expunge" the child pornography, the testimony in the record indicates otherwise. The testimony of Sgt. Joseph Duke revealed that a "wiping program" was installed on the hard drive of defendant's computer. Duke further testified that it would have taken less than fifteen minutes to completely eradicate the child pornography files from the computer.

[2] 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952).

[3] 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994).

[4] 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994).

is required. However, those cases do not hold that a defendant's criminal intent is dependent on the particular response or reaction of a third party. In each case, the Supreme Court held that the prosecution was required to prove a defendant possessed criminal intent,[5] either with regard to the nature of the volitional act (*Morissette*) or with regard to the nature of the prohibited goods (*Staples* and *X-Citement*). In *Morissette*, for example, the Court required the prosecution to prove that the defendant had the intent to steal shell casings. In this case, the prosecution must prove that defendant had the general intent to distribute child pornography. See *People v Nowack*, 462 Mich 392, 405; 614 NW2d 78 (2000) (requiring " 'the intent to do the physical act' " for a general intent crime) (citation omitted). The lead opinion transforms defendant's admittedly volitional act into a nonvolitional act on the basis of what defendant expected his employer to do.

Under the lead opinion, it is not enough that defendant intentionally distribute the computer, nor is it enough that defendant be aware of the presence of child pornography on the computer at the time of distribution. Rather, the opinion requires proof that defendant specifically intended a particular action or response on the part of the recipient.[6]

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[5] "Criminal intent" is defined as "[t]he intent to commit a crime . . . ." Black's Law Dictionary (5th ed). In this case, defendant intended to commit a crime, as defined by our Legislature: he knowingly delivered a computer that he knew to contain child pornography. The only intent defendant lacked in this case was the intent *to get caught*.

[6] Those on the lead opinion believe that this specific intent is required, else all the "Comcast employees" who handled the computer files could be convicted of violating the statute, despite having "no criminal intent." *Ante* at 458 and 459. However, even under the standard articulated in the lead opinion, *all* the witnesses could still be convicted of violating the statute. Each one of the Comcast employees intentionally distributed the

It is unclear why the lead opinion requires that a defendant specifically intend his or her recipient to "discover or view" the prurient material in order to "distribute" the material. The plain meaning of the word "distribute" does not support such a requirement. The dictionary definition of "distribute" is: "1. to divide and give out in shares; allot. 2. to spread throughout a space or over an area; scatter. 3. to pass out or deliver: *to distribute pamphlets*. 4. to sell (merchandise) in a specified area." *Random House Webster's College Dictionary* (2d ed, 1997). Likewise, Black's Law Dictionary (6th ed) defines "distribute" as "[t]o deal or divide out in proportion or in shares." As the Court of Appeals correctly stated, the most applicable definition of "distribute" is to "pass out or deliver." Nothing in either the lay dictionary or the legal dictionary gives any indication that "distribution" requires the recipient to view or appreciate the prurient nature of the material intentionally distributed.

Moreover, the lead opinion makes no effort to rationalize why defendant's erroneous belief that no one at Comcast would "discover or view" the child pornography converts defendant's volitional act into a nonvoli-

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computer to his superior, knowing that the computer contained child pornography, and intending for the recipient to "discover or view" the material.

Although not directly applicable here, the Legislature has already taken steps to prevent the prosecution of people deemed to have no criminal intent. For example, MCL 752.367 contains several exemptions to MCL 750.145c(3). MCL 750.145c has been amended by 2002 PA 629 and 2004 PA 478. The most recent amendments of MCL 750.145c provide both civil and criminal immunity from a charge of possession to computer technicians acting within the scope of their employment. MCL 750.145c(4)(a) and (9). The Legislature has also taken steps to provide criminal immunity to police officers acting within the scope of their employment. MCL 750.145c(4)(b). It is within the purview of the Legislature, not the judiciary, to extend this immunity to the distribution of child pornography.

tional act. Likewise, the opinion fails to explain why defendant's criminal intent to distribute turns on how he believed Comcast would respond after the intentionally distributed material was received. While the lead opinion relies heavily on the claim that "the practice" at Comcast was to reformat the hard drive of the computer without reviewing any of the files, the testimony of Christopher Williams indicated that this practice was only done "on some of" the company computers. Williams testified that he inspected the contents of the computer "to see what it needed" before being "issued to another technician." Cliff Radcliff testified that the process of completely erasing the contents of the hard drive was "lengthy," and that "just cleaning out the unneeded files" shortened the cleaning process. The record does not reveal any company "policy" requiring the automatic erasure of computer hard drives without inspection. Indeed, even if such a "policy" did exist, the lead opinion fails to explain why defendant enjoyed any type of expectation interest in the continuation of this so-called "practice."[7] That defendant believed that the material would not *be discovered* in the computer does not alter the fact that he knew that his employer would in fact *receive* the material. Thus, the prosecutor presented sufficient evidence for a conviction under MCL 750.145c(3).

Apart from the sufficiency of the evidence, Chief Justice TAYLOR raises in his concurrence for the first time in these proceedings the requirement of unanimity

[7] The lead opinion also notes that defendant had "no expectation" that defendant's employer would "search for and find" the child pornography. Yet this ignores the uncontroverted evidence that defendant knowingly delivered the company computer to computer technicians, who would have no difficulty locating the images "in subfolders seven directory levels down." Indeed, one officer located the materials without difficulty, despite his inexperience with computer investigations.

in a conviction. Under this constitutional requirement, individual jurors must rely on the same *actus reus*, despite the presence of alternative acts, when they convict a defendant. See *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). Here, the Chief Justice's concern is that the jury heard evidence regarding two different "acts" that *might* have met the statute and *might* have resulted in defendant's conviction: (1) defendant's return of the computer to his employer and (2) defendant's participation in an Internet club that traded in child sexually abusive material.

While it may be possible that the jury could have failed to reach unanimity here, the issue has not been raised by defendant and is not before our Court. Additionally, as Chief Justice TAYLOR notes, this issue is unpreserved. Defendant neither requested a unanimity instruction nor objected to the instructions given.

An unpreserved constitutional error comes within the standard of review articulated in *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). As the Chief Justice noted when he listed the requirements for showing that a plain error occurred that affected a substantial right, the *defendant* bears the evidentiary burden. *Id*. at 763 (recognizing that the burden of persuasion for a showing of prejudice was on the defendant). However, defendant has not established entitlement to relief under *Carines* because, at a minimum, defendant did not identify or argue the issue. Moreover, prejudice requires showing that the error affected the outcome. This differs from showing the *possibility* that the jury improperly failed to meet the unanimity requirement and requires a showing that the error *did* affect the outcome.

Here, the jury was instructed to consider only acts occurring on August 9, 2000, the day that defendant

relinquished his employment. The social worker's testimony did not link defendant's admission that he participated in an Internet club to any particular date. Also, the jury was instructed to consider only the evidence presented, and that the arguments made by the attorneys were not evidence. Thus, I believe that the Chief Justice has established, at best, the *possibility* of error; however, it has not been shown that claimed error affected the outcome of the case. More fundamentally, defendant must make this showing rather than rely on the Chief Justice to make it on an issue not preserved below and not argued before this Court.

In conclusion, the prosecutor presented sufficient evidence to convict defendant of distribution of child sexually abusive material under MCL 750.145c(3). While I agree that an intent requirement is properly imputed to the "distributes or promotes" element of the statute, the prosecution put forward sufficient evidence to sustain defendant's conviction. Defendant intentionally delivered the computer to his employer, knowing that the computer contained child sexually abusive material at the time of its return. The majority errs in imputing a heightened requirement that defendant intend his recipient to "discover or view" the material. Because this requirement is neither constitutionally nor statutorily required, I dissent from its adoption. I would reverse the decision of the Court of Appeals and reinstate defendant's conviction.

WEAVER and YOUNG, JJ., concurred with CORRIGAN, J.

OFFICE PLANNING GROUP, INC v BARAGA-HOUGHTON-KEWEENAW CHILD DEVELOPMENT BOARD

Docket No. 125448. Argued November 10, 2004 (Calendar No. 6). Decided June 8, 2005.

Office Planning Group, Inc., brought an action in the Houghton Circuit Court against the Baraga-Houghton-Keweenaw Child Development Board, a private, nonprofit organization that runs federal Head Start programs, seeking disclosure of bids submitted to the defendant by vendors of office supplies and furnishings. The plaintiff, which did not submit the winning bid, sought such disclosure under 42 USC 9839(a), a provision of the Head Start Act that allows "reasonable public access" to information. The court, Garfield W. Hood, J., granted summary disposition in favor of the plaintiff. The Court of Appeals, METER, P.J., and SAAD and SCHUETTE, JJ., affirmed, holding that a private cause of action could be inferred under § 9839(a) and that the trial court did not err in finding that the defendant had not complied with the requirement of reasonable public access under § 9839(a). 259 Mich App 279 (2003). The Supreme Court granted the defendant's application for leave to appeal. 470 Mich 888 (2004).

In an opinion by Justice YOUNG, joined by Chief Justice TAYLOR, and Justices CORRIGAN and MARKMAN, the Supreme Court *held*:

The Head Start Act does not provide for a private cause of action to enforce the disclosure requirement of § 9839(a). The plaintiff failed to state a cognizable claim. The judgment of the Court of Appeals must be reversed and a judgment in favor of the defendant must be entered.

1. The circuit court and the Court of Appeals have properly exercised jurisdiction over the plaintiff's claim under § 9839(a). In determining whether a state court has jurisdiction over a federal-law claim, the inquiry is whether Congress intended to grant federal courts exclusive jurisdiction over such a dispute and, if not, whether state law allows our courts to exercise subject-matter jurisdiction over the action. Congress has done nothing in the exercise of its powers under the Supremacy Clause, US Const, art VI, cl 2, to affirmatively divest state courts of their presumptively concurrent jurisdiction over claims brought under the Head Start

Act. The courts of Michigan have subject-matter jurisdiction over this dispute because, under Const 1963, art 6, § 13, the circuit courts of this state have original jurisdiction in all matters not prohibited by law.

2. Private rights of action to enforce federal law must be created by Congress. Congress did not create a private cause of action to enforce § 9839(a). The Head Start Act does not expressly provide for such a private cause of action. The act does not demonstrate an implicit intent to provide for such an action and, instead, indicates that the sole remedy for a violation of § 9839(a) is an enforcement proceeding by the secretary of the United States Department of Health and Human Services and the possible termination of Head Start agency status.

Justice WEAVER, concurring in part and dissenting in part, concurred in the majority opinion to the extent that it holds that the state courts have concurrent jurisdiction in this matter. She dissents, however, from the majority holding that 42 USC 9839(a) of the federal Head Start Act does not permit the plaintiff to seek disclosure of information relevant to the defendant's bidding decision. She believes that the majority errs in suggesting that *Alexander v Sandoval*, 532 US 275 (2001), appears to have abandoned altogether the inquiry stated in *Cort v Ash*, 422 US 66 (1975), in favor of a completely textual analysis in determining whether a private remedy exists under a particular statute.

Reversed.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that none of the theories that the defendant relies on to challenge the jurisdiction of the Supreme Court applies here. In addition, although she agrees with the majority that our state courts have jurisdiction over the plaintiff's claim under the Head Start Act, 42 USC 9831 *et seq*., she disagrees with the conclusion that the act does not provide a private cause of action. The four-part test articulated in *Cort v Ash* is used to determine whether a private cause of action was intended. The majority errs in concluding that the *Cort* factors were abandoned in *Alexander v Sandoval*. 42 USC 9839(a) specifies the congressional goal of maintaining open accountability in the use of public funds and effectuates this goal by providing a right of public access to books and records. It is appropriate to apply all the *Cort* factors in this matter because the language of the statute does not contradict the existence of a private cause of action. The first factor, whether the plaintiff is a member of the class for whose benefit Congress enacted the statute, indicates that the plaintiff, a member of the public, is within the appropriate class. The second factor, whether there is

any indication that Congress intended to create or to deny a private right of action, is answered because 42 USC 9839(a) indicates a specific intent to create such an action. The third factor, whether inferring the right of action is consistent with the underlying scheme of the legislation, is properly answered in the affirmative. The fourth factor, whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to base the determination solely on federal law, is properly answered in the negative. Therefore, the *Cort* factors point to the need to recognize a private right of action under 42 USC 9839(a). After it is determined that Congress intended a private right of action, courts must presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. The remedy sought in this matter was appropriate and consistent with 42 USC 9839(a). The trial court properly granted the remedy requested. The judgment of the Court of Appeals should be affirmed.

1. ACTIONS — HEAD START ACT — CONCURRENT JURISDICTION.

The courts of Michigan have concurrent jurisdiction over actions brought under the Head Start Act because Congress has done nothing to affirmatively divest state courts of their presumptively concurrent jurisdiction over such actions and because, under the Michigan Constitution, the circuit courts of this state have original jurisdiction in all matters not prohibited by law. (Const 1963, art 6, § 13; 42 USC 9831 *et seq.*).

2. ACTIONS — HEAD START ACT — DISCLOSURE REQUIREMENTS — ENFORCEMENT ACTIONS.

There is no private cause of action to enforce the disclosure requirements of § 9839(a) of the Head Start Act, which provides for "reasonable public access" to information (42 USC 9831 *et seq.).*

Tercha & Daavettila, PLLC (by *Robert T. Daavettila*), for the plaintiff.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Marcia L. Howe*), for the defendant.

YOUNG, J. Plaintiff is a disappointed bidder that seeks disclosure from defendant of bid documents under 42 USC 9839(a), a provision of the federal Head Start Act[1]

[1] 42 USC 9831 *et seq*.

that requires Head Start agencies to provide for "reasonable public access" to information. Defendant Head Start agency contends that the act does not create a private cause of action to enforce its provisions. We hold that the Head Start Act does not contemplate a private cause of action seeking disclosure of the contested bid documents under § 9839(a). Accordingly, we reverse the judgment of the Court of Appeals and enter judgment in favor of defendant.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Baraga-Houghton-Keweenaw Child Development Board, Inc., is a private, nonprofit organization that is designated as a Head Start[2] agency under 42 USC 9836(a).[3] Defendant operates Head Start programs in Baraga, Houghton, and Keweenaw counties. In January 2001, defendant solicited bids for office supplies and furniture. Plaintiff, a private, for-profit corporation, submitted a bid. Defendant conducted an open meeting at which its building committee reviewed the bids and made a recommendation to its board of directors. Defendant accepted the lowest bid at the open meeting. Rodney Liimatainen, defendant's executive director,

[2] See section III(A) of this opinion.

[3] 42 USC 9836(a) provides:

> The Secretary [of Health and Human Services] is authorized to designate as a Head Start agency any local public or private nonprofit or for-profit agency, within a community, which (1) has the power and authority to carry out the purposes of this subchapter [42 USC 9831 *et seq*.] and perform the functions set forth in section 642 [42 USC 9837] within a community; and (2) is determined by the Secretary (in consultation with the chief executive officer of the State involved, if such State expends non-Federal funds to carry out Head Start programs) to be capable of planning, conducting, administering, and evaluating, either directly or by other arrangements, a Head Start program.

notified plaintiff's branch manager, Jack Hamm, that plaintiff's bid had exceeded the lowest bid by $10,000.

Hamm, suspicious that the lower bidders had offered lesser-quality merchandise, requested copies of all the bids submitted. Liimatainen informed Hamm that the details of the bids were unavailable for inspection by the public because the other bidders did not want the information disseminated. Liimatainen acknowledged, however, that there might be small discrepancies in quality, manufacturer, and type of product among the bids submitted. In an attempt to compel defendant to disclose copies of the bids, Hamm then submitted written requests to defendant under the Michigan Freedom of Information Act (FOIA).[4] Defendant refused the requests on the basis that it was a private corporation that was not subject to the FOIA. Plaintiff also requested copies of the submitted bids from the Department of Health and Human Services (HHS), the federal agency responsible for administering the Head Start Act.

In April 2001, plaintiff filed an action under the FOIA[5] demanding a complete copy of each bid. Plaintiff later filed an amended complaint alleging that it was additionally entitled to disclosure of the bid information under unspecified "federal legislation which requires disclosure of information by parties supplying service under the so-called Head Start Program." In subsequent motion papers, plaintiff indicated that the federal legislation on which it relied was 42 USC 9839(a), which provides, in relevant part:

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[4] MCL 15.231 *et seq*.

[5] Although the trial court treated plaintiff's complaint as if it contained a claim under the federal Freedom of Information Act, 5 USC 551 *et seq*., the parties agree that plaintiff's claim was based solely on the Michigan FOIA.

> Each [Head Start] agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.

After the commencement of the litigation, various HHS officials issued memoranda indicating that defendant was not required under the FOIA or the Head Start Act to provide plaintiff with access to the bid information. In a letter to defendant, a program officer in the Chicago regional office of the HHS advised defendant that Head Start grantees are not subject to the FOIA provisions. The program officer further noted that, under § 9839(a) and its corresponding HHS regulation, 45 CFR 1301.30,[6] defendant was not required to disclose specific information regarding the selection of a supplier; rather, it was required only to disclose general information such as copies of its written procurement procedures.

Similarly, in a letter to plaintiff's counsel, the director of the HHS Office of Public Affairs, FOI/Privacy Acts Division, stated that the FOIA did not apply to defendant; however, the director noted that defendant had provided plaintiff with a copy of the policy it followed in conducting its procurement activities and with background documents addressing its source of funding.

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[6] 45 CFR 1301.30 provides:

> Head Start agencies and delegate agencies shall conduct the Head Start program in an effective and efficient manner, free of political bias or family favoritism. *Each agency shall also provide reasonable public access to information and to the agency's records pertaining to the Head Start program*. [Emphasis supplied.]

The director also wrote a letter advising defense counsel that defendant was not subject to the requirements of the federal Freedom of Information Act.[7] The director further advised counsel that defendant was bound by any provisions incorporated into the grant language regarding its obligations to make information concerning its activities available to the public, but that defendant had already complied with those requirements.

Finally, in a letter written to Congressman Bart Stupak, who had apparently come to plaintiff's aid in seeking the bid documents, the director of the HHS Office of Family and Child Development stated that defendant had reasonably complied with the requirements of § 9839 and 45 CFR 1301.30 by providing plaintiff with a copy of its procurement procedures, and that defendant was under no further obligation to provide documents with specific commercial information it received through the competitive bid process.

Citing these HHS memoranda, defendant moved for summary disposition, arguing that it was not subject to the Michigan FOIA or the federal FOIA and that defendant had exceeded any obligation it had to supply plaintiff with information under 42 USC 9839(a).

The trial court granted defendant's motion for summary disposition to the extent that plaintiff sought relief under the Michigan FOIA and the federal FOIA.[8] The court, however, sua sponte granted summary disposition in favor of plaintiff under MCR 2.116(I)(2) on the ground that the requested information was subject to disclosure under § 9839(a). The court, observing that § 9839(a) required that a Head Start agency grant

[7] 5 USC 551 *et seq*.

[8] See note 5. Plaintiff's FOIA claims are not at issue in this appeal.

"reasonable public access" to its books and records, opined that

> [a] demand that information be provided outside of working hours would not be reasonable. A demand that an agency exhaustively search for something that the requesting party cannot properly identify would not be reasonable. As recognized by the Michigan Freedom of Information Act, it would likely not be reasonable to expect an agency to create a record, such as a compilation or summary, when no such record exists. And it may well not be reasonable to demand that an employee's personnel file or disciplinary record be disclosed.
>
> In the present situation, a denial by the Plaintiff [sic] of a written request to review specified, existing and readily accessible written bids is certainly not compliant with a requirement of providing reasonable public access. That would be true regardless of who made the request, but the case is even more compelling when the requesting party has a genuine, identifiable reason for the information sought, as did the Plaintiff.
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> In summary, Defendant's denial of Plaintiff's request to review and obtain copies of the bids in question was in violation of the Federal requirement that Plaintiff [sic] provide for reasonable public access to information, including reasonable public access to books and records of the agency, involving the use of funds for which the Plaintiff [sic] is responsible.

The Court of Appeals affirmed.[9] Noting that the state courts shared concurrent jurisdiction to decide a case involving the Head Start Act because the act did not provide for exclusive federal jurisdiction,[10] the panel rejected the reasoning of federal case law holding that the Head Start Act does not provide a private cause of

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[9] *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 259 Mich App 279; 674 NW2d 686 (2003).

[10] *Gulf Offshore Co v Mobil Oil Corp*, 453 US 473, 478; 101 S Ct 2870; 69 L Ed 2d 784 (1981).

action.[11] The panel, citing *Long v Chelsea Community Hosp*, 219 Mich App 578; 557 NW2d 157 (1996), and *Forster v Delton School Dist*, 176 Mich App 582, 585; 440 NW2d 421 (1989), held that a private cause of action could be *inferred* under § 9839(a) because the statute did not provide adequate means to enforce its provisions:

> The statute in question, 42 USC 9839(a), requires Head Start agencies to provide reasonable public access to their books and records, but it does not provide any means of enforcing this specific provision. Although the Head Start Act requires agencies to open their books and records to the department secretary or the United States Comptroller General for audit and examination, 42 USC 9842, Congress specifically provided for public access to the books and records, not simply to the audits prepared by these other entities. Therefore, we conclude an implied private cause of action exists.[12]

The panel concluded that the trial court did not err in granting summary disposition for plaintiff because defendant had not complied with the "reasonable public access" requirement of § 9839(a). The panel, noting that defendant had failed to suggest why it would be *unreasonable* to disclose the requested information, held that because the information was readily available and could be produced on short notice, it was covered by the statutory directive to provide "reasonable public access."[13] The panel rejected defendant's contention that the bidders did not have notice that the bids would be disclosed, stating that the statute itself provided that notice; the panel also rejected defendant's argument

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[11] See *Johnson v Quin Rivers Agency for Community Action, Inc*, 128 F Supp 2d 332, 336 (ED Va, 2001); *Hodder v Schoharie Co Child Dev Council, Inc*, 1995 US Dist LEXIS 19049 (ND NY, 1995).

[12] 259 Mich App at 289-290 (emphasis deleted).

[13] 259 Mich App at 290-292.

that public policy dictated against interpreting the statute to require disclosure of the bids.[14] Finally, the panel held that it was not required to defer to the interpretation of § 9839(a) set forth in the letters written by HHS officials, opining that only a ruling from the "upper echelon" of the HHS would be entitled to deference and that, in any event, the officials' interpretation was clearly wrong.[15]

We granted defendant's application for leave to appeal.[16] Because we conclude that § 9839(a) does not provide for a private cause of action, we reverse the judgment of the Court of Appeals and enter judgment in favor of defendant.

II. STANDARD OF REVIEW

This case presents issues of statutory construction and other questions of law. Such questions are subject to review de novo by this Court.[17] Similarly, we review a trial court's grant of summary disposition de novo.[18]

III. ANALYSIS

A. INTRODUCTION

The Head Start Act was enacted for the purpose of "promot[ing] school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their

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[14] 259 Mich App at 292-295.

[15] 259 Mich App at 297.

[16] 470 Mich 888 (2004).

[17] *Preserve the Dunes, Inc v Dep't of Environmental Quality,* 471 Mich 508, 513; 684 NW2d 847 (2004); *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002); *Grand Traverse Co v Michigan*, 450 Mich 457, 463-464; 538 NW2d 1 (1995).

[18] *Mack, supra* at 193.

families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary."[19] The secretary of the HHS is authorized under 42 USC 9836(a) to designate as a Head Start agency "any local public or private nonprofit or for-profit agency . . . ." The act further authorizes the secretary to provide financial assistance or grants to Head Start agencies for the operation of Head Start programs.[20]

Under 42 USC 9836a, the secretary is directed to establish by regulation standards applicable to Head Start agencies, including performance standards, administrative and financial management standards, and standards relating to the conditions and location of agency facilities. The secretary has promulgated regulations implementing these statutory directives.[21] The secretary is directed under 42 USC 9836a(c) and (d) to monitor Head Start agencies for compliance with statutory and regulatory standards and to take corrective action if necessary. If an agency does not comply with such standards, the secretary may initiate proceedings to terminate the designation of the agency unless the agency corrects the deficiency.[22]

At issue in this case is § 9839(a) of the act, which provides as follows:

> Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the

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[19] 42 USC 9831; see also *Action for Boston Community Dev, Inc v Shalala*, 136 F3d 29, 30 (CA 1, 1998).

[20] 42 USC 9833 to 9835; *Community Action of Laramie Co, Inc v Bowen*, 866 F2d 347, 348 (CA 10, 1989).

[21] See 45 CFR 1304.1.

[22] 42 USC 9836a(d)(1)(C).

> purposes of this subchapter [42 USC 9831 *et seq*.] and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. *Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.* Each such agency shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to (1) establish specific standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits; (2) assure that only persons capable of discharging their duties with competence and integrity are employed and that employees are promoted or advanced under impartial procedures calculated to improve agency performance and effectiveness; (3) guard against personal or financial conflicts of interest; and (4) define employee duties in an appropriate manner which will in any case preclude employees from participating, in connection with the performance of their duties, in any form of picketing, protest, or other direct action which is in violation of law. [Emphasis supplied.]

Similarly, Head Start regulation 45 CFR 1301.30 provides that "[e]ach agency shall also provide reasonable public access to information and to the agency's records pertaining to the Head Start program."

The lower courts concluded that defendant was required under the "reasonable public access" provision of § 9839(a) to disclose copies of all bids it received in connection with its January 2001 solicitation of bids for office supplies and furniture. In considering the propriety of the lower courts' rulings, we must first determine

whether the trial court properly exercised jurisdiction over plaintiff's claim under § 9839(a). Next, we must examine whether § 9839(a) allows for plaintiff's private cause of action to enforce the disclosure provision. Although we conclude that the state courts have jurisdiction over this action, we hold that § 9839(a) does not provide for a private cause of action.

B. CONCURRENT JURISDICTION

Defendant first argues that the state courts lack jurisdiction over plaintiff's claim under the federal Head Start Act.[23] We disagree and hold that the state courts have concurrent jurisdiction with the federal

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[23] We note initially that defendant, in support of its assertion that subject-matter jurisdiction is lacking, presents a hodgepodge, "shotgun approach" argument that conflates the concepts of exhaustion of remedies, primary jurisdiction, "*Chevron* doctrine" deference, and existence of a private cause of action under the federal statute at issue, making it rather difficult to discern what precisely it is that defendant is arguing. These concepts are not, in fact, jurisdictional in nature. See, e.g., *Northwest Airlines, Inc v Kent Co, Michigan*, 510 US 355, 365; 114 S Ct 855; 127 L Ed 2d 183 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional.").

In light of our determination that the Head Start Act, in the first instance, does not provide for a private cause of action to enforce the public access requirement of § 9839(a), it is unnecessary to address defendant's assertion that primary jurisdiction over this cause of action lies with the HHS, see *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001), and its related argument that plaintiff failed to exhaust administrative remedies before filing this state-court action. However, we note that this case presents a straightforward issue of statutory construction involving the meaning of the simple phrase "reasonable public access." The interpretation of this particular statutory language does not require knowledge of sophisticated or technical terms or the exercise of expert judgment or discretion. Because the "reasonable public access" provision presents a matter that the judiciary is particularly competent to address, rather than a matter within the "specialized and expert knowledge" of the HHS, see *id*. at 198, primary jurisdiction does not lie with that agency. Moreover, there are no "prescribed administrative remedies" that plaintiff has failed to exhaust

courts to entertain plaintiff's action seeking relief under § 9839(a).

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before seeking relief under § 9839(a) from the courts. *McCarthy v Madigan*, 503 US 140, 144-145; 112 S Ct 1081; 117 L Ed 2d 291 (1992).

Defendant's somewhat cryptic assertion that the state courts are required to give deference to the HHS's interpretation of § 9839(a) warrants additional comment. Citing the "*Chevron* doctrine," see *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984), defendant argues that the state courts are required to give deference to the determinations of HHS officials regarding the disclosure required under the act and that the state courts therefore lack jurisdiction over this action. Again, defendant is conflating two discrete doctrines. The concept of *Chevron* deference is not jurisdictional; rather, it is a doctrine that is in the nature of a *standard of review*, applied by the judiciary in reviewing an agency's reasonable construction of an ambiguous statute, which recognizes that any necessary policy determinations in interpreting a federal statute are more properly left to the agency responsible for administering the particular statute. See *Yellow Transportation, Inc v Michigan*, 537 US 36, 47-48; 123 S Ct 371; 154 L Ed 2d 377 (2002); *United States v Mead Corp*, 533 US 218, 227-228; 121 S Ct 2164; 150 L Ed 2d 292 (2001), quoting *Chevron, supra* at 844 (" 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer' ").

Again, because we have determined that there is no private cause of action to enforce the disclosure requirement of the Head Start Act, we need not address whether the state courts are required, under *Chevron* and *Mead*, *supra*, to accord deference to the letters authored by these HHS officials. However, we note in passing that these letters presumably lack the "force of law" that is generally required for application of *Chevron*-type deference. See, e.g., *Shalala v Guernsey Mem Hosp*, 514 US 87, 99; 115 S Ct 1232; 131 L Ed 2d 106 (1995) (noting that administrative interpretive rules, which do not require notice and comment, "do not have the force and effect of law and are not accorded that weight in the adjudicatory process"); *Northwest Airlines, supra* at 366-367 (noting that a "reasoned decision" of the Secretary of Transportation would be entitled to *Chevron*-type deference in a dispute over the meaning of a provision of the Anti-Head Tax Act, 49 USC 1513); *Human Development Corp of Metropolitan St Louis v United States Dep't of Health & Human Services*, 312 F3d 373, 379 (CA 8, 2002) (applying *Chevron* deference to a final decision of the HHS's Departmental Appeals Board interpreting an HHS regulation); see also *Mead, supra* at 236 n 17; *Christensen v Harris Co*, 529 US 576, 586-587; 120 S Ct 1655; 146 L Ed 2d 621 (2000).

It has long been established that, so long as Congress has not provided for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims " 'whenever, by their own constitution, they are competent to take it.' "[24] State courts possess sovereignty concurrent with that of the federal government, "subject only to limitations imposed by the Supremacy Clause."[25] Thus, state courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law.[26] If concurrent jurisdiction otherwise exists, subject-matter jurisdiction over a federal-law claim is governed by state law.[27]

In determining whether our state courts enjoy concurrent jurisdiction over a claim brought under federal law, it is necessary to determine whether Congress intended to limit jurisdiction to the federal courts.

> "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication

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[24] *Tafflin v Levitt*, 493 US 455, 459; 110 S Ct 792; 107 L Ed 2d 887 (1990), quoting *Claflin v Houseman*, 93 US 130, 136; 23 L Ed 833 (1876).

[25] *Tafflin, supra* at 458. See US Const, art VI, cl 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[26] *Tafflin, supra* at 459; *Gulf Offshore Co, supra* at 478; *Charles Dowd Box Co, Inc v Courtney*, 368 US 502, 507-508; 82 S Ct 519; 7 L Ed 2d 483 (1962).

[27] *Gulf Offshore Co, supra* at 478.

> from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[28]

Defendant does not present a coherent argument that the courts of this state lack jurisdiction over the parties' dispute concerning the disclosure of documents under § 9839(a). Rather, defendant simply contends that the "expansive regulatory scheme" of the Head Start Act "evidences Congressional intent that the HHS exercise its sole discretion over its administration of local Head-Start agencies through its regulations." Defendant has conflated the vesting of discretion in federal agencies with the vesting of jurisdiction in the federal courts: That a particular agency has discretion to administer a federal statute and to implement regulations for the enforcement of the statute does not address whether state courts have concurrent jurisdiction over a dispute arising under that statute. Instead, our inquiry is limited to whether Congress intended to limit to federal courts exclusive jurisdiction over such a dispute and, if not, whether state law allows our courts to exercise subject-matter jurisdiction over the action.

Defendant concedes that nothing in the Head Start Act explicitly confines jurisdiction to the federal courts, and defendant does not point to any statutory indication that Congress intended that jurisdiction over a dispute under the Head Start Act should lie solely in the

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[28] *Tafflin, supra* at 459-460, quoting *Gulf Offshore Co, supra* at 478 (citations omitted); see also *Peden v Detroit*, 470 Mich 195, 201 n 4; 680 NW2d 857 (2004). Although we, of course, must apply these federal-law principles in determining whether concurrent jurisdiction exists under the federal statute, we would be remiss if we failed to note that the use of legislative history in the search for legislative intent " 'is a perilous venture . . . [that is] doubly fraught with danger in Michigan which, unlike Congress, has failed to create an authoritative legislative record.' " *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 n 7; 624 NW2d 180 (2001), quoting *People v Tolbert*, 216 Mich App 353, 360 n 5; 549 NW2d 61 (1996).

federal courts. We have been unable to locate anything in the legislative history of the act demonstrating an intent to grant exclusive federal-court jurisdiction, and defendant has certainly failed to bring any such information to our attention. Moreover, there is no "clear incompatibility" between state-court jurisdiction and federal interests with respect to application of the Head Start Act, particularly with respect to a straightforward question of statutory construction such as the one presented in this case. Indeed, as noted in *Gulf Offshore Co v Mobil Oil Corp*, 453 US 473, 478 n 4; 101 S Ct 2870; 69 L Ed 2d 784 (1981), "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights."

Congress has done nothing in the exercise of its powers under the Supremacy Clause to "affirmatively divest state courts of their presumptively concurrent jurisdiction" over claims brought under the Head Start Act.[29] Additionally, it is clear that the courts of this state have subject-matter jurisdiction over the dispute at issue, because our Constitution provides that the circuit courts of this state have original jurisdiction "in all matters not prohibited by law . . . ."[30] Accordingly, we hold that the courts of this state have properly exercised concurrent jurisdiction over plaintiff's § 9839(a) claim.

C. PRIVATE CAUSE OF ACTION TO ENFORCE § 9839(a)

Defendant next contends that plaintiff's claim fails because § 9839(a) does not provide for a private cause of action to enforce the public access requirement. We agree.

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[29] *Yellow Freight Sys, Inc v Donnelly*, 494 US 820, 823; 110 S Ct 1566; 108 L Ed 2d 834 (1990).

[30] Const 1963, art 6, § 13.

1. WHETHER A CAUSE OF ACTION EXISTS IS SOLELY A MATTER OF STATUTORY CONSTRUCTION

" '[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.' "[31] Rather, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress."[32] Thus, in determining whether plaintiff may bring a private cause of action to enforce the public access requirement of § 9839(a), we must determine whether Congress intended to create such a cause of action.[33] Because the Head Start Act does not evidence an intent to create a private remedy for an alleged violation of § 9839(a), plaintiff's action must be dismissed.

Although the United States Supreme Court in the last century embraced a short-lived willingness to create remedies to enforce private rights,[34] the Court

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[31] *Touche Ross & Co v Redington*, 442 US 560, 568; 99 S Ct 2479; 61 L Ed 2d 82 (1979), quoting *Cannon v Univ of Chicago*, 441 US 677, 688; 99 S Ct 1946; 60 L Ed 2d 560 (1979).

[32] *Alexander v Sandoval*, 532 US 275, 286; 121 S Ct 1511; 149 L Ed 2d 517 (2001); see also *Touche Ross & Co, supra* at 578.

[33] *Alexander, supra* at 286-287.

[34] See, e.g., *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971) (inferring a private cause of action for damages to enforce the Fourth Amendment guarantee against unreasonable searches and seizures); *J I Case Co v Borak,* 377 US 426, 433; 84 S Ct 1555; 12 L Ed 2d 423 (1964) (holding that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" of a federal statute). See also, generally, *Correctional Services Corp v Malesko*, 534 US 61, 75; 122 S Ct 515; 151 L Ed 2d 456 (2001) (Scalia, J., concurring) (noting that "*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition"); Note, *Section 1983 and implied rights of action: Rights, remedies, and realism*, 90 Mich L R 1062, 1071-1083 (1992) (exploring

"abandoned" that approach to statutory remedies in *Cort v Ash*[35] and "[has] not returned to it since."[36] In *Cort*, the Court set forth a test for determining whether a private remedy is implicit in a statute that does not expressly provide such a remedy:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[37]

Post-*Cort*, the Court has become increasingly reluctant to imply a private cause of action, preferring to focus exclusively on the second *Cort* element, which requires indicia of congressional intent to create a cause of action. For example, as early as *Cannon v Univ of Chicago*,[38] although the Court applied each of the *Cort* factors, it characterized the determination whether a private remedy existed to enforce a statutory right as a matter of "statutory construction."[39] In *Touche Ross* &

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the evolution of the United States Supreme Court's implied right of action jurisprudence and its subsequent retreat).

[35] 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975).

[36] *Alexander, supra* at 287.

[37] *Cort, supra* at 78 (emphasis deleted).

[38] 441 US 677, 688; 99 S Ct 1946; 60 L Ed 2d 560 (1979).

[39] See also *Merrell Dow Pharmaceuticals Inc v Thompson*, 478 US 804, 812; 106 S Ct 3229; 92 L Ed 2d 650 (1986), noting that it would "flout congressional intent to provide a private federal remedy" for an alleged violation of the federal Food, Drug, and Cosmetic Act, 21 USC 301 *et seq*.:

Co,[40] the Court declined to even address the remaining *Cort* factors where it was clear that Congress did not intend to create a private cause of action to enforce § 17(a) of the Securities Exchange Act of 1934:[41]

> It is true that in *Cort* v. *Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S. at 78—are ones traditionally relied upon in determining legislative intent. Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And the parties as

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See, *e.g.*, *Daily Income Fund, Inc.* v. *Fox*, 464 US 523, 535-536 (1984) ("In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question."); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U.S., at 13 ("The key to the inquiry is the intent of the Legislature."); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress."); *California* v. *Sierra Club*, 451 U.S. at 293 ("[The] ultimate issue is whether Congress intended to create a private right of action."); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 91 (1981) ("The ultimate question in cases such as this is whether Congress intended to create the private remedy."); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979) ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction."); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979) ("The question of the existence of a statutory cause of action is, of course, one of statutory construction."). [*Merrell, supra* at 812 n 9.]

[40] *Touche Ross &* Co, *supra* at 575-576.

[41] 15 USC 78q(a).

> well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17 (a). At least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative.

Similarly, in *California v Sierra Club,*[42] the Court, noting that "the focus of the inquiry is on whether Congress intended to create a remedy," concluded that consideration of the first two *Cort* factors was dispositive. Because there was no indication that Congress intended to create a private remedy to enforce § 10 of the Rivers and Harbors Appropriation Act of 1899,[43] the Court held that it was unnecessary to inquire further into the remaining factors, because "[t]hese factors are only of relevance if the first two factors give indication of congressional intent to create the remedy."[44]

In *Alexander,* the Court appears to have abandoned the *Cort* inquiry altogether in favor of a completely textual analysis in determining whether a private remedy exists under a particular statute. Rather than applying the *Cort* factors, the *Alexander* Court concluded, solely on the basis of the text of 42 USC 2000d-1, that private individuals could not sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The Court

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[42] 451 US 287, 297; 101 S Ct 1775; 68 L Ed 2d 101 (1981).

[43] 33 USC 403.

[44] *Sierra Club, supra* at 298.

This Court has also noted the paramount importance of legislative intent in determining whether a private cause of action can be founded on an alleged violation of a statute. See *Gardner v Wood*, 429 Mich 290, 302 n 6; 414 NW2d 706 (1987) (noting that *Cort* marked "the beginning of a trend in the federal courts to reserve the creation of civil remedies from penal violations only where to do so [was] clearly consistent with affirmative legislative intent").

rejected the plaintiff's argument that dispositive weight could be accorded to context shorn of text, holding that "legal context matters only to the extent it clarifies text."[45] The *Alexander* majority additionally rejected the dissent's claim that the position adopted " 'blind[ed] itself to important evidence of congressional intent,' " noting that the methodology employed in the majority opinion was well established in earlier decisions that explained "that the interpretive inquiry begins with the text and structure of the statute . . . and ends once it has become clear that Congress did not provide a cause of action."[46]

2. THE HEAD START ACT DOES NOT PROVIDE FOR A PRIVATE CAUSE OF ACTION

With the aforementioned principles in mind, we examine the text of the Head Start Act to determine

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[45] *Alexander, supra* at 288.

[46] *Id*. at 288 n 7.

Our dissenting colleagues assert that we have incorrectly characterized *Touche Ross & Co* and *Alexander* as representing a departure from the four-factor *Cort* test. *Post* at 514-515. Whether the United States Supreme Court will, in the future, continue to apply the four-part *Cort* test is, however, simply irrelevant where it is clear from the text of the statute at issue that Congress did not intend to create a private enforcement action. Indeed, this case is directly analogous to *Touche Ross & Co* and *Alexander*. As the dissent points out, the provisions at issue in *Touche Ross & Co* and *Alexander* neither conferred rights on individuals nor proscribed conduct as unlawful. The same can certainly be said of 42 USC 9839(a). Similarly, the dissent notes that the *Alexander* Court found it quite telling that the statute at issue expressly empowered governmental agencies to enforce regulations. The Head Start Act does *precisely* that, by directing the secretary to establish regulations governing Head Start agencies and to enforce those regulations, and, in 42 USC 9839(a), by requiring Head Start agencies to conduct program activities in conformity with the Head Start Act and to establish or adopt rules to carry out that duty.

We note, in passing, that Justice WEAVER's separate dissent merely echoes the longer dissent of Justice KELLY. Accordingly, we respond to both in kind.

whether it provides for a private cause of action to enforce § 9839(a).

To date, two federal district courts have considered whether causes of action existed under different provisions of the Head Start Act. Although our Court of Appeals cited these cases, it rejected their analyses without explanation.

In *Hodder, supra*, the United States District Court for the Northern District of New York applied the *Cort* factors and concluded that the plaintiffs, former employees of a Head Start agency, could not bring a cause of action for wrongful discharge under the Head Start Act:

> Turning to the first [*Cort*] factor, plaintiffs are far-removed from the class for whose special benefit Congress enacted the Head Start Act. The purpose of this Act is to authorize the appropriation of funds for Project Head Start's "effective delivery of comprehensive health, educational, nutritional, social and other services to economically disadvantaged children and their families." 42 USC § 9831(a). Hence, the class for whose special benefit Congress passed the Head Start Act is the class of economically disadvantaged children and their families who need the specified services, which do not under any reasonable interpretation of the Act include employment services. Indeed, a Head Start agency would likely violate the Act if it employed the parent of [a] Head Start child. See 42 USC § 9839(a)(3). Plaintiffs' assertion that "employees of Head Start agencies . . . are members of a class which is specially addressed are protected by the Act and regulations" is legally unsupported and legally unsupportable. . . . Congress plainly did not enact the Head Start Act in order to benefit Head Start employees.
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> As to the second Cort factor, the Court has found no indication that Congress intended the Act or its interpretive regulations to create a private right of action for employees who are terminated from Head Start agencies in

a manner allegedly inconsistent with those rules. Plaintiffs admit that the Act lacks any explicit indication that Congress intended to create a cause of action for these employees, but argue that § 9849(b) of the Act "specifically negates any intent to deny such a cause of action." . . . Section 9849(b) concerns the application of the Civil Rights Act to any sexual discrimination that may occur in connection with Head Start programs or activities. The last sentence states that the section "shall not be construed as affecting any other legal remedy that a person may have if such person is . . . denied employment in connection with[] any [Head Start] program, project, or activity . . . ."

At best, this sentence reveals a congressional unwillingness to interfere with any of the state and federal remedies that may be available to people who are denied jobs at Head Start agencies; it certainly does not reveal a congressional intent to create a private right of action under the Head Start Act for people who are fired from Head Start agencies. As plaintiffs surely realize, if courts inferred from Congress' failure to prohibit a private cause of action the congressional intent to create a private cause of action, courts would read into almost every federal statute an implied right of action. In the majority of instances, this curious interpretive method would undermine congressional intent rather than effectuate it. It also runs counter to the Supreme Court's demonstrated reluctance to infer private causes of action from federal statutes. . . .

Plaintiffs fare no better under the third Cort factor because implying a private right of action from the Head Start Act would do little or nothing to further the underlying purposes of the legislative scheme. . . .

* * *

We now come to the fourth Cort factor. Plaintiffs cast their claim as one "based on employee discharge in violation of federal policies . . . ." . . . For purposes of determining the existence of subject matter jurisdiction, however, the Court considers the true nature of plaintiffs' action. . . . Although plaintiffs carefully avoid the phrase in their

> complaint, the essence of their claim is breach of an employment contract. Actions of this kind are traditionally relegated to state law. Thus the fourth Cort factor, along with the first three, strongly support the conclusion that the Head Start Act does not contain an implied private right of action for people who are terminated from Head Start agencies.[47]

Similarly, in *Johnson, supra*, the plaintiff alleged that the defendants had mismanaged a Head Start program in violation of federal regulations. The District Court for the Eastern District of Virginia held that Congress did not intend to provide a private cause of action to enforce the federal regulations:

> In this case, the applicable statutory scheme is set forth pursuant to the Head Start Act, 42 U.S.C. §§ 9831-9852a. Under the scheme, the Secretary of the Department of Health and Human Services is directed to "establish by regulation standards applicable to Head Start agencies, programs, and projects under this subchapter," including "minimum levels of overall accomplishment that a Head Start agency shall achieve." 42 U.S.C. § 9836a(a)(1) & (2). The Secretary is also directed under this section to monitor the performance of every Head Start program and to take appropriate corrective action when a program fails to meet the performance standards established by the regulations. Specifically, the Act requires a full review of each grantee at least once during each three-year period, review of new grantees after the completion of the first year, follow up reviews and return visits to grantees that fail to meet the standards, and "other reviews as appropriate." 42 U.S.C. § 9836a(c). If the Secretary determines, on the basis of such a review, that a grantee fails to meet the standards described in § 9836a(a), the Secretary shall, *inter alia*, institute proceedings to terminate the Head Start grant unless the agency corrects the deficiency. 42 U.S.C. § 9836a(d).

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[47] *Hodder, supra* at *11-*16 (citations omitted).

> All but three of the regulations cited in plaintiff's Second Amended Complaint were promulgated pursuant to the Head Start Act. See 45 C.F.R. § 1304.1. There is no provision in the Head Start Act, however, permitting a private citizen to enforce its provisions. Based on the alternative specific remedies mentioned above, Congress' intent is clear. The remedy for substandard performance by a Head Start program is an enforcement action by the Secretary of the Department of Health and Human Services, not by private litigants. For these reasons, the Court dismisses with prejudice plaintiff's claims alleging violations of statutory and regulatory provisions relating to the Head Start Act, for failure to state a claim upon which relief can be granted.[48]

We find *Hodder* and *Johnson* to be persuasive and similarly conclude, on the basis of the text and structure of the Head Start Act, that no private cause of action exists to enforce § 9839(a).

The act, of course, does not expressly provide for a private cause of action to enforce the disclosure requirement of § 9839(a). Thus, the question becomes whether the text of the act demonstrates an *implicit* intent to provide for a private cause of action.

Again, the stated purpose of the act is to promote school readiness by providing services to low-income children and their families. 42 USC 9831. The act does not contemplate any benefit to private corporations such as plaintiff; nor does it indicate any intent that such a private corporation may sue to enforce its provisions. Where the intended beneficiaries are specifically identified, we are loath to create a private means of seeking redress under the act for nonbeneficiaries.

More important, the act contains a comprehensive mechanism for ensuring agency compliance with its provisions. We agree with the *Johnson* court that, far

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[48] *Johnson, supra* at 336-337.

from demonstrating an intent to allow for a private cause of action, the act indicates that the *sole* remedy for a violation of § 9839(a) is an enforcement proceeding by the secretary of the HHS and the possible termination of Head Start agency status. See 42 USC 9836a.

In light of this clear indication of congressional intent, we are precluded from venturing beyond the bounds of the statutory text to divine support for the creation of a private claim to enforce § 9839(a). To do so would be to substitute our own judgment for that of Congress and thus to usurp legislative authority, something that we of course decline to do.[49]

IV. CONCLUSION

Because the Head Start Act does not provide for a private cause of action to enforce the disclosure requirement of § 9839(a), plaintiff has failed to state a cognizable claim. Accordingly, we reverse the judgment of the Court of Appeals and enter judgment in favor of defendant.

TAYLOR, C.J., and CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

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[49] Again, contrary to the assertions of our dissenting colleagues, we do not miss any "important distinction" between the statutes at issue in *Touche Ross & Co* and *Alexander* and the statute at issue in this case, and this case does not represent the "opposite situation" of the situations present in those cases. *Post* at 516. Rather, just as the provisions at issue in *Touche Ross & Co* and *Alexander*, 42 USC 9839(a) calls for oversight by governmental agencies. *Post* at 516. Moreover, we wholly disagree with the dissent's contention that § 9839(a) "specifically confers an individual right on members of the public to conduct inspections of books and records." *Post* at 516. Rather, § 9839(a) imposes on Head Start agencies a disclosure requirement, and 42 USC 9836a explicitly provides a remedy for a violation of that requirement: corrective action to be initiated by the secretary.

WEAVER, J. *(concurring in part and dissenting in part).* I concur in the majority opinion to the extent it holds that the state courts have concurrent jurisdiction in this matter.

I dissent from the majority holding that 42 USC 9839(a) of the federal Head Start Act does not permit plaintiff to seek disclosure of information relevant to the defendant's decision on competing bids for a contract. 42 USC 9839(a) provides, in pertinent part:

> Each [Head Start] agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.

For the reasons stated in Justice KELLY's dissent, I would hold that this statutory language does provide plaintiff a right to seek "reasonable" disclosure of records pertaining to contract bids submitted to a Head Start agency.

I write separately to elaborate on the majority's misreading of the effect of *Alexander v Sandoval*[1] on *Cort v Ash*.[2] Specifically, the majority is wrong to suggest that *Alexander* "appears to have abandoned the *Cort* inquiry altogether in favor of a completely textual analysis in determining whether a private remedy exists under a particular statute." *Ante* at 499.

Cort identified four factors relevant to determining whether a federal statute implied a private remedy where the statute did not expressly provide one. *Cort* held:

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[1] 532 US 275; 121 S Ct 1511; 149 L Ed 2d 517 (2001).

[2] 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975).

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[3]

Unlike *Cort's* focus on whether a cause of action can be inferred from a statute, *Alexander* involved a distinct issue: whether a private cause of action could be inferred from a regulation that forbids conduct beyond that which was forbidden by the statute under which the regulation was promulgated.[4]

Because the conduct at issue in *Alexander* was prohibited by a regulation, but not by the statute pursuant to which the regulation was adopted, *Alexander* held that a cause of action alleging conduct in violation of the regulation could not be inferred from the statute. Given

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[3] *Cort, supra* at 78.

[4] *Alexander* involved an interpretation of Title VI of the Civil Rights Act of 1964, which provides in § 601 that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 USC 2000d. Section 602 of the statute authorizes federal agencies to implement the provisions in § 601 by regulations.

The Department of Justice adopted regulations pursuant to § 602 that forbid funding recipients from adopting policies that created a disparate impact on individuals because of their race, color, or national origin. See 28 CFR 42.104(b)(2) (1999). Claiming that an English-only policy caused such disparate impacts, the plaintiffs in *Alexander* sued to enjoin the policy. While the *Alexander* Court assumed that the regulations were valid, the Court held that there was no private cause of action as a result of the policy because § 601 did not prohibit disparate impacts.

this situation, it was unnecessary for *Alexander* to delve deeply into the *Cort* factors to resolve whether a cause of action could be inferred from the statute.

Though the majority may prefer that *Cort's* factors be abandoned and a "completely textual" approach be adopted, neither logic nor federal precedent supports its preference. First, it is absurd to advocate a "completely textual approach" where the need to examine whether a cause of action may be inferred from a statute is engendered by the *lack* of an expressly stated cause of action in the text of the statute. Further, the majority makes no attempt to explain how its "completely textual" approach differs from the *Cort* factors.

Second, while the majority correctly notes that not every federal case involving whether a private cause of action may be inferred from a statute has applied all the four *Cort* factors, it is an overstatement to suggest that the federal courts have "abandoned the *Cort* inquiry altogether." Even federal cases relied on by the majority employ a *Cort*-based analysis. For example in *Hodder v Schoharie Co Child Dev Council, Inc,* 1995 US Dist LEXIS 19049, *10 (ND NY, 1995), the court premised its analysis as follows:

> The Court may infer a private right of action from a federal statute that does not expressly create one only if the statute's language, structure, and legislative history reveal Congress' intent to create a private right of action. See *Thompson v. Thompson*, 484 U.S. 174, 179, 98 L. Ed. 2d 512, 108 S. Ct. 513 (1988)*; Touche Ross & Co. v. Redington*, 442 U.S. 560, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979); *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). Courts normally try to divine Congressional intent by applying the four Cort factors: 1) whether plaintiffs belong to the class for whose special benefit Congress passed the statute; 2) whether the indicia of legislative intent reveal a congressional purpose to provide a private cause of action;

> 3) whether implying a private cause of action is consistent with the underlying purposes of the legislative scheme; and 4) whether the plaintiff's cause of action concerns a subject that is traditionally relegated to state law. *Merrell Dow* [*Pharmaceuticals Inc v Thompson*], 478 U.S. [804, 810-811; 106 S Ct 3229; 92 L Ed 2d 650 (1986)]; *Cort*, 422 U.S. at 78.

Hodder applied each factor from *Cort* to the provision of the Head Start Act at issue in that case.

That the majority misunderstands *Alexander's* effect is underscored by a recent United States Supreme Court decision, *Jackson v Birmingham Bd of Ed,* 544 US ___, ___; 125 S Ct 1497, 1506; 161 L Ed 2d 361, 373 (2005), where the Court emphasized that *Alexander's* holding is simply premised on the fact that the regulations at issue in *Alexander* extended protection beyond the limits of the statute at issue in *Alexander*. Describing the holding of *Alexander, Jackson* stated:

> [In *Alexander*] we rejected the contention that the private right of action to enforce intentional violations of Title VI encompassed suits to enforce the disparate-impact regulations. We did so because "it is clear . . . that the disparate-impact regulations do not simply apply § 601 — since they indeed forbid conduct that § 601 permits — and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations." [*Alexander*] at 285, 149 L. Ed. 2d 517, 121 S. Ct. 1511. See also *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 173, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994) (A "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]").

In this case we must necessarily look beyond the text of the statute at issue to discern whether Congress intended that a private person be able to seek disclosure of documents from a Head Start agency. The text of the statute at issue in this case, 42 USC 9839(a), does not

expressly create a private cause of action to enforce its provision regarding public access to information. Thus, it is necessary to look beyond the text to determine whether Congress intended to create a private cause of action. As recognized in *California v Sierra Club,* 451 US 287, 293; 101 S Ct 1775; 68 L Ed 2d 101 (1981), the four *Cort* factors

> present the relevant inquiries to pursue in answering the recurring question of implied causes of action. Cases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to create a private right of action . . . but the four factors specified in *Cort* remain the "criteria through which this intent could be discerned." [Citations omitted.]

Given the task at hand and the federal precedent by which we are bound, it is absurd to suggest that we must employ a "completely textual" approach. Any inquiry into whether a private cause of action may be inferred requires consideration of the intent of Congress and *Cort* is our guide. Regardless of the majority's apparent discomfort with *Cort's* factors and inferred causes of action, we are bound by federal law and five votes have not combined in any one case in the United States Supreme Court to declare *Cort* a dead letter.[5]

KELLY, J. (*dissenting*). I agree with the majority that our state courts have jurisdiction over plaintiff's claim under the federal Head Start Act, 42 USC 9831 *et seq*. However, I disagree with its conclusion that the act, at 42 USC 9839(a), does not provide a private cause of

[5] In *Thompson v Thompson*, 484 US 174; 108 S Ct 513; 98 L Ed 2d 512 (1988), Justice Scalia (concurring in the judgment) expressed his vigorous disagreement with whether the Court should reaffirm *Cort* and whether it was appropriate to infer private causes of action from federal statutes that do not expressly provide them. Justice Scalia's view of *Cort* and inferred causes of action has not yet garnered the requisite five votes.

action. The statutory language, the focus of the legislation, its history, and its purpose imply a congressional intent to allow private actions. Therefore, I would find such a right and affirm the decision of the Court of Appeals.

DEFENDANT'S VARIOUS JURISDICTIONAL CHALLENGES

Defendant raises a variety of jurisdictional arguments on appeal. It claims that primary jurisdiction must rest with the Department of Health and Human Services (HHS) because, otherwise, an "imbalance" would be created in the administration of the Head Start Act. This Court explained the doctrine of primary jurisdiction in *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001). It is based on the principle of separation of powers and is concerned with the respect appropriately shown to an agency's decisions made in the performance of regulatory duties. *Id*. at 196-197.

The primary jurisdiction doctrine underscores the notion that administrative agencies possess specialized and expert knowledge to address the matters they regulate. *Id*. at 198. The question of primary jurisdiction arises only with respect to matters that Congress has assigned to a governmental agency or administrative body. *Attorney General v Diamond Mortgage Co,* 414 Mich 603, 613; 327 NW2d 805 (1982). This case does not concern such matters.

Moreover, resolution of this case does not require specialized knowledge. Instead, it involves a straightforward question of statutory interpretation. This Court is well equipped to handle such questions because they do not require specialized or expert knowledge outside the scope of our general jurisdiction. Therefore,

the primary jurisdiction doctrine simply does not apply to this case. *Id*.; *Travelers*, *supra* at 198-199.

Defendant complains that, under the *Chevron*[1] doctrine, the meaning that HHS has given to "reasonable public access" in various letters interpreting 42 USC 9839(a) should be definitive. *Chevron* directs that considerable weight be accorded an agency's construction of a statutory scheme. *Chevron*, *supra* at 844. But this applies only when the decision involves reconciling conflicting policies and requires more than ordinary knowledge of matters that the agency regulates. *Id*.

This case does not demand a detailed knowledge of the subject matter of the Head Start Act. Nor does it concern a complicated matter of interagency interaction or policy. It does not require detailed knowledge of the workings of the Head Start Act. Rather, it involves an issue of statutory construction. No special expertise being required, the *Chevron* doctrine does not apply. *Id*.

Defendant also argues that we lack jurisdiction because plaintiff failed to exhaust all its administrative remedies. But the United States Supreme Court has ruled that "where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v Madigan*, 503 US 140, 144; 112 S Ct 1081; 117 L Ed 2d 291 (1992). 42 USC 9839(a) contains no exhaustion requirements and is silent regarding administrative remedies. Therefore, it is within our sound discretion to hear this case.

Given that none of the theories that defendant relies on to challenge this Court's jurisdiction applies here, it is appropriate for us to reach the merits of the case. And

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[1] *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

it is appropriate for us to decide whether Congress intended a private right of action in 42 USC 9839(a).

WHETHER A PRIVATE CAUSE OF ACTION EXISTS REQUIRES A DETERMINATION OF LEGISLATIVE INTENT

Congress can create a private right of action in two ways. It can expressly provide for the right or it can imply it. *Cannon v Univ of Chicago*, 441 US 677, 717; 99 S Ct 1946; 60 L Ed 2d 560 (1979). Frequently, legislation does not clearly express whether a private right was intended. The growing volume of litigation and the complexity of federal legislation increase the need for careful scrutiny to ensure what Congress wanted. *Merrill Lynch, Pierce, Fenner & Smith, Inc v Curran*, 456 US 353, 377; 102 S Ct 1825; 72 L Ed 2d 182 (1982).

To assist us in undertaking that scrutiny, the United States Supreme Court articulated a four-part test thirty years ago in *Cort v Ash*, 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975). A court makes four inquiries: (1) whether the plaintiff is a member of the class for whose benefit the legislative body enacted the statute, (2) whether there is any indication that the legislative body intended to create or deny such a right of action, (3) whether inferring the right of action is consistent with the underlying scheme of the legislation, and (4) whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to base the determination solely on federal law. *Id*. at 78. The key to this inquiry is determining the legislative intent in enacting the statute. *Merrill Lynch*, *supra* at 377-378.

In *Touche Ross & Co v Redington*,[2] the Court opined that the first three factors of *Cort* should be given greater weight than the fourth. The opinion states:

[2] 442 US 560; 99 S Ct 2479; 61 L Ed 2d 82 (1979).

> Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78—are ones traditionally relied upon in determining legislative intent. [*Id*. at 575-576.]

The language of the statute in question in *Touche Ross*[3] did not explicitly create a private remedy. Also, the legislative history gave no indication that Congress intended one. The statute neither conferred rights on private parties nor proscribed conduct as unlawful. *Touche Ross, supra* at 569. It required that brokers keep certain documents for government inspection and focused on governmental rights of inspection. *Id*. at 569-570. Because the statute did not imply a private right of action, the Court found that none existed. *Id*. at 571.

The majority contends that, twenty-two years after *Touche Ross*, the United States Supreme Court abandoned the *Cort* analysis and switched to a completely textual analysis in *Alexander v Sandoval*, 532 US 275; 121 S Ct 1511; 149 L Ed 2d 517 (2001). I disagree. In *Alexander*, the Court followed the same reasoning as in *Touche Ross* and focused on the initial *Cort* factors.

As in *Touche Ross*, the *Alexander* Court stated that, to determine legislative intent, it was important to start with the language of the statute. *Id*. at 287-288. In that case, it needed to go no further in its inquiry. *Id*. at 288. The reason was that, as in *Touche Ross*, the statute under consideration[4] indicated that Congress intended not to create a private cause of action. *Alexander*, *supra* at 288-289.

That statute neither conferred rights on private parties nor proscribed conduct as unlawful. Instead, it

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[3] 15 USC 78q(a).

[4] 42 USC 2000d-1.

empowered governmental agencies to enforce regulations. *Id*. at 289. The Court concluded that, by expressly providing one method of enforcement, Congress signaled that it intended to preclude other methods.[5] *Id*. at 290.

Contrary to the majority's conclusion, a full reading of *Alexander* indicates that the Court did not abandon *Cort*. Instead, *Alexander* stated that the analysis in that case need not extend beyond the first two *Cort* factors because the statute indicated that Congress did not intend a private cause of action. The *Cort* factors remain a valid and important means of discerning legislative intent. The *Alexander* decision provides no basis to conclude the contrary.

SPECIFIC ANALYSIS OF 42 USC 9839

Despite espousing a textualist approach, the majority never deals with the actual language of 42 USC 9839(a). Instead, it focuses on tangentially related federal district court cases and the overall purpose of the Head Start Act.

Let us review the actual language in question. 42 USC 9839(a) provides in part:

> Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter [42 USC 9831 *et seq*.] and the

[5] The majority points out that 42 USC 9839(a) contains language like the statutory language that the Supreme Court analyzed in *Alexander*. *Ante* at 500 n 46. But the majority again misses the point. Unlike 42 USC 2000d-1, it contains a directive that does not concern the mere internal creation of rules. 42 USC 9839(a) contains language that is absent in 42 USC 2000d-1 (the statutory language analyzed in *Alexander*). 42 USC 9839(a) specifically mentions the "public" and "appropriate community groups . . . ." It allows the public and these groups to request public hearings and to seek access to books and records. 42 USC 9839(a).

> objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. *Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency* or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible. Each such agency shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to . . . (3) guard against personal or financial conflicts of interest . . . . [Emphasis added.]

This language indicates the intent of Congress to maintain open accountability in the use of Head Start funds. It explicitly provides a right of public access. After stating that "[e]ach agency shall also provide for reasonable public access to information," it spells out particulars on how to meet this requirement, including holding public meetings.

The statute specifically confers an individual right on members of the public to conduct inspections of books and records. The opposite situation existed in both *Touche Ross* and *Alexander,* where the statutes lacked language creating such a right. They offered neither the general public nor any private individual access to anything. The oversight they called for was by governmental agencies. *Alexander*, *supra* at 288-289; *Touche Ross*, *supra* at 569-570. The majority simply misses this important distinction.[6]

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[6] The majority states that it "wholly disagree[s]" with the conclusion that 42 USC 9839(a) confers an individual right on a member of the public. It contends that 42 USC 9839(a) merely creates a disclosure requirement. *Ante* at 505 n 49. Again, the majority fails to analyze the

It relies on two federal district court cases, *Johnson v Quin Rivers Agency for Community Action, Inc*, 128 F Supp 2d 332 (ED Va, 2001), and *Hodder v Schoharie Co Child Dev Council, Inc*, 1995 US Dist LEXIS 19049 (ND NY, 1995). But *Johnson* and *Hodder* do not support the conclusion that no private cause of action exists and they are inapplicable to the case at hand.

Neither dealt with 42 USC 9839(a). *Johnson* concerned claims of discrimination and substandard enforcement of Head Start regulations. *Johnson*, *supra* at 335. The Head Start provisions in question were 42 USC 9836a(a)(1) and (2). *Johnson, supra* at 336-337.

Hodder concerned claims of employees terminated from Head Start agencies. *Hodder*, *supra* at *16. It dealt with 42 USC 9849(b). *Hodder*, *supra* at *12. 42 USC 9839(a) was mentioned only in passing.

The only thing *Hodder* and *Johnson* have in common with this case is that both involve provisions of the Head Start Act. But the statutory language scrutinized in *Hodder* and *Johnson* makes no mention of public access as 42 USC 9839(a) does. Given that *Hodder* and *Johnson* do not deal with 42 USC 9839(a), they are of no assistance in our resolution of this case.

The majority also bases its decision on the general purpose of the Head Start Act. It assumes that the only purpose worth considering is the act's overarching goal of providing services to low-income children and their families. It ignores the congressional intent specifically written into 42 USC 9839(a).

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actual language of the statute. 42 USC 9839(a) mandates public access, such as public hearings, at the request of "appropriate community groups . . . ." Only by allowing enforcement of this public inspection and access requirement can we effectuate Congress's specific goal of maintaining open accountability in the use of public funds. The majority simply ignores this clear congressional intent.

42 USC 9839(a) specifies Congress's goal of maintaining open accountability in the use of public funds and effectuates it by providing a right of public access to books and records. By ignoring these specific provisions, the majority has effectively substituted its judgment for that of Congress. In reducing public oversight, it frustrates the paramount goals of the Head Start Act by facilitating the misuse of federal funds.

APPLICATION OF THE *CORT* FACTORS TO 42 USC 9839(a)

Given that the language of the statute does not contradict the existence of a private cause of action, it is appropriate to apply all the *Cort* factors. The first question is whether plaintiff is in the class for whose benefit Congress enacted 42 USC 9839(a). The statute indicates that Congress intended to grant access to the public at large. Plaintiff is a member of the public. Therefore, plaintiff is within the appropriate class. *Cort*, *supra* at 79.

The second question, whether there is any indication that Congress intended to create or to deny a private right of action, has already been discussed. The language of 42 USC 9839(a) indicates a specific intent to create such an action. There is no legislative history or other material contradicting this intent.

The third question is whether it is consistent with the underlying legislative scheme to infer a private right of action. *Cort, supra* at 78. As the majority states, the overall purpose of the Head Start Act is to promote school readiness. 42 USC 9831. As part of its plan to reach this goal, Congress expressed an intent to maintain open accountability in the use of public funds in 42 USC 9839(a). In the same section, to effectuate this intent, Congress provided the public with a right of access to books and records. Inferring a right of action

to implement this right enforces that intent. Therefore, inferring a right of action is consistent with the legislative scheme.

Finally, there is no indication that this is a cause of action traditionally relegated to state law. And defendant makes no such argument. To the contrary, an action pursuant to 42 USC 9839(a) is the only means by which plaintiff could obtain the information it seeks. Therefore, the analysis of this factor, as with the other *Cort* factors, points to the need to recognize a private right of action under 42 USC 9839(a).

WHERE A LEGAL RIGHT EXISTS, SO DOES A LEGAL REMEDY

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ." *Marbury v Madison*, 5 US (1 Cranch) 137, 163; 2 L Ed 60 (1803). One of the fundamental tenets of the American legal system is that, where there is a legal right, there is also a legal remedy. *Id*. After it is determined that Congress intended a right of action, courts presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. *Franklin v Gwinnett Co Pub Schools*, 503 US 60, 66; 112 S Ct 1028; 117 L Ed 2d 208 (1992).

In this case, a private right of action exists under 42 USC 9839(a). Plaintiff sought the appropriate remedy of viewing the records of the bids submitted for office supplies and furniture. Defendant makes no persuasive argument that viewing this information would be unreasonable. This proposed remedy is specifically consistent with the language of 42 USC 9839(a), which allows for reasonable inspections of books and records. Therefore, Congress has not expressly indicated that this remedy is inappropriate. And the trial court did not err in granting it.

I would affirm the decision of the Court of Appeals.

CAVANAGH, J., concurred with KELLY, J.

GRIFFITH v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Docket No. 122286. Argued October 5, 2004 (Calendar No. 2). Decided June 14, 2005.

Phyllis L. Griffith, legal guardian for Douglas W. Griffith, a legally incapacitated person, brought an action in the Ingham Circuit Court against State Farm Mutual Automobile Insurance Company, seeking no-fault insurance benefits for Douglas Griffith's food expenses while receiving at-home care. The court, Peter D. Houk, J., entered a judgment for the plaintiff, ruling that the food costs were allowable expenses under MCL 500.3107(1)(a). The Court of Appeals, WHITE, P.J., and NEFF and JANSEN, JJ., affirmed. Unpublished opinion per curiam, issued August 16, 2002 (Docket No. 232517). The Supreme Court granted leave to appeal. 469 Mich 1020 (2004).

In an opinion by Justice CORRIGAN, joined by Chief Justice TAYLOR and Justices YOUNG and MARKMAN, the Supreme Court *held*:

Under MCL 500.3105(1) and MCL 500.3107(1)(a) the defendant is not required to reimburse the plaintiff for the food expenses at issue. The food expenses involved in this matter are neither "for accidental bodily injury" under § 3105 nor "for an injured person's care, recovery, or rehabilitation" under § 3107(1)(a).

1. Sections 3105(1) and 3107(1)(a) require that for expenses to be compensable under the no-fault act, the expenses must be for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle and must be reasonably necessary for an injured person's care, recovery, or rehabilitation. A no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident. An insurer is liable to pay benefits for accidental bodily injury only if those injuries arise out of or are caused by the ownership, operation, maintenance, or use of a motor vehicle. In this case, the plaintiff does not claim that Douglas Griffith's diet is different from that of an uninjured person, that his food expenses are part of his treatment plan, or that the costs are related in any way to his injuries. The plaintiff

claims instead that the defendant is liable for ordinary, everyday food expenses. As such, the plaintiff has not established that the food expenses are for accidental bodily injury.

2. The products, services, and accommodations that are reasonably necessary for an injured person's recovery or rehabilitation under § 3107(1)(a) are those that are reasonably necessary to restore the injured person to the condition he was in before sustaining injury or to bring the injured person to a condition of health or ability to resume his preinjury life. The products, services, and accommodations reasonably necessary for the injured person's care under § 3107(1)(a) are those whose provision is necessitated by the injury sustained in the motor vehicle accident. The food costs at issue here are not related to the injured person's care, recovery, or rehabilitation. The food the injured person consumes is simply an ordinary means of sustenance rather than a treatment for his care, recovery, or rehabilitation.

3. The decision in *Reed v Citizens Ins Co of America*, 198 Mich App 443 (1993), which held that a person receiving at-home care is entitled to room and board costs under § 3107(1)(a) to the same extent that such costs would constitute an allowable expense if the injured person received the same care in an institutional setting, must be overruled.

Reversed.

Justice WEAVER, dissenting, stated that the reasonable charges incurred for the plaintiff's husband's food while he is cared for at home are recoverable as allowable expenses under MCL 500.3107(1)(a). The opinion of the Court of Appeals should be affirmed. It is hard to deny that food is a product reasonably necessary for the care of an invalid, however "care" is defined. There is no principled basis for deciding that food provided to the plaintiff's husband at home is not as much an allowable expense as the food provided in a licensed medical care facility.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that food is a product reasonably necessary for the care of an invalid, however the word "care" is defined. The appropriate question is whether the injured person reasonably incurred the questioned expense as part of his or her care, recovery, or rehabilitation. The majority arbitrarily limits the meaning of "care" to that care needed for recovery and rehabilitation, ascribing to "care" a restorative meaning. "Care" fits with "recovery" and "rehabilitation" when "care" is interpreted broadly to mean the provision of what is necessary for the welfare and protection of the injured insured. The Legislature intended that an injured insured's needs be furnished until recovery has been accomplished

through rehabilitation. The Legislature did not expressly limit the expenses recoverable in no-fault cases to those that the injured person did not require before the injury. The no-fault act does not provide that the determination whether a home-based expense is allowable depends on whether an uninjured person would have the same expense. No principled distinction justifies a holding that, where a patient is institutionalized, food is a reasonably necessary expense, but if he or she is at home receiving the same care, it is not. The decision in *Reed v Citizens Ins Co of America* was correct and should not be overturned.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — COMPENSABLE EXPENSES.

An expense, to be compensable under the personal protection insurance provisions of the no-fault act, must be for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle and be reasonably necessary for the injured person's care, recovery, or rehabilitation; the expenses must be causally connected to the accidental bodily injury arising out of an automobile accident and the injury must arise out of or be caused by the ownership, operation, maintenance, or use of a motor vehicle (MCL 500.3105[1]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE — ALLOWABLE EXPENSES.

A no-fault insurer is liable under the personal protection insurance provisions of the no-fault act for "allowable expenses" for the cost of products, services, and accommodations reasonably necessary for an injured person's care, recovery, or rehabilitation; products, services, and accommodations that are reasonably necessary for the injured person's recovery or rehabilitation are those that are reasonably necessary to restore the person to the condition he was in before sustaining injury or to bring the person to a condition of health or ability to resume his preinjury life; products, services and accommodations reasonably necessary for the injured person's care are those whose provision is necessitated by the injury sustained in the motor vehicle accident (MCL 500.3105[1], 500.3107[1][a]).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas, Bryan J. Waldman*, and *L. Page Graves*), for the plaintiff.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor* and *David N. Campos*), for the defendant.

Amici Curiae:

Gross, Nemeth & Silverman, P.L.C. (by *Steven G. Silverman*), for Auto Club Insurance Association.

Cochran, Foley & Associates, P.C. (by *Terry L. Cochran* and *Mary K. Freedman*), for The Coalition Protecting Auto No Fault.

CORRIGAN, J. In this case, we consider whether the no-fault act, MCL 500.3101 *et seq*., requires defendant, a no-fault insurer, to reimburse plaintiff for her incapacitated husband's food expenses. Because the food in this case is neither "for accidental bodily injury" under MCL 500.3105(1) nor "for an injured person's care, recovery, or rehabilitation" under MCL 500.3107(1)(a), we hold that the expenses for it may not be recovered under those provisions of the no-fault act. We thus reverse the judgment of the Court of Appeals.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

On April 28, 1994, plaintiff's sixty-three-year-old husband, Douglas Griffith,[1] suffered a severe brain injury as a result of a motor vehicle accident. He received treatment at in-patient facilities and hospitals until August 1995, at which time he was transferred to a residence where he received twenty-four-hour nursing and attendant care. On August 6, 1997, Griffith returned home with plaintiff. He remains confined to a wheelchair and continues to require assistance with basic daily tasks such as eating and bathing.

[1] This opinion references Douglas Griffith as "Griffith" and Phyllis Griffith as "plaintiff."

After the accident, defendant provided coverage as Griffith's no-fault insurer. Until the time that Griffith returned home, the expenses that defendant covered included food expenses. After Griffith returned home, defendant denied plaintiff's claim for Griffith's food expenses, and plaintiff sued to recoup those expenses.[2] The trial court ruled that Griffith's food costs are an "allowable expense" under MCL 500.3107(1)(a) of the no-fault act and ordered defendant to pay a per diem food charge.

The Court of Appeals affirmed.[3] The Court relied on *Reed v Citizens Ins Co of America*, 198 Mich App 443; 499 NW2d 22 (1993), which held that a person receiving at-home care is entitled to room and board costs under MCL 500.3107(1)(a) to the same extent that such costs would constitute an allowable expense if the injured person received the same care in an institutional setting. Thus, the panel concluded that, under *Reed*, Griffith's food costs are an "allowable expense" under MCL 500.3107(1)(a).

Defendant filed an application for leave to appeal to this Court, which this Court denied.[4] Thereafter, this Court granted defendant's motion for reconsideration and granted leave to appeal.[5]

II. STANDARD OF REVIEW

This case requires us to determine whether an injured person's food costs constitute an "allowable expense" under MCL 500.3107(1)(a). Issues of statutory

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[2] Plaintiff's complaint included claims for items other than Griffith's food, but those claims are not at issue in this appeal.

[3] Unpublished opinion per curiam of the Court of Appeals, issued August 16, 2002 (Docket No. 232517).

[4] 468 Mich 946 (2003).

[5] 469 Mich 1020 (2004).

interpretation are questions of law that this Court reviews de novo. *Jenkins v Patel*, 471 Mich 158, 162; 684 NW2d 346 (2004).

III. PRINCIPLES OF STATUTORY INTERPRETATION

When interpreting a statute, we must ascertain the legislative intent that may reasonably be inferred from the statutory language itself. *Sotelo v Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004). When the language of a statute is unambiguous, the Legislature's intent is clear and judicial construction is neither necessary nor permitted. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Because the role of the judiciary is to interpret rather than write the law, courts lack authority to venture beyond a statute's unambiguous text. *Id*. Further, we accord undefined statutory terms their plain and ordinary meanings and may consult dictionary definitions in such situations. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

IV. ANALYSIS

A. STATUTORY LANGUAGE AND LEGAL BACKGROUND

MCL 500.3105(1) provides:

> Under personal protection insurance an insurer is liable to pay benefits *for accidental bodily injury* arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter. [Emphasis added.]

According to the plain language of MCL 500.3105(1), a no-fault insurer is only required to pay benefits "for accidental bodily injury" arising out of an automobile accident. The no-fault act *further* restricts a no-fault insurer's liability by defining the limited types of ben-

efits that are payable "for accidental bodily injury . . . ." MCL 500.3107(1)(a), the statutory provision at the center of this case, states:

> Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations *for an injured person's care, recovery, or rehabilitation*. [Emphasis added.]

Thus, in addition to the requirement under MCL 500.3105(1) that benefits be "for accidental bodily injury," MCL 500.3107(1)(a) circumscribes benefits to those expenses consisting only of items or services that are reasonably necessary "for an injured person's care, recovery, or rehabilitation."

Both this Court and the Court of Appeals have interpreted and applied the above statutes in cases involving claims for food or "room and board" expenses. In *Manley v Detroit Automobile Inter-Ins Exchange,* 127 Mich App 444, 448; 339 NW2d 205 (1983), rev'd 425 Mich 140 (1986), the plaintiffs' minor son suffered severe head trauma in an automobile accident. He resided with the plaintiffs and received care from nurse's aides. *Id*. at 449. The plaintiffs sued the defendant no-fault carrier, seeking, among other things, reimbursement for his room and board costs. *Id*. at 448-449. The defendant insurance carrier argued that because the plaintiffs already had a legal duty to care for their child, room and board costs were not compensable. *Id*. at 451. The Court of Appeals rejected this argument, largely on the basis of a worker's compensation case that distinguished between "ordinary household tasks" such as cleaning and washing clothes and nonordinary tasks such as " '[s]erving meals in bed and

bathing, dressing, and escorting a disabled person . . . .' " *Id*. at 452, quoting *Kushay v Sexton Dairy Co,* 394 Mich 69; 228 NW2d 205 (1975).

The panel concluded that the distinction between ordinary and nonordinary tasks could be reconciled with the language of MCL 500.3107(a), which then provided that "products, services, and accommodations not reasonably necessary for the injured person's care, recovery, or rehabilitation are not 'allowable expenses.' " 127 Mich App at 453. The Court reasoned:

> The necessity for the performance of ordinary household tasks has nothing to do with the injured person's care, recovery, or rehabilitation; such tasks must be performed whether or not anyone is injured.
>
> This reasoning supports a generalization concerning the circumstances in which a product, service, or accommodation can fall within the definition of "allowable expense". *Products, services, or accommodations which are as necessary for an uninjured person as for an injured person are not "allowable expenses".* [*Id*. at 453-454 (emphasis added).]

The panel then opined that food "is as necessary for an uninjured person as for an injured person" and thus would not ordinarily constitute an "allowable expense" under MCL 500.3107 for an injured person cared for at home. 127 Mich App at 454.

When *Manley* was appealed to this Court, we effectively vacated the Court of Appeals room and board analysis. *Manley v Detroit Automobile Inter-Ins Exchange,* 425 Mich 140; 388 NW2d 216 (1986). We stated that the "question whether food, shelter, utilities, clothing, and other such maintenance expenses are an allowable expense when the injured person is cared for at home" had neither been raised before the trial court nor

argued in the Court of Appeals. *Id*. at 152. Accordingly, this Court declined to address the issue and stated that the Court of Appeals analysis of the issue "shall not be regarded as of precedential force or effect." *Id*. at 153.

Justice BOYLE issued a concurring and dissenting opinion, asserting that the room and board issue was properly before this Court because the Court of Appeals had raised it sua sponte and discussed the issue in its opinion. *Id*. at 168 (BOYLE, J., concurring in part and dissenting in part). She could find "no principled basis" for distinguishing between food provided in an institutional setting and food provided at home, and concluded that the Court of Appeals "injured person vs. uninjured person" test was not only "unwieldy and unworkable" but that it effectively punished those who choose to care for injured family members at home. *Id*. at 168-169. Justice BOYLE opined that MCL 500.3107 imposes three requirements for "allowable expenses": "1) the charge must be reasonable, 2) the expense must be reasonably necessary, and 3) the expense must be incurred." 425 Mich at 169.

Thereafter, in *Reed*, the Court of Appeals adopted Justice BOYLE's *Manley* analysis. The insured in *Reed* had been severely injured in an auto accident. *Reed*, *supra* at 445. The plaintiff, the insured's mother, filed various claims against the defendant insurer and moved to amend her complaint to include a claim for room and board expenses. *Id*. at 445-446. The trial court denied the motion on the basis that such expenses were not recoverable under the no-fault act. *Id*. at 446.

The Court of Appeals reversed, reasoning as follows:

> We see no compelling reason not to afford the same compensation under the act to family members who provide room and board. Subsection 1(a) does not distinguish between accommodations provided by family members and

> accommodations provided by institutions, and we decline to read such a distinction into the act. Moreover, holding that accommodations provided by family members is [sic] an "allowable expense" is in accord with the policy of this state. Denying compensation for family-provided accommodations while allowing compensation in an institutional setting would discourage home care that is generally, we believe, less costly than institutional care. Irrespective of cost considerations, it can be stated without hesitation that home care is more personal than that given in a clinical setting. . . .
>
> *We hold that, where an injured person is unable to care for himself and would be institutionalized were a family member not willing to provide home care, a no-fault insurer is liable to pay the cost of maintenance in the home.* [*Id.* at 452-453 (citations omitted; emphasis added).]

In addition to the above reasoning, the Court of Appeals relied on the notion that because the no-fault act is remedial in nature, it "must be liberally construed in favor of persons intended to benefit thereby." *Id*. at 451.

B. INTERPRETATION OF STATUTORY LANGUAGE AND APPLICATION

As previously stated, MCL 500.3105(1) and MCL 500.3107(1)(a) impose two separate and distinct requirements for "care, recovery, or rehabilitation" expenses to be compensable under the no-fault act. First, such expenses must be "*for accidental bodily injury* arising out of the ownership, operation, maintenance or use of a motor vehicle . . . ." MCL 500.3105(1) (emphasis added). Second, these expenses must be "reasonably necessary . . . for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a).

Defendant contends that MCL 500.3105(1) requires that allowable expenses be causally connected to a

person's injury. We agree. In fact, MCL 500.3105(1) imposes two causation requirements for no-fault benefits.

First, an insurer is liable only if benefits are "*for* accidental bodily injury . . . ." "[F]or" implies a causal connection.[6] "[A]ccidental bodily injury" therefore triggers an insurer's liability and defines the scope of that liability. Accordingly, a no-fault insurer is liable to pay benefits only to the extent that the claimed benefits are causally connected to the accidental bodily injury arising out of an automobile accident.

Second, an insurer is liable to pay benefits for accidental bodily injury only if those injuries "aris[e] out of" or are caused by "the ownership, operation, maintenance or use of a motor vehicle . . . ." It is not *any* bodily injury that triggers an insurer's liability under the no-fault act. Rather, it is only those injuries that are caused by the insured's use of a motor vehicle.

In this case, it is uncontested that the insured's injuries arose out of his use of an automobile. Therefore, to the extent that the insured's injuries stem from an automobile accident, application of the second causal element noted above does not bar plaintiff's claim.

The first causal element, however, poses a problem for plaintiff. Plaintiff does not claim that her husband's diet is different from that of an uninjured person, that his food expenses are part of his treatment plan, or that these costs are related in any way to his injuries. She claims instead that Griffith's insurer is liable for ordi-

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[6] *Random House Webster's College Dictionary* (1997) defines "for," when used as a preposition, as "with the object or purpose of," "intended to belong to or be used in connection with," or "suiting the purposes or needs of." The definition offered by Justice KELLY—" 'by reason of' "—also implies a causal connection. See *post* at 545. (Citation omitted.)

nary, everyday food expenses. As such, plaintiff has not established that these expenses are "for accidental bodily injury . . . ."[7]

Even if ordinary food expenses were compensable under § 3105, an insurer would be liable for those expenses only if they were also "allowable expenses" under MCL 500.3107(1)(a). This section provides that benefits are payable for "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." In other words, an insurer is liable only for the cost of "products, services and accommodations" "reasonably necessary" "for an injured person's care, recovery, or rehabilitation."[8]

There is no dispute that Griffith is an "injured person." Thus, the question is whether food is reasonably necessary for his "care, recovery, or rehabilitation" as an injured person. It is not contended here that the food expenses at issue are a part of the insured's "recovery" or "rehabilitation." Indeed, plaintiff does not allege that the food has special curative properties that might advance Griffith's recovery or rehabilita-

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[7] Our dissenting colleagues fail to explain how they avoid the causation requirement in MCL 500.3105(1). As we will explain, because plaintiff is not on a special diet, his food expenses are not "*for* accidental bodily injury," and those expenses therefore are not recoverable in this case. It is therefore not surprising that our dissenting colleagues avoid developing their analysis of MCL 500.3105(1), because their position is plainly inconsistent with the unambiguous language of that provision.

[8] In her concurring and dissenting opinion in *Manley*, Justice BOYLE read MCL 500.3107(1)(a) as imposing only three requirements: "1) the charge must be reasonable, 2) the expense must be reasonably necessary, and 3) the expense must be incurred." 425 Mich at 169 (BOYLE, J., concurring in part and dissenting in part). In addition to these requirements, however, the statute states that an "allowable expense" must be "for" one of the following: (1) an injured person's care, (2) his recovery, or (3) his rehabilitation.

tion. The key issue, therefore, is whether the food expenses are necessary for Griffith's "care."

Because "care" can have several meanings depending on the context in which it is used, the doctrine of *noscitur a sociis* is helpful in discerning the meaning of that term in this statute. This doctrine is premised on the notion that "the meaning of statutory language, plain or not, depends on context." *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991).[9] Thus, under the doctrine of *noscitur a sociis*, " ' " a word or phrase is given meaning by its context or a setting." ' " *Koontz, supra* at 318 (citations omitted). As a general matter, "words and clauses will not be divorced from those which precede and those which follow." *Sanchick v State Bd of Optometry*, 342 Mich 555, 559; 70 NW2d 757 (1955). When construing a series of terms such as "care, recovery, or rehabilitation," we are guided by the principle "that words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v Impac Ltd, Inc*, 432 US 312, 322; 97 S Ct 2307; 53 L Ed 2d 368 (1977).

Generally, "care" means "protection; charge," and "to make provision." *Random House Webster's College Dictionary* (2001). Thus, taken in isolation, the word "care" can be broadly construed to encompass *anything* that is reasonably necessary to the provision of a person's protection or charge. But we have consistently held that "[c]ourts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute sur-

[9] See *Koontz*, *supra* at 318, quoting *Brown v Genesee Co Bd of Comm'rs (After Remand)*, 464 Mich 430, 437; 628 NW2d 471 (2001), quoting *Tyler v Livonia Pub Schools*, 459 Mich 382, 390-391; 590 NW2d 560 (1999) (" 'Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: "[i]t is known from its associates," see Black's Law Dictionary (6th ed), p 1060.' ").

plusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co,* 466 Mich 142, 146; 644 NW2d 715 (2002). Therefore, we must neither read "care" so broadly as to render nugatory "recovery and rehabilitation" nor construe "care" so narrowly that the term is mere surplusage.[10] "Care" must have a meaning that is related to, but distinct from, "recovery and rehabilitation."[11]

As an initial matter, it is important to note that the statute does not require compensation for any item that is reasonably necessary to a person's care in general. Instead, the statute specifically limits compensation to charges for products or services that are reasonably necessary "for an *injured person's* care, recovery, or rehabilitation." (Emphasis added.) This context suggests that "care" must be related to the insured's injuries.

This conclusion is supported by the fact that the statute lists "care" together with "recovery" and "rehabilitation." "Recovery" is defined as "restoration or return to any former and better condition, esp. to health from sickness, injury, addiction, etc." *Random House Webster's College Dictionary* (2001). "Rehabilitate" is defined as "to restore or bring to a condition of good health, ability to work, or productive activity." *Id*. Both terms refer to restoring an injured person to the

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[10] Our dissenting colleagues make the former error, construing "care" so broadly that "recovery and rehabilitation" are mere surplusage. If "care" means, as Justice KELLY contends, " 'the provision of what is necessary for the welfare and protection of someone,' " *post* at 547, then "recovery and rehabilitation"—both of which are certainly necessary for an injured person's welfare—are stripped of any meaning.

[11] See Sutherland Statutory Construction (6th ed, 2000 rev), § 47.16, pp 265-267 ("[W]hen two or more words are grouped together, and ordinarily have a similar meaning, but are not equally comprehensive, the general word will be limited and qualified by the special word.").

condition he was in before sustaining his injuries. Consequently, expenses for "recovery" or "rehabilitation" are costs expended in order to bring an insured to a condition of health or ability sufficient to resume his preinjury life. Because "recovery" and "rehabilitation" are necessary only when an insured has been injured, both terms refer to products, services, and accommodations that are necessary *because of* injuries sustained through the use of a motor vehicle.

"Care" must have a meaning that is broader than "recovery" and "rehabilitation" but is not so broad as to render those terms nugatory. As noted above, both "recovery" and "rehabilitation" refer to an underlying injury; likewise, the statute as a whole applies only to an "injured person." It follows that the Legislature intended to limit the scope of the term "care" to expenses for those products, services, or accommodations whose provision is necessitated by the injury sustained in the motor vehicle accident.[12] "Care" is broader than "recovery" and "rehabilitation" because it may encompass expenses for products, services, and accommodations that are necessary because of the accident but that may not restore a person to his preinjury state.

Griffith's food costs here are not related to his "care, recovery, or rehabilitation." There has been no evidence

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[12] For instance, the cost associated with setting a broken leg would be compensable under the term "recovery" because it is necessary to return a person to his post-injury health, and the cost of learning to walk on a prosthetic leg would be recoverable under the term "rehabilitation" because it is necessary to bring the person back to a condition of productive activity. Similarly, the cost of such items as a prosthetic leg or special shoes would be recoverable under the term "care," even though the person will never recover or be rehabilitated from the injuries, because the cost associated with such products or accommodations stems from the injury.

introduced that he now requires different food than he did before sustaining his injuries as part of his treatment plan. While such expenses are no doubt necessary for his *survival*, they are not necessary for his recovery or rehabilitation from the injuries suffered in the accident, nor are they necessary for his care because of the injuries he sustained in the accident. Unlike prescription medications or nursing care, the food that Griffith consumes is simply an ordinary means of sustenance rather than a treatment for his "care, recovery, or rehabilitation." In fact, if Griffith had never sustained, or were to fully recover from, his injuries, his dietary needs would be no different than they are now. We conclude, therefore, that his food costs are completely unrelated to his "care, recovery, or rehabilitation" and are not "allowable expenses" under MCL 500.3107(1)(a).[13]

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[13] Our dissenting colleagues do not pay sufficient regard to the context in which the word "care" is used in MCL 500.3107(1)(a). They do not give effect to the Legislature's choice to use the term "care" in conjunction with the terms "recovery" and "rehabilitation." They also fail to give effect to the statute's specific reference to "*an injured person's* care, recovery, or rehabilitation." As we have explained, this contextual background aids our effort to discern the meaning of the term "care" as used in the statute.

Our dissenting colleagues would instead read the word "care" in a vacuum, thereby allowing them to impose their preferred meaning without attempting to discern the context in which the Legislature used the term. Our dissenting colleagues' failure to read the word "care" in context renders the word devoid of any definitional limit. Let there be no mistake—the implication of their interpretation is that *any expense* that is necessary for a person's general "care" is recoverable, *regardless of whether that expense bears any causal relationship* to an "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). Because they would allow a plaintiff to recover expenses for normal, everyday food consumed at home that does not differ from what an uninjured person would eat, would they also allow recovery of housing costs and expenses for clothing and toiletries, where those expenses do not bear any causal

The parties focus on the distinction between food costs for hospital food and food costs for an insured receiving at-home care. Plaintiff contends that there is no distinction between such costs. We disagree.

Food costs in an institutional setting are "benefits for accidental bodily injury" and are "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." That is, it is "reasonably necessary" for an insured to consume hospital food during in-patient treatment given the limited dining options available. Although an injured person would need to consume food regardless of his injuries, he would not need to eat *that particular food* or bear the cost associated with it. Thus, hospital food is analogous to a type of special diet or select diet necessary for an injured person's recovery. Because an insured in an institutional setting is required to eat "hospital food," such food costs are necessary for an insured's "care, recovery, or rehabilitation" while in such a setting.

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relationship to an accidental bodily injury? Justice KELLY seems to concede that she would require no-fault insurers to pay for an injured person's "shelter" where that expense bears no causal relation to the injuries. *Post* at 552.

It thus appears that Justice KELLY would essentially invent a new entitlement system by converting our no-fault law into a general welfare scheme. Her new scheme would pay all expenses of everyday life, such as mortgage payments and grocery bills, for anyone who has been injured in a motor vehicle accident, *even where those expenses do not arise from injuries sustained in the accident*. Justice KELLY does not explain how she would pay for her newly minted entitlement plan, but the effect of her position would be to force Michigan citizens to make these general welfare payments through increased mandatory insurance premiums. Perhaps Justice KELLY sincerely believes that our state's citizens should bear this new financial burden, but such a policy choice belongs to the legislative branch of our government. In deciding the case before us, we must honor the intent of the Legislature as reflected in the current language of the no-fault act by applying the causation requirement embodied in the provisions at issue.

Once an injured person leaves the institutional setting, however, he may resume eating a normal diet just as he would have had he not suffered any injury and is no longer required to bear the costs of hospital food, which are part of the unqualified unit cost of hospital treatment.[14]

This reasoning can be taken a step further when considering the costs of items such as an injured person's clothing, toiletries, and even housing costs. Under plaintiff's reasoning, because a hospital provided Grif-

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[14] Our dissenting colleagues opine that the language of the no-fault act does not distinguish between food expenses incurred in a hospital and food expenses at home. As we have explained, however, we believe this distinction arises from the language in MCL 500.3105(1) and MCL 500.3107(1)(a). Food expenses in an institutional setting are "benefits for accidental bodily injury," and are "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation," given the limited dining options available in hospitals. After all, an injured person is required to eat *hospital food* precisely because his injuries require treatment in a hospital. By contrast, a person who eats a normal diet at home does not incur food expenses that meet the requirements of MCL 500.3105(1) and MCL 500.3107(1)(a).

Justice KELLY also asks whether the majority is implying that hospital food expenses would be reimbursable under MCL 500.3107(1)(a), but not under MCL 500.3105(1). We have stated clearly, however, that food costs in an institutional setting are "benefits for accidental bodily injury" and are "reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." See p 537 of this opinion. In other words, we have quoted the language from *both* statutory provisions in saying that such expenses are recoverable.

Finally, Justice KELLY expresses concerns about allowing recovery for food expenses in a hospital but not at home. It is the prerogative of the Legislature, however, to determine whether the no-fault act should be amended to allow recovery of food costs that are unrelated to an accidental bodily injury, taking into account policy concerns such as those expressed by Justice KELLY and competing considerations such as the increased costs of premiums for this mandatory form of insurance coverage. This Court lacks both the institutional capacity to weigh the competing policy considerations and the constitutional authority to amend the no-fault act.

fith with clothing while he was institutionalized, defendant should continue to pay for Griffith's clothing after he is released. The same can be said of Griffith's toiletry necessities and housing costs. While Griffith was institutionalized, defendant paid his housing costs. Should defendant therefore be obligated to pay Griffith's housing payment now that he has been released when Griffith's housing needs have not been affected by his injuries?

Under plaintiff's reasoning, nothing would prevent no-fault insurers from being obligated to pay for any expenses that an injured person would otherwise be provided in an institutional setting as long as they are remotely related to the person's general care. Plaintiff's interpretation of MCL 500.3107(1)(a) stretches the language of the act too far and, incidentally, would largely obliterate cost containment for this mandatory coverage. We have always been cognizant of this potential problem[15] when interpreting the no-fault act, and we are no less so today.

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[15] See, e.g., *Shavers v Attorney General,* 402 Mich 554, 607-611; 267 NW2d 72 (1978) ("In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates."); *Cruz v State Farm Mut Automobile Ins Co*, 466 Mich 588, 597; 648 NW2d 591 (2002) (recognizing that, because no-fault coverage is mandatory, the Legislature has continually sought to make it more affordable); *Celina Mut Ins Co v Lake States Ins Co,* 452 Mich 84, 89; 549 NW2d 834 (1996) ("the no-fault insurance system . . . is designed to provide victims with assured, adequate, and prompt reparations *at the lowest cost to both the individuals and the no-fault system*" [emphasis added]); *O'Donnell v State Farm Mut Ins Co,* 404 Mich 524, 547; 273 NW2d 829 (1979) (recognizing that the Legislature had provided for setoffs in the no-fault act: "Because the first-party insurance proposed by the act was to be compulsory, it was important that the premiums to be charged by the insurance companies be maintained as low as possible. Otherwise, the poor and the disadvantaged people of the state might not be able to obtain the necessary insurance.").

Moreover, in seeking reimbursement for food and other such quotidian expenses, plaintiff is essentially seeking a wage-loss benefit. Reimbursement for the value of lost wages, however, is specifically addressed elsewhere in the no-fault act. See MCL 500.3107(1)(b).[16] See also *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 463, 471; 521 NW2d 831 (1994). Plaintiff's construction of § 3107(1)(a) is strongly undermined by the Legislature's express provision for, and limitation on, wage-loss benefits in § 3107(1)(b).

Under MCL 500.3105 and MCL 500.3107(1)(a), defendant is not required to reimburse plaintiff for the food expenses at issue in this case. Such expenses are not necessary "for accidental bodily injury" under MCL 500.3105. In addition, they are not "allowable expenses" under MCL 500.3107(1)(a) because food is not necessary for Griffith's "care, recovery, or rehabilitation" under that subsection. Because the rule announced in *Reed*, *supra*, is contrary to the language of the above provisions, we overrule the Court of Appeals decision in *Reed*.

V. CONCLUSION

We conclude that defendant is not required to reimburse plaintiff for Griffith's food costs under MCL 500.3105 and MCL 500.3107(1)(a) of the no-fault act. Accordingly, we reverse the judgment of the Court of Appeals.

TAYLOR, C.J., and YOUNG and MARKMAN, JJ., concurred with CORRIGAN, J.

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[16] This section provides, in part:

> Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured.

WEAVER, J. *(dissenting).* I dissent from the majority's holding that food expenses for plaintiff's incapacitated husband are not "allowable expenses" for which plaintiff should be paid under MCL 500.3107(1)(a). Rather, consistently with Justice BOYLE's concurrence in *Manley v Detroit Automobile Inter-Ins Exchange,*[1] and with the Court of Appeals opinion in *Reed v Citizens Ins Co of America,*[2] I would conclude that the reasonable charges incurred for plaintiff's husband's food while he is cared for at home are recoverable as "allowable expenses" under the statute. Therefore, I would affirm the Court of Appeals decision in this case.

Under the statute, "allowable expenses" consist of

> all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. [MCL 500.3107(1)(a).]

With this language, the Legislature provided a fairly broad definition of "allowable expenses" to encompass all the things that might reasonably be needed for an injured person's care, recovery, or rehabilitation. As Justice KELLY notes in her dissent, "[i]t is difficult to deny that food is a product reasonably necessary for the care of an invalid, however narrowly 'care' is defined. Without nourishment, an injured person could not be restored to health and could not properly be cared for." *Post* at 548. And, as stated by Justice BOYLE, there is

> no principled basis for deciding that food provided to [the plaintiff's husband] at home is not as much an "allowable expense" as the food provided in a licensed medical care facility. Where a person who normally would require insti-

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[1] 425 Mich 140, 168-169; 388 NW2d 216 (1986) (BOYLE, J., concurring in part and dissenting in part).

[2] 198 Mich App 443, 452-453; 499 NW2d 22 (1993).

> tutional treatment is cared for at home in a quasi-institutional setting made possible by the love and dedication of the injured victim's family, the test for "allowable expenses" should not differ from that set out in MCL 500.3107(a). [*Manley, supra* at 168-169 (citations omitted).]

Therefore, it is reasonable to conclude that the cost of plaintiff's husband's food is recoverable as "allowable expenses" under the no-fault act, and I would affirm the Court of Appeals decision.

KELLY, J. (*dissenting*). Today the Court reaches the extraordinary conclusion that food is not always necessary for an injured person's care. The Court concludes that food is "completely unrelated to [an injured person's] 'care, recovery, or rehabilitation' " if provided in a home, although it is both necessary and reimbursable if provided in an institution. *Ante* at 536.

I disagree. The Court of Appeals decision that reached the opposite conclusion twelve years ago, *Reed v Citizens Ins Co of America*,[1] was correct and should not be overturned. It is obvious to me that food should continue to be an allowable expense under the no-fault act wherever provided as long as reasonably necessary to an injured person's care.

THE NO-FAULT ACT

We review issues of statutory construction de novo. *Stewart v Michigan*, 471 Mich 692, 696; 692 NW2d 376 (2004). In construing statutes, our purpose is to determine and implement the intent of the Legislature. *Sanders v Delton Kellogg Schools*, 453 Mich 483, 487; 556 NW2d 467 (1996).

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[1] 198 Mich App 443; 499 NW2d 22 (1993).

The act under review here was passed to provide benefits for victims of motor vehicle accidents without regard to who was at fault. Substituting for certain tort remedies that it abolished, the act created a comprehensive and expeditious benefit system through insurance. *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978). This Court has determined that the Legislature intended the no-fault act to be construed liberally in favor of the insured.[2] *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995).

MCL 500.3105(1)

In this case, Mr. Griffith was injured in an automobile accident that rendered him unable to care for himself. He remains injured. Therefore, without contest, he satisfies the requirement of § 3105(1), and his insurer must pay him benefits. The issue here involves the meaning of "benefits."

Section 3105(1) requires:

> Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.

On its face, this section requires an insurer to pay benefits to its insured injured in a motor vehicle accident. The Legislature took pains to define at a different section of the statute what benefits must be paid. MCL 500.3107(1)(a).[3] As the majority observes, § 3107(1)(a)

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[2] The majority's decision today, taking food as it were from the mouth of the injured insured convalescing at home, is anything but a liberal construction in his favor.

[3] In pertinent part, MCL 500.3107 provides:

> [P]ersonal protection insurance benefits are payable for . . .

is "the statutory provision at the center of this case." *Ante* at 527. Because the Legislature defined "benefits" in § 3107(1)(a), it seems contradictory that it would have given "benefits" a different definition in § 3105(1).

Yet, the majority reads § 3105(1) to mean that the only benefits that a no-fault insurer is liable to pay are those "causally connected to the accidental bodily injury . . . ." *Ante* at 531. It is not Mr. Griffith's injury, it reasons, that occasioned his need for food. Hence the cost of his food is not a covered expense.

The majority finds that § 3105 limits the benefits made available in § 3107, despite the fact that the courts have never before found such a limitation. The majority defines "for" in the phrase "an insurer is liable to pay benefits *for* accidental bodily injury" as meaning " 'with the object or purpose of,' " " 'intended to belong to or be used in connection with,' " and " 'suiting the purposes or needs of.' " *Ante* at 531 n 6. (Citation omitted.) From that it concludes that these definitions "imply" that the benefit an injured party seeks must be directly caused by the injury. Not only is the majority's reading of § 3105 novel and unprecedented, it flies in the face of our time-honored determination to liberally construe the no-fault act for the benefit of the insured.

(a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. . . .

(b) Work loss . . . .

(c) Expenses . . . reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injured person would have performed . . . .

The word "for" in the English language has many nuances in its meaning. I feel confident that the Legislature added § 3107(1)(a) for the purpose of defining "benefits" in § 3105. On the basis of that belief, I find that the definition of "for" in § 3105 that best accords with the Legislature's intent is "by reason of." *Random House Webster's College Dictionary* (2001). Hence, § 3105 should be read to mean that benefits are payable "by reason of" accidental bodily injury.

Reading § 3105 in this way ensures that the only limitations placed on "benefits" for an insured injured in an auto accident are those clearly stated by the Legislature in § 3107. My belief is that, if the Legislature intended that the sole benefits payable for an insured's injury were those directly arising therefrom, it would have said so. Also, it would not have required at § 3107 payment for so broad a category as "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

Additionally, the majority's reading of the act is irrational. The majority believes that food provided in the hospital qualifies as a benefit under the act. However, under its reading of § 3105, food would be excluded: the need for it does not arise from the injury. The majority explains that, in an institution, one has little choice what food is served. But it fails to explain how that fact transforms hospital food into an expense arising from an accident.

If the Legislature had intended, for example, that ground beef be compensable only if no other entrée were offered, it should have written something to make that clear. The majority will search in vain for some indication in the act that food, or any item, can qualify for "benefits for an accidental bodily injury" if fur-

nished in the hospital but not at home. Absolutely nothing in either § 3105 or § 3107 allows for that distinction.

The difficulty the majority has in providing a convincing answer to this question illustrates the weakness of its conclusion. Its reading of § 3105 is, at its foundation, unsound. The majority criticizes my analysis of § 3105(1) as inadequate and undeveloped. *Ante* at 532, n 7. It would be inadequate only if I agreed with the majority's choice to create two requirements where there is only one in § 3105. I have taken my own analysis of § 3105(1) to its logical conclusion. It is not the same analysis as the majority's, but it is more faithful to the text of the statute. Contrary to Justice CORRIGAN's belief, I have set forth a principled basis for my analysis. It includes a plain-language reading of §§ 3105(1) and 3107(1)(a).

MCL 500.3107(1)(a)

The majority finds that Douglas Griffith fails to qualify not only under § 3105(1) but also under § 3107(1)(a). In construing § 3107(1)(a), first it goes to the dictionary to interpret the meaning of "care."

As is frequently the case, here a dictionary alone does not clarify the Legislature's intent. "Care" has several definitions. The majority chooses "protection" or "charge" as the appropriate one. But the word can also be defined as "the provision of what is necessary for the welfare and protection of someone or something." *Compact Oxford English Dictionary*.

It is clear that, when consulting a dictionary in performance of the interpretative task, one is normally required to make a choice among several definitions. It

is nothing less than a pretense to maintain that, in enforcing a statute "as written," a court does not make definitional choices.

The language of § 3107(1)(a) is broad. Yet, the majority ultimately limits the meaning of "care" to the care needed for recovery and rehabilitation, ascribing to it a restorative meaning. The logical consequence of using this restrictive definition demonstrates that it is poorly chosen. It reads "care" out of the sentence. Given that "recovery and rehabilitation" are in the sentence with "care," the effect of the majority's choice of definitions turns "care" into a mere redundancy. This approach violates our obligation when interpreting statutes to try to give every word meaning and treat no word as surplusage. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

My reading of the statute gives independent meaning to the word "care." Under the doctrine of *noscitur a sociis*, the meaning of questionable words may be ascertained by reference to the meaning of other words associated with it. Applying this doctrine, "care" fits with "recovery" and "rehabilitation" when "care" is interpreted broadly to mean "the provision of what is necessary for the welfare and protection of someone." The Legislature intended that an injured person's needs be furnished ("care") until "recovery" has been accomplished through "rehabilitation."

In some cases, such as where a motorist is catastrophically injured, recovery and rehabilitation may not be an achievable goal. In these cases, the Legislature requires that the injured individual receive all products and services reasonably necessary for his or her continuing care. The act's comprehensive language demonstrates the Legislature's intent to ensure

that benefits are provided in every instance where a motorist suffers injury.

THE LEGISLATURE'S INTENTION WITH RESPECT TO FOOD

It is difficult to deny that food is a product reasonably necessary for the care of an invalid, however narrowly "care" is defined. Without nourishment, an injured person could not be restored to health and could not properly be cared for. In fact, without it, a person's physical well-being would be immediately threatened. A finding that food is necessary for "care" accords with the purpose of the no-fault act: to provide benefits needed by someone injured in an automobile accident.

There is a limitation on those benefits in the act: all benefits reasonably necessary. Given the wide variety of circumstances under which injured parties seek no-fault benefits, the act provides for wide latitude in determining what benefits are reasonably necessary in a given situation. Unfortunately, the majority limits the wide latitude provided by the Legislature by restrictively reading the word "care."

It is noteworthy that the Legislature did not expressly limit the expenses recoverable in no-fault cases to those that the injured person did not require before the injury. It could have included, but did not, a clause such as "benefits are payable except for those that were reasonably necessary for the care of the person before the injury." It is the majority, not the Legislature, that writes this limitation into the act.

The majority concludes that food is not necessary for the care of Mr. Griffith because he requires food, injured or not. It adds that food has nothing to do with an injured party's "care, recovery, or rehabilitation." It

further reasons that food is not an allowable expense when consumed in the home, although it is an allowable expense in an institution.[4]

This is not a reasonable construction of the statutory language. Nothing in the language of the no-fault act indicates that whether a home-based expense is allowable depends on whether an uninjured person has the same expense. The act's language mandates that the appropriate question is whether the injured person reasonably incurred the questioned expense as part of his or her care, recovery, or rehabilitation.

The logic in the majority's reasoning is, charitably speaking, illusory. If an automobile accident victim is hospitalized, the reasonable cost of his or her food is a covered expense under § 3107(1)(a). If another automobile accident victim requires the same care, but receives it at home, the reasonable cost of his or her food likewise should be a covered expense under § 3107(1)(a).

I agree with Justice BOYLE's partial concurrence in *Manley v Detroit Automobile Inter-Ins Exchange*,[5] and the Court of Appeals decision in *Reed*: no principled distinction justifies a holding that, where a patient is institutionalized, food is a reasonably necessary expense, but if he or she is home receiving the same care, it is not. Moreover, the plain language of the no-fault act makes no such distinction.

The majority claims that its ruling is necessary to keep down the cost of no-fault insurance. However, the

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[4] The majority claims a distinction exists where an injured person is required to eat hospital food because his or her injuries require treatment in a hospital. This ignores the closely related situation presented in this case. A catastrophically injured individual remains injured and continues to require institutional treatment, but does not necessarily require the treatment in a hospital or long-term care facility.

[5] 425 Mich 140, 168; 388 NW2d 216 (1986).

record contains no evidence to support that claim. There is nothing to indicate that no-fault insurance has become unaffordable because of in-home food expenses that insurers until now have been required to provide to catastrophically injured policyholders.[6]

The facts of Mr. Griffith's case illustrate the complexity of the issue before us and why the Legislature could not have intended the interpretation made by the majority. Mr. Griffith is receiving one hundred percent institutional care, albeit in a home setting. He resides in his own home and is being cared for solely by medical professionals, his wife having been placed in a nursing home.

Thus, family members play no role in cooking for Douglas Griffith or in providing his food. There is no evidence that his meals differ in any respect from those he earlier received in the hospital. Because food in both settings is necessary for his care, both should be compensable under the act.

The only distinction between Mr. Griffith's hospital care and his in-home care is the location at which he receives it. The language of the no-fault act does not

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[6] The majority claims that my interpretation of the statute is based on policy considerations. But, in this case, I base my interpretation on the language found in the no-fault act. The Legislature has already made the policy decision. My construction of the statute is in accordance with that decision. Nonetheless, policy considerations are frequently appropriate. Certainly, the decision in this case has numerous policy implications. For example, the majority appears concerned that no-fault costs be kept low. This is a policy concern. In that regard, I fail to see why my interpretation of the law, which has prevailed at least since 1993, would increase current no-fault premiums. One would expect that no-fault providers have been factoring the potential for these costs into their premiums for years. Perhaps this state's drivers can expect that their premiums will decrease in response to the majority's opinion today. After all, Michigan drivers will no longer be entitled to the same level of benefits that they have paid for in premiums during the past twelve years.

limit expenses only to those incurred in a hospital setting. This is a new rule created by the Court.

The majority attempts to buttress its interpretation by asserting that it has discerned the policy choice made by the Legislature. It insists that my reading is my own policy choice that cannot be accurate unless the Legislature amends the no-fault act. This is a logical fallacy that assumes the majority's conclusion as its premise.

Also faulty is the majority's assertion that my reading of the statute "essentially invent[s] a new entitlement system." *Ante* at 537 n 13. To the contrary, my reading of the statute conforms with the law as interpreted for at least the past twelve years.

The Court of Appeals made the same application. While the majority's accusations and appeal to cost concerns create a rhetorical flourish, it is the majority, and not I, that advocates a drastic change in established law.

Let there be no mistake in this: motorists, required to purchase no-fault insurance in order to drive in Michigan, now have one less resource available to them because of the majority's restrictive reading of the no-fault act. The majority holds that food, as a matter of law, is never reasonably necessary for one's care, recovery, or rehabilitation outside a hospital, at least absent a special diet.

A proper reading of the text belies the majority's conclusions. There is no need to require the Legislature to amend its decision that all expenses should be covered as long as reasonably necessary to an injured person's care, recovery, and rehabilitation.

FURTHER IMPLICATIONS OF THE MAJORITY'S DECISION

The majority forces a harsh dilemma on insured individuals injured in automobile accidents: remain in

an institution, if insurance coverage is available, or convalesce at home where they or others are burdened with the cost of their food. Unfortunately for impoverished families, the only choice may be to remain in institutional care.[7]

Reed has been the rule of law in Michigan for twelve years. There are unacknowledged alarming implications in overruling it. If we apply the majority's reasoning about in-home food, is shelter at home an allowable expense? An uninjured person requires shelter. The majority incentivizes no-fault insurers to refuse to reimburse these and other expenses in the future, even though they are without dispute reasonably necessary for an injured person's care.

The majority opines that reimbursement for in-home food is a form of wage-loss benefits. However, it is unable to substantiate that statement with a showing that any legislation equates wage-loss benefits with payment for care of the injured. Wage-loss benefits exist to replace lost income, not as reimbursement for expenses incurred.

Furthermore, the no-fault act limits wage-loss benefits to three years. But the insurer's obligation to provide for the care of an injured person can extend over the person's lifetime. Therefore, equating the provision of food with wage loss is inaccurate. The Legislature struck a very definite compromise on the duration of wage-loss benefits that stands in contrast to the lifetime care to which an injured person is entitled.

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[7] Interestingly, although the majority expresses its concern that costs for insurers be minimized, its decision arguably helps to increase those costs. In the future, the care of patients who remain institutionalized during the period they once might have returned home is likely to be more expensive.

The majority[8] finds that §§ 3105 and 3107 "impose two separate and distinct requirements" before expenses are compensable under the act. It finds that Mr. Griffith's expenses for in-home food fail to satisfy the requirements of both sections. They fail to satisfy § 3107 because they were not necessary for his care. They fail to satisfy § 3105 because they were not caused by the accidental bodily injury.

The majority informs us that Mr. Griffith's food, when provided in the hospital, did satisfy § 3107. Are we to infer that the hospital food was nonetheless not a reimbursable expense because it did not satisfy § 3105?[9] Clearly, the food was not an expense caused by the accidental bodily injury when furnished either in the hospital or at home.

Finally, the majority makes no provision for those who in the past have incurred ongoing expenses and assumed ongoing burdens in reliance on the availability

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[8] *Ante* at 530.

[9] After quoting both statutory provisions relevant to the present analysis, the majority concludes that hospital food remains a covered expense. But merely quoting the statutory language does not resolve the question.

According to the majority, an injured person's food is not "for" an accidental bodily injury because the need for food was not caused by the automobile accident. By the majority's logic, even one who is hospitalized is not entitled to food expenses because those expenses are as necessary to an uninjured person as to an injured person. This logic is equally applicable regardless of the injured person's physical location.

Contrary to the majority's assertion, I do not express policy concerns about allowing recovery for food expenses in a hospital, but not for the same costs at home. Rather, my concern is the lack of a logical basis for the distinction the majority seeks to create. Instead of the majority's artificial distinction, I would apply the clear language of § 3107(1)(a) and allow recovery for products reasonably necessary to "an injured person's care, recovery, or rehabilitation." I would not decide, as the majority does, that as a matter of law at-home food expenses are never reasonably necessary to one's care, recovery, or rehabilitation.

of reimbursements for in-home food. Because its holding is not limited to new cases, many whose caregivers are already receiving reimbursement for in-home food may be forced to return to institutional settings.

CONCLUSION

The majority's conclusion is that food is unnecessary to one's "care, recovery, or rehabilitation" outside an institution, although necessary inside an institution. It makes a distinction without a difference. Not only is it illogical, no statutory basis exists to distinguish the reimbursability of the cost of institutional food from the reimbursability of the cost of in-home food.

I would affirm the trial court and the Court of Appeals decisions and leave *Reed* intact. Regardless of the choice of meanings ascribed to the word "care," the Legislature's intent had to be that food is an allowable expense for injured automobile accident victims convalescing at home.

CAVANAGH, J., concurred with KELLY, J.

PEOPLE v HENDRICK

Docket No. 126371. Argued April 12, 2005 (Calendar No. 4). Decided June 14, 2005.

Darin Hendrick pleaded guilty in the Wayne Circuit Court of attempted first-degree home invasion and was sentenced to a five-year term of probation, with the first year to be served in jail. Less than a month later, the defendant pleaded guilty of possession of a Molotov cocktail and was again sentenced to five years of probation, with the first year to be served in jail. The defendant was arrested for violating the terms of his probation by possessing a shotgun on a public street, and the court, Vera Massey Jones, J., revoked probation and sentenced the defendant to one to five years of imprisonment for attempted home invasion and ten to twenty years of imprisonment for possession of a Molotov cocktail. The court stated that the legislative sentencing guidelines, which provided for a minimum term of twelve to forty-eight months for the Molotov cocktail conviction, does not apply to sentences imposed after probation violation. The Court of Appeals dismissed the defendant's claim of appeal and denied his delayed application for leave to appeal. The Supreme Court, in lieu of granting leave, remanded the case to the Court of Appeals for consideration as on leave granted. 468 Mich 918 (2003). On remand, the Court of Appeals, CAVANAGH, P.J., and GAGE and ZAHRA, JJ., held that the sentencing guidelines apply to sentences imposed after a probation violation, vacated the sentence, and remanded the case to the trial court for resentencing. 261 Mich App 673 (2004). The Supreme Court granted the prosecution's application for leave to appeal. 471 Mich 914 (2004).

In a unanimous opinion by Justice CORRIGAN, the Supreme Court *held*:

The legislative sentencing guidelines apply to sentences imposed after the revocation of probation. The defendant is entitled to be resentenced under the legislative sentencing guidelines. A defendant's conduct while on probation may be considered as a substantial and compelling reason for departure from the legislative sentencing guidelines. The judgment of the Court of Appeals

must be affirmed in part and reversed in part, the defendant's sentence must be vacated, and the matter must be remanded to the trial court for resentencing.

1. The Court of Appeals correctly held that the legislative sentencing guidelines apply to a sentence imposed after a probation violation and that the acts giving rise to the probation violation may constitute substantial and compelling reasons to depart from the guidelines. The Court of Appeals erred in holding that the acts giving rise to the probation violation in this case were already considered in connection with the prior record variables and offense variables.

2. The legislative sentencing guidelines apply to certain enumerated felonies committed on or after January 1, 1999, whether or not the sentence is imposed after probation revocation. MCL 777.1 *et seq.*; MCL 769.34(2). It is undisputed that the felonies the defendant committed are among the enumerated felonies and that they were committed after January 1, 1999.

3. Although the trial court considered several reasons for the sentence it imposed, it did not sufficiently articulate its reasons on the record because it believed that the sentencing guidelines did not apply to sentences imposed after revocation of probation. Some of the trial court's reasons are considered in the scoring of the prior record variables and offense variables while others are not. In addition, the trial court did not consider the circumstances surrounding the probation violation in scoring the prior record variables and offense variables.

Court of Appeals judgment affirmed in part and reversed in part, sentence vacated, and case remanded to the trial court for resentencing.

SENTENCES — SENTENCING GUIDELINES — PROBATION REVOCATIONS.

The legislative sentencing guidelines apply to sentences imposed after the revocation of probation for conviction of certain enumerated felonies committed on or after January 1, 1999; a defendant's conduct while on probation can be considered as a substantial and compelling reason for departure from the sentencing guidelines (MCL 777.1 *et seq.*; MCL 769.34[2]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Carolyn M. Breen*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marla R. McCowan* and *Brandy Y. Johnson*) for the defendant.

CORRIGAN, J. In this case, we consider whether the legislative sentencing guidelines apply to sentences imposed after a probation violation and whether a defendant's conduct while on probation can be considered as a substantial and compelling reason for departure from the legislative sentencing guidelines.

The legislative sentencing guidelines apply to certain enumerated felonies committed on or after January 1, 1999. MCL 777.1 *et seq.*; MCL 769.34(2). The language of MCL 769.34(2) is very clear. It lists no exceptions. Thus, the legislative guidelines would apply to defendant's sentence, even if the sentence follows the imposition and revocation of probation.

Further, MCL 771.4 states that if probation is revoked, the court *may* sentence the probationer to the same penalty as if probation had never been granted, but does not *require* that the same penalty be imposed. Thus, the sentencing court is not precluded from considering events surrounding the probation violation when sentencing the defendant on the original offense.

The Court of Appeals[1] correctly held that the sentencing guidelines apply to sentences imposed after a probation violation and that acts giving rise to the probation violation may constitute substantial and compelling reasons to depart from the guidelines. It incorrectly held that the acts giving rise to the probation violation in this case were already considered in connection with the prior record variables and offense variables. We thus affirm in part and reverse in part the

[1] 261 Mich App 673; 683 NW2d 218 (2004).

judgment of the Court of Appeals, vacate the sentence, and remand this case to the trial court for resentencing.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

On March 20, 2000, defendant pleaded guilty to a charge of attempted first-degree home invasion, MCL 750.92; MCL 750.110a(2). Defendant was sentenced to a five-year term of probation, with the first year to be served in jail. On April 9, 2001, defendant pleaded guilty to a charge of possession of a Molotov cocktail, MCL 750.211a. The trial court again sentenced him to a five-year term of probation, with the first year to be served in jail. On July 23, 2001, defendant was arrested yet again for violating the terms of his probation by possessing a shotgun while walking on a public street.

On August 23, 2001, the trial court revoked defendant's two probationary sentences and sentenced him to one to five years of imprisonment for the attempted home invasion and ten to twenty years of imprisonment for possession of a Molotov cocktail. The legislative sentencing guidelines range for the Molotov cocktail conviction was twelve to forty-eight months in prison, thus making defendant's ten-year minimum sentence a departure if the guidelines applied. The trial court, however, did not believe that the guidelines applied to sentences imposed after probation violation. Accordingly, it did not apply the guidelines in determining defendant's sentence.

The Court of Appeals denied leave to appeal. In lieu of granting leave to appeal, we remanded this case to the Court of Appeals for consideration as on leave granted and directed it to consider (1) whether the legislative sentencing guidelines apply to sentences imposed after a probation violation, and (2) if not, whether a sentencing court may consider the principles

of proportionality discussed in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).[2]

The Court of Appeals held that the legislative sentencing guidelines were indeed applicable to sentences imposed after probation revocation. The panel further noted that in "exceptional cases," the circumstances causing the probation revocation could constitute a "substantial and compelling" reason for an upward departure. The Court of Appeals, however, remanded for resentencing, concluding that the reasons articulated by the trial court were not "substantial and compelling."

The prosecutor sought leave to appeal, contending that the legislative sentencing guidelines do not apply to sentences imposed after a probation violation. In the alternative, the prosecution argued that if the guidelines were applicable, the conduct constituting the probation violation provided an automatic substantial and compelling reason for departure from the guidelines.

We granted the prosecution's application for leave to appeal.[3]

II. STANDARD OF REVIEW

Whether the legislative sentencing guidelines apply to sentences imposed after probation revocation is a question of law that we review de novo. *People v Rodriguez,* 463 Mich 466, 471; 620 NW2d 13 (2000). Similarly, whether conduct resulting in the revocation of probation may constitute a "substantial and compelling" reason for an upward departure from the legisla-

[2] 468 Mich 918 (2003).

[3] 471 Mich 914 (2004).

tive sentencing guidelines is also a question of law subject to review de novo. *Id*.

III. ANALYSIS

A. THE LEGISLATIVE SENTENCING GUIDELINES APPLY TO SENTENCES IMPOSED AFTER PROBATION REVOCATION.

The legislative sentencing guidelines apply to certain enumerated felonies committed on or after January 1, 1999. MCL 777.1 *et seq*.; MCL 769.34(2).[4] It is undisputed that the guidelines apply to the felonies defendant committed in this case—possession of a Molotov cocktail and attempted home invasion. It is also undisputed that defendant's underlying crimes were committed after January 1, 1999. Thus, the legislative sentencing guidelines apply, even if the sentence follows the imposition and revocation of probation, because the language of MCL 769.34(2) is clear and lists no exceptions. We therefore agree with the Court of Appeals that the guidelines apply to all enumerated felonies committed on or after the effective date, whether or not the sentence is imposed after probation revocation.[5]

B. THE ACT GIVING RISE TO THE PROBATION VIOLATION MAY PROVIDE A SUBSTANTIAL AND COMPELLING REASON TO DEPART FROM THE LEGISLATIVE SENTENCING GUIDELINES.

MCL 771.4, which governs probation and revocation of probation, states:

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[4] MCL 769.34(2) provides, in relevant part, that "the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed."

[5] The judicially created sentencing guidelines, however, do not apply to probation revocation cases.

> It is the intent of the legislature that the granting of probation is a matter of grace conferring no vested right to its continuance. If during the probation period the sentencing court determines that the probationer is likely again to engage in an offensive or criminal course of conduct or that the public good requires revocation of probation, the court *may* revoke probation. All probation orders are revocable in any manner the court that imposed probation considers applicable either for a violation or attempted violation of a probation condition or for any other type of antisocial conduct or action on the probationer's part for which the court determines that revocation is proper in the public interest. Hearings on the revocation shall be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials. In its probation order or by general rule, the court *may* provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition or conduct inconsistent with the public good. The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing. The court may investigate and enter a disposition of the probationer as the court determines best serves the public interest. *If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.* This section does not apply to a juvenile placed on probation and committed under section 1(3) or (4) of chapter IX to an institution or agency described in the youth rehabilitation services act, 1974 PA 150, MCL 803.301 to 803.309. [Emphasis added.]

The sentence at issue in MCL 771.4 is clearly permissive, not mandatory. It states that "if" probation is revoked, the court "may" sentence the defendant as if probation had never been granted. While the sentencing court *may* sentence the probationer in the same

manner and to the same penalty, nothing in the statute requires it to do so. In fact, the statute places an affirmative obligation on the trial court to take only two actions—to provide the probationer with a written copy of the charges constituting the probation violation and to conduct a probation revocation hearing.

Thus, the court may continue, extend, or revoke probation. In the event that the court revokes a defendant's probation, it *may* sentence the defendant "in the same manner and to the same penalty as the court might have done if the probation order had never been made." A judge, however, is not required to sentence the defendant "in the same manner."[6]

Further, the Legislature did not alter our jurisprudence on probation in the statutory codification of sentencing guidelines.[7] That is, a probation violation does "not constitute a separate felony . . . ." *Id.* at 482. Rather, "revocation of probation simply clears the way for a resentencing on the original offense."[8] Defendant here is thus being sentenced on the original offense—possession of a Molotov cocktail. Without a mandate to impose a sentence on the probationer in the same manner and to the same penalty that could have been imposed if the probation order had never been made, it is perfectly acceptable to consider postprobation factors

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[6] MCL 771.7(1), which deals with revocation of probation for a juvenile following certain convictions, specifically requires a trial court to "order the juvenile committed to the department of corrections for a term of years that *does not exceed* the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation." (Emphasis added.) The Legislature could have incorporated similar language in MCL 771.4 if it intended to preclude the trial court from sentencing adult probationers to a term of years that exceeds the penalty that could have originally been imposed, but it did not do so.

[7] *People v Kaczmarek*, 464 Mich 478, 482; 628 NW2d 484 (2001).

[8] *Id.* at 483.

in determining whether substantial and compelling reasons exist to warrant an upward departure from the legislative sentencing guidelines.[9]

Of course, not every probation violation and revocation warrants an upward departure. A trial court has broad latitude in deciding whether to revoke probation. It has less latitude in imposing a sentence in excess of the guidelines. The sentencing court must always follow the requirements set forth in MCL 769.34, as interpreted in *People v Babcock,* 469 Mich 247; 666 NW2d 231 (2003).

MCL 769.34(3) permits a court to "depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure." *Babcock* defines a "substantial and compelling" reason as requiring an objective and verifiable reason that "keenly" or "irresistibly" grabs the court's attention and is of "considerable worth." Moreover, *Babcock* requires that the "substantial and compelling" reasons articulated by the trial court justify that particular departure. The Court of Appeals held that the trial court's reasons for departing from the sentencing guidelines were not substantial and compelling because they were already considered when scoring the prior record variables and offense variables.

C. APPLICATION OF *BABCOCK* TO DEFENDANT'S POSTPROBATION VIOLATION SENTENCE.

Although the trial court considered several reasons for its upward departure, it did not sufficiently articu-

[9] We recognize that in *Kaczmarek, supra* at 483, we noted that " '[i]f a judge finds that a probationer violated his probation by committing an offense, the probationer is neither burdened with a new conviction nor exposed to punishment other than that to which he was already exposed . . . .' " (Citation omitted.) The issue in *Kaczmarek,* however, was whether a probation violation is a "crime"; it was not, as it is in this case, how a defendant should be sentenced after violating probation.

late its reasons on the record, because it believed that *Babcock* did not apply to sentences imposed after revocation of probation. Some of the trial court's reasons were already considered in scoring the prior record variables and offense variables.[10] Some of the trial court's reasons, however, were not considered in connection with the prior record variables and offense variables, such as defendant's intent to explode the Molotov cocktail in order to harm his sister. Further, the trial court did not consider the circumstances surrounding defendant's probation violation–defendant's possession of a shotgun while walking down the street near his sister's home–in scoring the variables.

The Court of Appeals erroneously implied that all of defendant's conduct noted by the trial court was considered in scoring the prior record variables and offense variables. Because of this erroneous conclusion and because the trial court did not apply the legislative sentencing guidelines in imposing defendant's sentence, we remand this case to the trial court for resentencing. Upon resentencing, the trial court may consider whether the conduct underlying defendant's probation violation constitutes a substantial and compelling reason to depart from the legislative sentencing guidelines.

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[10] The trial court referred to defendant's prior criminal history and recidivist history as factors to support defendant's sentence. These factors, however, were included in the scoring of the prior record variables and offense variables and, thus, were insufficient to support an upward departure absent a finding by the trial court that the factors were given inadequate weight when scored. MCL 769.34(3)(b). The trial court did not believe the legislative sentencing guidelines applied to sentences imposed after revocation of probation and, thus, did not deem it necessary to state that the above factors were given inadequate weight. To the extent that the trial court failed to apply the guidelines when imposing defendant's sentence, it erred.

IV. CONCLUSION

The legislative sentencing guidelines apply to sentences imposed after probation revocation. Thus, defendant is entitled to be resentenced under the legislative sentencing guidelines. Further, a defendant's conduct while on probation can be considered as a substantial and compelling reason for departure from the legislative sentencing guidelines. Defendant's sentence is thus vacated and this matter is remanded to the trial court for further proceedings consistent with this opinion.

TAYLOR, C.J., and CAVANAGH, WEAVER, KELLY, YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

CASCO TOWNSHIP v SECRETARY OF STATE
FILLMORE v SECRETARY OF STATE

Docket Nos. 126120, 126369. Argued March 8, 2005 (Calendar Nos. 2, 3). Decided June 14, 2005. Rehearing denied in *Fillmore* at 473 Mich 1205.

Casco Township, Columbus Township, and certain residents of those townships brought an action in the Ingham Circuit Court seeking a writ of mandamus requiring the Secretary of State to authorize a referendum, pursuant to a petition, on the detachment of land from the city of Richmond and the addition of part of the land to Casco Township and the remainder to Columbus Township. The court, Peter D. Houk, J., denied the writ, agreeing with the Secretary of State that the Home Rule City Act, MCL 117.1 *et seq*., did not allow a single election for a detachment of land from one city for addition to two townships. The Court of Appeals, COOPER and CAVANAGH, JJ. (ZAHRA, P.J., dissenting), affirmed. 261 Mich App 386 (2004).

Fillmore Township and certain electors from Fillmore Township, Holland Charter Township, Park Township, Laketown Township, and the city of Holland filed a complaint for mandamus against the Secretary of State in the Court of Appeals, seeking to compel the Secretary of State to authorize a referendum, pursuant to a petition, on the detachment of land from the city of Holland and the addition of the land in separate parts to each of the four townships. The matter was held in abeyance pending the decision in *Casco Twp v Secretary of State*, 261 Mich App 386 (2004), and the complaint for mandamus was denied by the Court of Appeals, GRIFFIN, P.J., and METER and SCHUETTE, JJ., following the decision in *Casco Twp*. Unpublished order, entered May 6, 2004 (Docket No. 245640).

The Supreme Court granted the plaintiffs' applications for leave to appeal in both cases and ordered the cases to be argued and submitted together. 471 Mich 890 (2004).

In an opinion by Justice CAVANAGH, joined by Chief Justice TAYLOR, and Justices WEAVER, KELLY, CORRIGAN, and MARKMAN, the Supreme Court *held*:

A single detachment petition and a single vote on that petition may not encompass territory that will be detached from one city

and added to more than one township. Mandamus was not proper in these cases. The decisions of the Court of Appeals must be affirmed.

1. A change of boundaries for a district to be affected by a detachment encompasses only one city and one township because a township's voters can be qualified electors only in relation to their own township's proposed change of boundaries and are affected only by their own township's proposed change of boundaries.

2. Interpreting the district to be affected in detachment proceedings as the city from which the territory is to be detached and the township to which the territory is to be added recognizes that the consequences of detachment may be different for each township that seeks to gain property.

3. Allowing a single petition and a single vote on detachment and addition of land to multiple townships does not allow voters to render a vote in support of addition of land to only one township.

4. There was no clear legal right to have the Secretary of State authorize each petition for a single vote. The writs of mandamus were properly denied.

Justice YOUNG, concurring in part and dissenting in part, concluded that a plain reading of all relevant language in the act indicates that the act permits the use of a single petition and election when adding land to multiple townships. The act's definition of the "district to be affected" by the detachment as including "each" municipality suggests that the Legislature contemplated a single detachment proceeding involving multiple recipient townships. Such a procedure comports with the Equal Protection Clause of the Fourteenth Amendment. Under federal case law, strict scrutiny review and the one-person, one-vote standard do not apply in the context of municipal boundary changes. The declaratory relief requested in *Casco Twp* should be granted. Any request for mandamus relief, however, is premature because the Secretary of State has not examined the petitions at issue to determine whether they satisfy all the conditions mandated by the act, and the writs of mandamus were properly denied in both cases.

Affirmed.

1. BOUNDARIES — HOME RULE CITIES — DETACHMENT ELECTIONS.

The Home Rule City Act does not allow a single petition and a single vote to encompass detachment of land from a city for addition to multiple townships (MCL 117.1 *et seq*.).

2. BOUNDARIES — HOME RULE CITIES — DETACHMENT ELECTIONS.

Residents of one township are not qualified electors for purposes of determining a change of boundaries for another township through detachment proceedings under the Home Rule City Act (MCL 117.1 *et seq*.).

Foster, Swift, Collins & Smith, P.C. (by *William K. Fahey, Stephen J. Rhodes, Eric E. Doster*, and *Ronald D. Richards, Jr.*), and *James V. Dubay* for Casco Township, Columbus Township, Patricia Iseler, James P. Holk, Fillmore Township, Shirley Greving, Andrea Stam, Larry Sybesma, Jody Tenbrink, and James Rietveld, and *Patrick J. O'Brien* and *Heather S. Meingast*, Assistant Attorneys General, for the Secretary of State and the Director of the Bureau of Elections.

Eric D. Williams and *Rex A. Burgess* for the city of Richmond.

Kerr, Russell and Weber, PLC (by *Robert J. Pineau*), for Walter K. and Patricia A. Winkle.

Cunningham Dalman, P.C. (by *Andrew J. Mulder, P. Haans Mulder*, and *Vincent L. Duckworth*), for the city of Holland.

Amici Curiae:

Bauckham, Sparks, Rolfe, Lohrstorfer & Thall, P.C. (by *John H. Bauckham*), for Michigan Townships Association.

Miller, Canfield, Paddock and Stone, P.L.C. (by *William B. Beach*), for Michigan Municipal League.

CAVANAGH, J. These consolidated appeals present two issues. First, we must address whether a single detachment petition and a single vote on that petition, pursuant to the terms of the Home Rule City Act, MCL 117.1

et seq., may encompass territory to be detached from one city and added to more than one township.[1] Second, if a single detachment petition and a single vote may encompass territory to be added to more than one township, we must determine whether a writ of mandamus compels the Secretary of State to issue a notice directing an election on the change of boundaries sought by plaintiffs in each case. Because we conclude that the Home Rule City Act does not allow a single detachment petition and a single vote on detachment for adding territory to multiple townships, mandamus is not proper in these cases. Accordingly, the decisions of the Court of Appeals are affirmed.

I. STATEMENT OF FACTS AND PROCEEDINGS

CASCO TWP v SECRETARY OF STATE

Plaintiffs in this case are two adjacent townships—Casco Township and Columbus Township—and residents of those townships who seek to detach territory from defendant city of Richmond. The territory sought to be detached is territory that was previously annexed to the city of Richmond.

Plaintiffs seek to present the ballot issue covering both townships in a single petition. This would result in a single vote about whether to detach territory from the city of Richmond and add the territory to Casco Township and Columbus Township. The residents of one township would be voting on the return of property to their township, as well as the return of property to a township in which they do not reside. The Secretary of State refused to approve an election on plaintiffs' petition because an election on the petition would allow

[1] While the Home Rule City Act, MCL 117.1 *et seq*., addresses various processes, the issue before this Court pertains solely to the process of detachment.

residents of one township to vote on, and possibly determine, a change in the boundaries of another township in which they do not reside.

Plaintiffs filed a complaint for mandamus and declaratory relief. The circuit court dismissed plaintiffs' complaint for mandamus to compel the Secretary of State to act because it was not clear that a single petition seeking detachment from a city and addition of the territory to two townships was permitted by the Home Rule City Act. The Court of Appeals affirmed the decision of the circuit court. *Casco Twp v Secretary of State*, 261 Mich App 386; 682 NW2d 546 (2004). We granted plaintiffs' application for leave to appeal and ordered that the case be argued and submitted with *Fillmore Twp v Secretary of State*, 471 Mich 890 (2004).

FILLMORE TWP v SECRETARY OF STATE

Plaintiffs are Fillmore Township and electors from four townships—Fillmore Township, Holland Charter Township, Park Township, and Laketown Township—and the city of Holland who want to detach territory from the city of Holland and add the territory to the four townships. Plaintiffs filed a joint detachment petition with the Secretary of State, asking that the petition be certified and that a single election be held regarding the territory that was proposed to be detached from the city of Holland. The Secretary of State refused to certify the petition because the petition involved an effort to detach territory for addition to more than one township.

Plaintiffs filed a complaint for mandamus in the Court of Appeals, and the complaint was held in abeyance pending the decision in the *Casco Twp* case. Unpublished order, entered May 19, 2003 (Docket No. 245640). Plaintiffs' complaint was subsequently denied by the Court of Appeals on the basis of the *Casco Twp*

decision. Unpublished order, entered May 6, 2004 (Docket No. 245640). We granted plaintiffs' application for leave to appeal and ordered that the case be argued and submitted with the *Casco Twp* case. 471 Mich 890 (2004).[2]

II. STANDARD OF REVIEW

The proper interpretation of a statutory provision is a question of law that this Court reviews de novo. *Lincoln v Gen Motors Corp*, 461 Mich 483, 489-490; 607 NW2d 73 (2000). A trial court's decision regarding a writ of mandamus is reviewed for an abuse of discretion. *In re MCI Telecom Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999).

III. ANALYSIS

These cases involve an issue of statutory interpretation. The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Id.* at 411. The first step is to review the language of the statute. If the statutory language is unambiguous, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible.

The Home Rule City Act, MCL 117.1 *et seq*., addresses four processes—incorporation, consolidation, annexation, and detachment.[3] The issue before this Court pertains only to the process of detachment.

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[2] Justice YOUNG states that the majority "fails to convey adequately the true character of the boundary disputes at issue." *Post* at 579. Yet the relevant facts are conveyed, and it is of no import if the history of these cases was contentious or of a calculated nature. The statutory analysis is the same whether the parties were friends, foes, or something in between.

[3] Recent amendments to the act do not affect the issue in this case.

Detachment means that territory is taken from an existing city and added to an existing township.

Section 6 of the Home Rule City Act, MCL 117.6, provides that a detachment be initiated by "proceedings originating by petition therefor signed by *qualified electors* who are freeholders residing within the cities, villages, or townships to be affected thereby . . . ." (Emphasis added.) Notably, MCL 117.8 and MCL 117.11 delineate the procedure for submitting a petition for a change of boundaries. MCL 117.8(1) provides in relevant part that "the board shall, by resolution, provide that the question of making the proposed incorporation, consolidation, or change of boundaries be submitted to the *qualified electors* of the district to be affected at the next general election or at a special election before the next general election." (Emphasis added.) Likewise, MCL 117.11(2) provides that "the question of making the incorporation, consolidation, or change of boundaries petitioned for shall be submitted to the *electors* of the district to be affected." (Emphasis added.) Michigan election law defines a qualified elector as "any person who possesses the qualifications of an elector as prescribed in section 1 of article 2 of the state constitution and who has resided in the city or township 30 days."[4] MCL 168.10.

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[4] Const 1963, art 2, § 1 provides the following:

> Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes.

Pursuant to US Const, Am XVI, the minimum voting age is now eighteen years.

Because Casco Township voters do not reside in Columbus Township, they are not "qualified electors" of Columbus Township who can sign a petition and vote on the detachment of territory from the city of Richmond for addition of the territory to Columbus Township. Likewise, because Columbus Township voters do not reside in Casco Township, they are not "qualified electors" of Casco Township who can sign a petition and vote on the detachment of territory from the city of Richmond for addition of the territory to Casco Township. Therefore, a single petition and a single vote on multiple detachments violate the statutory language of the Home Rule City Act.

Additional support for this position is found in the statutory language used in other parts of the Home Rule City Act. MCL 117.9(1) defines the "district to be affected" as the following: "The district to be affected by every such proposed incorporation, consolidation, or *change* of boundaries shall be deemed to include the whole of each city, village, or township from which *territory* is to be taken or to which *territory* is to be annexed." (Emphasis added.)

A *change* of boundaries for the district to be affected encompasses only one city and one township because a township's voters can be qualified electors only in relation to their own township's proposed change of boundaries and are *affected* only by their own township's proposed change of boundaries. Therefore, it is only plausible that the "district to be affected" encompasses one city and one township. Accordingly, a single detachment petition and a single vote may only encompass territory to be added to one township.[5]

[5] Other jurisdictions have held similarly. See, e.g., *City of Lake Wales v Florida Citrus Canners Coop*, 191 So 2d 453, 457 (Fla App, 1966) (A

Language in MCL 117.13, which sets forth the procedure following an election, further supports the principle that each township is considered a separate entity and there must be separate votes with respect to the territory to be detached from one city and added to each township. MCL 117.13 states, "Territory detached from any city shall thereupon become a part of the township or village from which it was originally taken . . . ." This indicates that the "district to be affected" is limited to the city in which the territory is located and the single township that seeks the return of the territory.

Further, interpreting the "district to be affected" in detachment proceedings as the city from which the territory is to be detached and the township to which the territory is to be added recognizes that the consequences of detachment may be quite different for each township that seeks to gain property. For example, property rights and liabilities must be adjusted between the city and the township when there is a detachment. MCL 123.1. Debts must be apportioned and land may need to be sold. MCL 123.2; MCL 123.3. The potential for dramatically different consequences of detachment is clearly indicated in the *Fillmore Twp* case. Four townships seek to detach land from the city of Holland. The Fillmore Township parcel is 1,054 acres, the Holland Charter Township parcel is 3.33 acres, the Park Township parcel is 1.27 acres, and the Laketown Township parcel is 0.77 acres. It is reasonable to conclude

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qualified elector in area 1 cannot vote for the annexation in area 2 because the area 1 voter is not within the territory affected.); *People ex rel Smith v City of San Jose*, 100 Cal App 2d 57, 60; 222 P2d 947 (1950) (An annexation election was improperly held because voters had to vote for the annexation of two parcels and could not vote separately for the annexation of each parcel.).

that the effect of detachment will be quite different when one parcel is 1,054 acres and one parcel is a mere 0.77 acres.

Moreover, allowing a single petition and a single vote on detachment from one city for the addition of territory to multiple townships does not allow voters to render a vote in support of the addition of territory to only one township. MCL 168.643a requires, in relevant part, the following:

> A question submitted to the electors of this state or the electors of a subdivision of this state shall, to the extent that it will not confuse the electorate, be worded so that a "yes" vote will be a vote in favor of the subject matter of the proposal or issue and a "no" vote will be a vote against the subject matter of the proposal or issue.

However, a single vote on detaching territory from one city and adding the territory to multiple townships does not allow a voter who may only favor one of the multiple additions of territory to cast a "yes" vote. As stated by this Court in *Muskegon Pub Schools v Vander Laan*, 211 Mich 85, 87; 178 NW 424 (1920), "Separate subjects, separate purposes, or independent propositions should not be combined so that one may gather votes for the other." In *Vander Laan*, this Court noted that the erection of three new school buildings showed a common purpose and were part of a comprehensive plan to meet the educational needs of the city. In contrast, we find that detaching territory from one city and adding the territory to multiple townships does not indicate a common purpose because the needs and consequences of the additions to various townships may differ remarkably. Combining multiple additions of territory in a single detachment petition so that there is only a single vote indeed combines independent propositions "so that one may gather votes for the other."

When put into context, the text of the Home Rule City Act is unambiguous—a petition and a vote about detachment must involve only one city and one township. A contrary reading of the statutory language belies the fact that there will *always* be two parties to a detachment—the city and the township. Justice YOUNG's focus on the word "each" in the statute ignores that the provisions must be read in context. Interpreting the word "each" to mean that a detachment petition can encompass more than one township is contrary to the statutory language that relates to qualified electors and ignores the fact that the Home Rule City Act encompasses four distinct procedures–incorporation, consolidation, annexation, and detachment. Language in the statute that at first may appear to indicate that multiple townships may be involved in a single detachment petition and a single vote must be read in context and in consideration of the statutory language regarding qualified electors. Significantly, residents of one township are not qualified electors in a detachment proceeding when it comes to determining a change of boundaries for another township, and the statute cannot properly be interpreted in this manner.[6]

Further, Justice YOUNG's reliance on this Court's decision in *Walsh v Secretary of State*, 355 Mich 570, 574; 95 NW2d 511 (1959), is misplaced. *Walsh* dealt with annexation, not detachment. Notably, in the multiple-township annexation at issue in *Walsh*, the votes of each territory were considered separately. In essence, a single township could "veto" the annexation from taking place, no matter how many voters approved of the annexation in other townships. In contrast, in the

[6] This is consistent with principles espoused in past cases from this Court. See, e.g., *Robertson v Baxter*, 57 Mich 127, 129; 23 NW 711 (1885) ("No person not living in the township has any voice in its affairs.").

detachment procedure at issue in these cases, the voters in a township have no "veto" power. The wishes of an entire township could effectively be ignored because voters in other townships believe that a detachment would be in their best interests. The "package" proposal in *Walsh* is hardly analogous to the detachment proceedings at issue in these cases.

Our conclusion that a single detachment petition and a single vote on that petition may only encompass territory to be added to one township is in accord with the unambiguous statutory language. Thus, the Legislature is presumed to have intended the meaning expressed in the statute and judicial construction is not permissible.

Finally, a writ of mandamus could be properly issued in these cases only if plaintiffs proved that (1) they had a clear legal right to the performance of the specific duty that they sought to be compelled, and (2) the Secretary of State had a clear legal duty to perform the act. *In re MCI*, *supra* at 442-443. Because the Home Rule City Act does not allow a single detachment petition and a single vote on that petition to encompass territory to be detached from one city and added to more than one township, there was no clear legal right to have the Secretary of State authorize each petition for a single vote. Therefore, there was no clear legal duty that required the Secretary of State to act, and the writs of mandamus were properly denied in both cases before this Court.

IV. CONCLUSION

The Home Rule City Act, MCL 117.1 *et seq*., does not allow a single petition and a single vote to encompass detachment of territory from a city for the addition of that territory to multiple townships; thus, the Secre-

tary of State did not have a clear legal duty to act. Therefore, mandamus was not an appropriate remedy. Accordingly, the decisions of the Court of Appeals are affirmed.

TAYLOR, C.J., and WEAVER, KELLY, CORRIGAN, and MARKMAN, JJ., concurred with CAVANAGH, J.

YOUNG, J. (*concurring in part and dissenting in part*). We granted leave to appeal in these consolidated cases to determine whether (1) the Home Rule City Act (HRCA)[1] permits the use of a single detachment petition and election when the territory to be detached from a city is to be transferred to more than one township and, (2) if such a procedure is allowed under the HRCA, whether plaintiffs[2] are entitled to mandamus relief. I agree with the majority that plaintiffs are not entitled to writs of mandamus because I believe that any request for mandamus relief is premature at this time. I disagree, however, with the majority's conclusion that the HRCA does not permit the use of a single detachment petition and vote thereon when transferring land to multiple townships.

The Legislature was well aware of the political gamesmanship that occurs between municipalities in the context of boundary disputes. Indeed, our Constitution was changed to free the Legislature from this political quagmire.[3] By enacting the HRCA, the Legislature established a standardized procedure to effectuate such changes in a manner that it viewed as fair and

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[1] MCL 117.1 *et seq*.

[2] Unless otherwise indicated, "plaintiffs" will be used to refer collectively to the plaintiffs in both of the cases that were consolidated. Similarly, "defendants" will be used to refer to the defendants in both cases collectively, unless otherwise noted.

[3] See the discussion in part III(A)(1) of this opinion.

reasonable. A plain reading of *all* relevant language in the HRCA demonstrates that the use of a single detachment petition when transferring land to multiple townships is permitted. The Court of Appeals focused only on select text in the HRCA and thereby gave the statute a particular meaning that is insupportable when one considers *all* the language used by the Legislature in the HRCA. Its exercise in selective statutory interpretation not only undermines the Legislature's intent in passing the HRCA, but also injects the judiciary—armed only with ill-defined notions of "fairness" and "justice"—as a referee in the inherently political, contentious, and tactical process of altering municipal boundaries. The majority opinion, while avoiding explicit reliance on extra-textual policy justifications, does not, in my view, give full meaning to all the relevant words in the statute.

Accordingly, I respectfully dissent from the majority's conclusion that a single detachment petition involving multiple townships is not permitted under the HRCA. In *Casco Twp*, I would grant the plaintiffs' request for declaratory relief and deny their claim for a writ of mandamus. In *Fillmore Twp*, because the plaintiffs only sought a writ of mandamus, I would deny entirely their request for relief.

I. FACTS AND PROCEDURAL HISTORY

The majority fails to convey adequately the true character of the boundary disputes at issue. By glossing over much of the relevant history, the majority understates the inherently political and calculated nature of the disputes.[4]

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[4] Contrary to the majority's assertion, I do not contend that the factual background of these cases should alter the statutory analysis. *Ante* at 571 n 2. Instead, I simply point out that the majority opinion, in my view,

The land at issue in this case has a long, contentious history. In July 1996, intervening defendants, Walter and Patricia Winkle, filed a petition with the State Boundary Commission (SBC) seeking to annex to the city of Richmond approximately 157 acres of land that they and other residents owned in Casco Township and Columbus Township. The Winkles hoped to develop their land for commercial use, but believed that commercial development could not occur unless their property was connected to the water and sewer lines offered by the city of Richmond.

Before the Winkles' July 1996 petition, however, Columbus Township and neighboring Lenox Township had entered into an agreement pursuant to 1984 PA 425 to transfer land from Columbus Township to Lenox Township.[5] A similar 425 agreement was reached between Casco Township and Lenox Township. These 425 agreements were designed to prevent future annexations, such as the one initiated by the Winkles in July 1996. In November 1997, the SBC determined that the 425 agreements were invalid and decided instead to approve the annexation petition filed by the Winkles.[6] After protracted litigation, the SBC's decision was

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inadequately describes the true tactical and strategic character of these ongoing territorial disputes. Moreover, the lower courts clearly believed that the ability of villages and townships to use the HRCA to their advantage was unfair. Providing the full history of these territorial disputes helps to reveal the lower courts' policy views.

[5] 1984 PA 425 provides a detailed mechanism by which municipal entities may transfer land to one another by contract. MCL 124.21 *et seq*. Such intergovernmental transfers are commonly referred to as "425 agreements."

[6] A referendum is not required for an annexation if the territory to be affected includes one hundred or fewer residents. MCL 117.9(4).

eventually upheld by the Court of Appeals.[7] The Court of Appeals found that the 425 agreements between the townships of Columbus, Casco, and Lenox were "sham[s]" and "essentially an attempt to avoid annexation," and upheld the SBC's decision approving the annexation initiated by the Winkles.[8] In July 2001, this Court denied leave to appeal.[9]

In December 2001, plaintiffs filed a single detachment petition with the Secretary of State, seeking to transfer from the city of Richmond to Casco Township and Columbus Township the same land that was involved in the prior annexation.[10] The disputed territory consisted of approximately eighty-seven acres in Casco Township and seventy acres in Columbus Township.

Unsure whether the HRCA permitted the use of a single detachment petition to transfer land to multiple townships, the Secretary of State requested an official opinion from the Attorney General interpreting the

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[7] *Casco Twp v State Boundary Comm*, 243 Mich App 392; 622 NW2d 332 (2000).

[8] *Id*. at 402.

[9] 465 Mich 855 (2001).

[10] Under the HRCA, a detachment petition is normally submitted to the county for certification. MCL 117.6. However, if the territory to be affected is situated in more than one county, certification must be sought from the Secretary of State. At the time that plaintiffs filed their petitions, § 11 of the HRCA provided:

> When the territory to be affected by any proposed incorporation, consolidation or change is situated in more than 1 county the petition hereinbefore provided shall be addressed and presented to the secretary of state . . . . [MCL 117.11.]

Because the city of Richmond is located in both St. Clair County and Macomb County, the plaintiffs filed the detachment petition with the Secretary of State pursuant to § 11.

HRCA. Citing a pending lawsuit in Eaton County, Michigan, involving a factually similar dispute,[11] and the Attorney General's policy of declining to issue opinions that might affect ongoing litigation, the Attorney General refused to issue a formal opinion construing the HRCA. However, in a May 2002 memorandum to the Department of State, Bureau of Elections, the Attorney General's Office provided "informal advice" regarding the use of a single detachment petition. Recognizing that there were "no cases directly on point that specifically address the issue," the memorandum informed the Department of State that it was "reasonable to refuse to certify" the petition.[12] The Secretary of State subsequently notified the plaintiffs that she would not certify the detachment petition.

The following month, the plaintiffs filed a complaint in the Ingham Circuit Court, seeking declaratory and mandamus relief against the defendants. After holding a hearing, the circuit court denied the plaintiffs' request for mandamus relief, ruling that the HRCA was not "patently clear" regarding whether a single detachment petition may be used to transfer land to more than one township. The circuit court then dismissed the plaintiffs' lawsuit without having addressed their request for declaratory relief.

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[11] In *City of Eaton Rapids v Eaton Co Bd of Comm'rs* (Eaton Circuit Court, Docket No. 02-235-AZ 2002), residents of Eaton Rapids Township and Hamlin Township filed a single detachment petition to detach land from the city of Eaton Rapids. Unlike the present case, however, the territory involved in *Eaton Rapids* was situated in only one county, thus eliminating the need for involvement by the Secretary of State. In *Eaton Rapids*, the trial court *upheld* the use of a single detachment petition. The Court of Appeals subsequently denied leave to appeal in an unpublished order, entered April 16, 2002 (Docket No. 240215).

[12] Memorandum from the Attorney General's Office to the Department of State, Bureau of Elections (May 14, 2002).

The plaintiffs appealed to the Court of Appeals, claiming that the circuit court erred in denying their request for mandamus relief and in dismissing their lawsuit without deciding their request for declaratory relief. In divided opinions, the Court of Appeals affirmed the judgment of the circuit court.[13] The Court of Appeals majority held that the HRCA was ambiguous as to whether a single detachment petition was permitted. Given the ambiguity, the majority decided that it "must consider the object of the statute and apply a reasonable construction that is logical and best accomplishes the HRCA's purpose."[14]

Acknowledging that there was "no case law that directly addresse[d] the current situation,"[15] the majority concluded that it was "clearly unfair" to allow the use of a single detachment petition when transferring land to multiple townships.[16] Accordingly, the Court of Appeals denied the plaintiffs' request for mandamus relief. The Court of Appeals further held that the circuit court had "implicitly" denied the plaintiffs' request for declaratory relief and affirmed the circuit court's ruling denying declaratory relief.[17] The dissent disagreed with the majority's conclusion that the HRCA was ambiguous and noted that the plain text of the HRCA permitted the use of a single detachment petition to transfer land to multiple townships. We granted leave to appeal and consolidated the case with *Fillmore Twp v Secretary of State*.[18]

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[13] *Casco Twp v Secretary of State*, 261 Mich App 386; 682 NW2d 546 (2004).

[14] *Id*. at 392-393.

[15] *Id*. at 393.

[16] *Id*. at 394.

[17] *Id*. at 395.

[18] 471 Mich 890 (2004).

B. *FILLMORE TWP v SECRETARY OF STATE*

As with the territory involved in the companion case of *Casco Twp v Secretary of State*, the disputed territory in this case also has a complex history. In 1997, Fillmore Township and the city of Holland entered into a 425 agreement through which land in Fillmore Township was to be transferred to Holland. Pursuant to the referendum provision in 1984 PA 425, qualified electors in Fillmore Township filed a petition calling for a referendum on the 425 agreement with the city of Holland. The voters ultimately defeated the 425 agreement in the referendum.

Several months after the 425 agreement was defeated, in late 1998, landowners in Fillmore Township filed petitions with the SBC to annex approximately 1,100 acres to the city of Holland. The SBC approved the annexation, thereby transferring approximately 1,100 acres from Fillmore Township to Holland. Seeking to reverse the annexation effected by the SBC's decision, in February 2000, electors in Fillmore Township filed a petition with the Secretary of State to detach the land that was previously annexed. In August 2000, voters in Fillmore and Holland defeated the detachment proposal by a vote of 3,917 to 2,614.

In October 2002, the plaintiffs submitted a single detachment petition to the Secretary of State,[19] again hoping to detach from the city of Holland the territory that was previously annexed from Fillmore Township. In addition to the Fillmore Township-city of Holland detachment, however, the petition also included three smaller detachments by which land would be detached

[19] Certification by the Secretary of State was required under § 11 of the HRCA because the city of Holland is situated in both Ottawa County and Allegan County.

from the city of Holland and added to Laketown Township, Park Township, and Holland Charter Township. Because the HRCA provides that "the *whole* of each city, village, or township" to be affected by the detachment is entitled to vote,[20] by adding the additional three townships to the single detachment petition, the voting base for the detachment election was greatly expanded.

The following table summarizes the acreage to be transferred by the detachment and the number of voters that would be added to the voting base by including each additional township in the single detachment petition:[21]

Municipality	Acres To Be Received from the Detachment	Registered Voters (as of November 2002)
City of Holland	——	19,771
Fillmore Township	1,054	1,854
Laketown Township	0.77	4,166
Holland Charter Township	3.33	15,221
Park Township	1.27	11,989

Thus, by including the three additional townships and detaching only an extra 5.37 acres, the voting base of the district to be affected would be expanded by an additional 31,376 voters over what the voting base would be if only Fillmore Township and the city of Holland were involved.

In November 2002, the Secretary of State refused to certify the detachment petition, relying on the September 2002 decision by the circuit court disallowing the use of a single detachment petition in *Casco Twp*. In response to the Secretary of State's refusal to certify the petition, the plaintiffs filed an original mandamus action

[20] MCL 117.9 (emphasis added).

[21] See brief of city of Holland at 9-10.

in the Court of Appeals seeking to have the Court order the Secretary of State to certify the petition and schedule an election. The Court of Appeals ordered that the plaintiffs' case be held in abeyance pending its resolution of *Casco Twp*. In March 2004, the Court of Appeals issued its opinion in *Casco Twp*, affirming the circuit court's decision disallowing the use of a single detachment petition. Citing its opinion in *Casco Twp*, the Court of Appeals then denied the plaintiffs mandamus relief by order in May 2004.[22] We granted leave to appeal and consolidated the case with *Casco Twp v Secretary of State*.[23]

II. STANDARD OF REVIEW

Whether the HRCA permits the use of a single detachment petition to transfer land to multiple townships is a matter of statutory interpretation, which is a question of law that is reviewed by this Court de novo.[24] The constitutionality of the HRCA's detachment procedure is also a question of law that is subject to review de novo.[25] This Court reviews a lower court's decision regarding a request for mandamus relief for an abuse of discretion.[26]

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[22] *Fillmore Twp v Secretary of State*, unpublished order of the Court of Appeals, entered May 6, 2004 (Docket No. 245640).

[23] 471 Mich 890 (2004).

[24] *Mann v St Clair Co Rd Comm*, 470 Mich 347, 350; 681 NW2d 653 (2004); *Peden v Detroit*, 470 Mich 195, 200; 680 NW2d 857 (2004); *Gladych v New Family Homes, Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003); *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 373; 663 NW2d 436 (2003).

[25] *Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306, 317-318; 685 NW2d 221 (2004); *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004); *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003).

[26] *Baraga Co v State Tax Comm*, 466 Mich 264, 268-269; 645 NW2d 13 (2002); *In re MCI Telecom Complaint*, 460 Mich 396, 443; 596 NW2d 164 (1999).

III. ANALYSIS

A. THE HRCA AND THE SINGLE DETACHMENT PROCEDURE

1. HISTORY OF THE HRCA

The HRCA, enacted in 1909, is an intricate statute that has been amended in piecemeal fashion numerous times over the past century. Before the enactment of the HRCA, the Legislature directly enacted municipal boundary changes on a case-by-case basis through special legislation. Delegates to the 1907-1908 constitutional convention recognized the substantial burden this process imposed, as well as the confusion that resulted from hundreds of pieces of such special legislation. The convention's Address to the People stated:

> One of the greatest evils brought to the attention of the Convention was the abuse practiced under local and special legislation. The number of local and special bills passed by the last legislature was *four hundred fourteen*, not including joint and concurrent resolutions. The time devoted to the consideration of these measures and the time required in their passage through the two houses imposed a serious burden upon the state. This section [prohibiting the enactment of special acts when a general act can be made applicable], taken in connection with the increased powers of local self-government granted to cities and villages in the revision, seeks to effectively remedy such condition. . . . The evils of local and special legislation have grown to be almost intolerable, introducing uncertainty and confusion into the laws, and consuming the time and energy of the legislature which should be devoted to the consideration of measures of a general character. By eliminating this mass of legislation, the work of the legislature will be greatly simplified and improved.[27]

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[27] 2 Proceedings & Debates, Constitutional Convention 1907, pp 1422-1423 (emphasis in original). In their Address to the People,

Based on this overwhelming dissatisfaction with special legislation as a means to adjust municipal boundaries, delegates to the 1907-1908 constitutional convention debated whether to direct the Legislature to enact a general municipal boundary statute that would provide a framework for all future municipal boundary changes. The delegates proposed, and the people of Michigan eventually ratified, Const 1908, art 8, § 20, which provided:

> The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages . . . .

With art 8, § 20 as a constitutional mandate, the Legislature enacted the HRCA the following year in order to establish a comprehensive, standardized procedure for initiating and approving all changes to municipal boundaries, including incorporations, annexations, detachments, and consolidations.[28]

2. RELEVANT PROVISIONS OF THE HRCA

As the majority correctly notes, three provisions of the HRCA are directly relevant in the present case. The detachment process is specifically authorized by § 6 of the HRCA, which provides:

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the delegates were referring to Const 1908, art 5, § 30, which provided:

> The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act, excepting acts repealing local or special acts in effect January 1, 1909 and receiving a 2/3 vote of the legislature shall take effect until approved by a majority of the electors voting thereon in the district to be affected.

[28] The substance of Const 1908, art 8, § 20 was carried forward into our current Constitution as Const 1963, art 7, § 21.

> Cities may be incorporated *or territory detached therefrom* or added thereto, or consolidation made of 2 or more cities or villages into 1 city, or of a city and 1 or more villages into 1 city, or of 1 or more cities or villages together with additional territory not included within any incorporated city or village into 1 city, by proceedings originating by petition therefor signed by qualified electors who are freeholders residing within the cities, villages, or townships to be affected thereby . . . .[29]

However, because both the city of Richmond and the city of Holland are located in more than one county, rather than filing their detachment petitions with the county under § 6, plaintiffs in both cases were required to file their petitions with the Secretary of State pursuant to § 11 of the HRCA. At the time of the present lawsuits, § 11 provided:

> When the territory to be affected by any proposed incorporation, consolidation, or change is situated in more than 1 county the petition hereinbefore provided shall be addressed and presented to the secretary of state, with 1 or more affidavits attached thereto sworn to by 1 or more of the signers of said petition, showing that the statements contained in said petition are true, that each signature affixed thereto is the genuine signature of a qualified elector residing in a city, village, or township to be affected by the carrying out of the purposes of the petition and that not less than 25 of such signers reside in each city, village or township to be affected thereby. The secretary of state shall examine such petition and the affidavit or affidavits annexed, and if he shall find that the same conforms to the provisions of this act he shall so certify, and transmit a certified copy of said petition and the accompanying affidavit or affidavits to the clerk of *each* city, village or township to be affected by the carrying out of the purposes of such petition, together with his certificate as above provided, and a notice directing that at the next general election occurring not less than 40

[29] MCL 117.6 (emphasis added).

> days thereafter the question of making the incorporation, consolidation or change of boundaries petitioned for shall be submitted to the electors of *the district to be affected*, and if no general election is to be held within 90 days the resolution may fix a date preceding the next general election for a special election on the question. If he shall find that said petition and the affidavit or affidavits annexed thereto do not conform to the provisions of this act he shall certify to that fact, and return said petition and affidavits to the person from whom they were received, together with such certificate. The *several* city, village and township clerks who shall receive from the secretary of state the copies and certificates above provided for shall give notice of the election to be held on the question of making the proposed incorporation, consolidation or change of boundaries as provided for in section 10 of this act.[30]

Lastly, the phrase "district to be affected," as used in § 11, is defined by § 9 of the HRCA:

> The district to be affected by the proposed incorporation, consolidation, or change of boundaries is considered to include the whole of *each* city, village, or township from which territory is to be taken or to which territory is to be annexed.[31]

3. PRINCIPLES OF STATUTORY INTERPRETATION

When interpreting a statute, a court's duty is to give effect to the intent of the Legislature based on the actual words used in the statute.[32] If the statutory language is clear and unambiguous, no further con-

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[30] MCL 117.11 (emphasis added). Effective January 1, 2005, § 11 was amended. None of the amendments is material to the resolution of the present cases.

[31] MCL 117.9(1) (emphasis added).

[32] *Shinholster v Annapolis Hosp*, 471 Mich 540, 548-549; 685 NW2d 275 (2004).

struction is necessary or permitted.[33] The statute is enforced as written.[34] It is the duty of the judiciary to interpret, not write, the law.[35]

In *Lansing Mayor v Pub Service Comm*, this Court repudiated prior case law that held that a statute is ambiguous if it is susceptible to more than one meaning or if "reasonable minds can differ" regarding the statute's meaning.[36] Instead, as this Court stated in *Lansing Mayor*, a statutory provision is ambiguous only if it " 'irreconcilably conflict[s]' with another provision, or when it is *equally* susceptible to more than a single meaning."[37] In ascertaining whether an ambiguity exists, therefore, a court must employ conventional rules of construction and "give effect to every word, phrase, and clause in a statute."[38]

4. THE PLAIN TEXT OF THE HRCA PERMITS THE USE OF A SINGLE DETACHMENT PETITION TO TRANSFER LAND TO MULTIPLE TOWNSHIPS

At its core, the Court of Appeals opinion in *Casco Twp* represents a deliberate decision to subordinate the actual text of the HRCA in favor of the Court of Appeals' own abstract notions of fairness and justice. By choosing to give meaning to only *some* of the words

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[33] *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 157; 680 NW2d 840 (2004); *In re MCI*, *supra* at 411.

[34] *Stanton v Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002); *Huggett v Dep't of Natural Resources*, 464 Mich 711, 717; 629 NW2d 915 (2001); *Anzaldua v Band*, 457 Mich 530, 535; 578 NW2d 306 (1998); *Sanders v Delton Kellogg Schools*, 453 Mich 483, 487; 556 NW2d 467 (1996).

[35] *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

[36] *Lansing Mayor, supra* at 165.

[37] *Id*. at 166 (emphasis in original; citation omitted).

[38] *Id*. at 165, 168; *Koontz*, *supra* at 312.

in the HRCA and ignoring others, the Court of Appeals substituted its conception of "fairness" for the policy determination made by the Legislature in writing the HRCA.[39] While this à la carte method of statutory interpretation that focuses only on certain words in a statute is extraordinarily effective at allowing a court to reach a conclusion that it views as "fair" or "just," it is an affront to the separation of powers principle. As this Court has stated numerous times, it is the duty of the judiciary to effectuate the intent of the Legislature by giving effect to *every* "word, phrase, and clause in a statute."[40]

A close analysis of the text of the HRCA demonstrates that the statute is not ambiguous and that a single detachment petition may be used to detach land from a city and add it to multiple townships. Although the majority focuses extensively on § 9 of the HRCA,[41] the majority notably fails to give full effect to the Legislature's use of the word "each" in § 9.

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[39] The Court of Appeals opinion is replete with references to "fairness," "injustice," "prejudice," and "absurd results." *Casco Twp*, *supra*, 261 Mich App at 391, 394. The Court of Appeals stated, "In simple terms, it is clearly unfair that citizens of one township be allowed to vote on issues that affect another township. Indeed, the townships' combined voting strength could be used to overwhelm the city's voting strength." *Id*. at 394.

Appellees also rely on vague notions of "fairness" and "justice" in support of their position. See Winkle brief at 17 (permitting a multiple-township detachment would lead to "absurd results which create injustice"); Secretary of State brief at 35 (" '[p]ublic policy requires that statutes controlling the manner in which elections are conducted be construed as fair as possible' "); City of Holland brief at 20 (a multiple-township detachment is "one of the most egregious examples of . . . inherent mischief").

[40] *Lansing Mayor*, *supra* at 168; *Koontz*, *supra* at 312; *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

[41] *Ante* at 573.

The section of the HRCA under which plaintiffs filed their petitions, § 11, provides that "the question of making the incorporation, consolidation or change of boundaries petitioned for, shall be submitted to the electors of *the district to be affected* . . . ."[42] Under § 9, the HRCA defines "the district to be affected" as "includ[ing] the whole of *each* city, village, or township from which territory is to be taken or to which territory is to be annexed."[43] By defining "the district to be affected" as including the whole of "each" city, village, or township, the Legislature contemplated that "the district to be affected" could include *multiple* townships in a detachment proceeding.

The word "each" is not defined in the HRCA. Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless, of course, the undefined word is a term of art.[44] Because "each" is not a term of art, this Court must therefore give the word its plain meaning. As this Court stated in *Horace v City of Pontiac*,[45] "[w]hen considering a nonlegal word or phrase that is not defined within a statute,

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[42] MCL 117.11 (emphasis added).

[43] MCL 117.9 (emphasis added).

[44] MCL 8.3a provides:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

See also *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 18; 651 NW2d 356 (2002); *Koontz*, *supra* at 312; *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-249; 596 NW2d 574 (1999).

[45] 456 Mich 744; 575 NW2d 762 (1998).

resort to a layman's dictionary . . . is appropriate."[46] Moreover, it is appropriate to use a dictionary from the period contemporaneous to the statute's enactment in order to give full effect to the intent of the Legislature that enacted the statute.[47]

Although the HRCA has been amended frequently over the past century, the relevant provisions of §§ 9 and 11 have remained unchanged in the HRCA since 1909, the year the HRCA was originally enacted. The word "each" is defined by *The New American Encyclopedic Dictionary* as "*every* one of a number considered separately, *all*."[48] *The Century Dictionary* defines "each" as "Being either or any unit of a numerical aggregate consisting of two *or more,* indefinitely."[49] *Funk & Wagnalls New Standard Dictionary of the English Language* defines "each" as "Being one of two *or more* . . . *Every* one of any number or aggregation. . . ."[50]

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[46] *Id*. at 756; see also *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004); *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002); *Stokes v Millen Roofing Co*, 466 Mich 660, 665; 649 NW2d 371 (2002); *Robinson v Detroit*, 462 Mich 439, 456 n 13; 613 NW2d 307 (2000); *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 163; 596 NW2d 126 (1999).

[47] *Cain v Waste Management, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005); see also *Title Office, Inc v Van Buren Co Treasurer*, 469 Mich 516, 522; 676 NW2d 207 (2004). Writing for the Court in *Title Office*, Justice CAVANAGH noted that, in construing the word "transcript" in the 1895 Transcripts and Abstracts of Records Act (TARA), it was proper for the Court to consult a dictionary in use "[*a*]*t the time of enactment* of [the] TARA." *Id*. (emphasis added).

[48] *The New American Encyclopedic Dictionary*, p 1575 (1907) (emphasis added).

[49] *The Century Dictionary: An Encyclopedic Lexicon of the English Language*, p 1813 (1906) (emphasis added).

[50] *Funk & Wagnalls New Standard Dictionary of the English Language*, p 779 (1913) (emphasis added).

It is clear, therefore, that the word "each," as used in 1909, means "all" and "every," and plainly encompasses *multiple* entities. Indeed, by using "each" in § 9, the Legislature effectively said, as a definitional matter, that "the district to be affected" is to be comprised of "all" or "every" city, village, or township affected by the boundary change. The "district" is not limited to a predetermined number, but rather includes *every* municipal entity from which territory is to be taken or to which territory is to be added. Thus, while "the district to be affected" can certainly contain just two municipal entities, it can also include *more than* two entities.[51]

Defendants argue that the Legislature's use of the word "each" is not determinative because, by using "each," the Legislature was simply referring to the two municipal entities that necessarily must be involved in any detachment proceeding: the city that will lose the land and the township that will gain the land.[52] Defendants' argument is unpersuasive. Had the Legislature intended "each" to refer only to the two sides involved in a typical detachment proceeding—the donor city and the recipient township—and not to multiple recipient townships, the Legislature would have used the word "both," not "each."[53] The Legislature, however, did not

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[51] The Legislature's use of the word "each" was not limited solely to § 9 and the definition of "the district to be affected." For example, the same provision under which plaintiffs filed their petitions, § 11, directly states that the Secretary of State shall transmit a certified copy of the petition to "*each* city, village or township to be affected by the carrying out of the purposes of such petition . . . ." MCL 117.11 (emphasis added).

[52] The majority makes a similar, though more general, argument. It notes that a reading of the HRCA "contrary" to its own "belies the fact that there will *always* be two parties to a detachment—the city and the township." *Ante* at 576 (emphasis in original). Conspicuously, the majority neglects to give meaning to the Legislature's use of the word "each."

[53] *The New American Encyclopedic Dictionary*, p 580 (1907) defines "both" as "*two* taken together" and *The Century Dictionary: An Ency-*

limit "the district to be affected" to only two municipal entities by using the word "both." Instead, it deliberately used the distributive adjective "each," thereby referring to *every* municipality affected. It is only by assuming that "each" refers exclusively to the donor and recipient municipalities in a *conventional* detachment proceeding that the majority position may be sustained. There is no textual basis for making this assumption or otherwise limiting the customary meaning of "each."[54]

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clopedic Lexicon of the English Language, p 636 (1906) defines "both" as "The one and the other; *the two*; the pair or the couple, in reference to *two* persons or things . . . ."

[54] Further examination of the text of § 11 demonstrates that a single detachment petition may be used to transfer land to multiple townships. For example, § 11 states, "The *several* city, village and township clerks who shall receive from the secretary of state the copies and certificates above provided shall give notice of the election to be held . . . ." The word "several" is defined by *The New American Encyclopedic Dictionary* (1907) as "Consisting of a number; *more than two*." The use of "several," therefore, also indicates that the Legislature envisioned a situation under which a single detachment petition could be used to transfer land to *multiple* townships. While it is true that "several" can also mean "separate" or "individual"—e.g., "they go their *several* ways"—such a meaning exists only in the context of a *plurality*. "Several" only indicates "individual" or "separate" if there is a larger collective whole to begin with.

At oral argument, defense counsel conceded that the word "several," as used in the HRCA, means "more than a couple."

> *Justice YOUNG*: I'm asking you to look at section 11 that refers near the end: "The several city, village and township clerks who shall receive from the Secretary of State copies of the certificates." I'm looking at the term "several" there. Does that not indicate at least the potential for multiple—
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> *Counsel*: Well again we go to kind of the dictionary look at the definition and "several" can mean one individual.
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> *Justice YOUNG*: Really?
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> *Counsel*: I'm sorry, you're talking about a city, village or –

This construction of the HRCA is bolstered by the fact that, throughout § 11, the words "petition" and "election" are used in the singular even though the words "each" and "several" are used in the same sentences when modifying "city, village or township." For example, § 11 states that the Secretary of State must transmit "a certified copy of said *petition* . . . to the clerk of *each* city, village or township to be affected by the carrying out of the purposes of such *petition* . . . ."[55] Section 11 further provides that "[t]he *several* city, village and township clerks . . . shall give notice of *the election* to be held . . . ."[56] While it is true that MCL 8.3b states that, in construing statutes, "[e]very word importing the singular number only may extend to and embrace the plural number," it is important to remember that MCL 8.3b is *permissive*, not mandatory. MCL 8.3b states only that the singular "may" extend to the plural.

This Court addressed MCL 8.3b in *Robinson,* in which we construed the phrase "*the* proximate cause" within the context of the governmental immunity statute.[57] As we noted in *Robinson*, MCL 8.3b "only states

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Justice YOUNG: Doesn't "several" mean more than a couple?

Counsel: Yes.

[55] MCL 117.11 (emphasis added). The word "petition" is used in the singular three other times in § 11:

> The secretary of state shall examine such *petition* and the affidavit or affidavits annexed . . . . If he shall find that said *petition* and the affidavit or affidavits annexed thereto do not conform to the provisions of this act he shall certify to that fact, and return said *petition* and affidavits to the person from whom they were received . . . . [*Id*. (emphasis added).]

[56] *Id*. (emphasis added).

[57] MCL 691.1407(2) provides:

that a word importing the singular number 'may extend' to the plural. The statute does not say that such an automatic understanding is required."[58] We went on to hold that MCL 8.3 "provides that the rule stated in § 3b shall be observed 'unless such construction would be inconsistent with the manifest intent of the Legislature.' "[59] This Court concluded that because the Legislature chose to use the definite article "the" within the phrase "the proximate cause," it "clearly evince[d] an intent to focus on *one* cause."[60]

The same is true in the present case. In § 11, the Legislature consistently referred to "petition" in the singular and used the phrase "*the* election." There is no principled basis by which to say that "the" means "one" in *Robinson*, but "the" does not mean "one" when referring to "*the* election" mandated by § 11.

Taken together, all of these textual clues demonstrate that the HRCA permits the use of a *single* detachment petition and election when transferring land to more than one township. Unlike the majority,

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> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
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> * * *
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is *the proximate cause* of the injury or damage. [Emphasis added.]

[58] *Robinson*, *supra* at 461 n 18.

[59] *Id*.

[60] *Id*. at 458-459 (emphasis added).

which focuses only on select words in the HRCA, I believe that this Court is obligated to give effect to *every* word the Legislature used in writing the HRCA. I would hold, therefore, that the Court of Appeals erred in finding that the HRCA is ambiguous. No provision of the HRCA conflicts, irreconcilably or otherwise, with any other provision of the HRCA. Nor is the HRCA *equally* susceptible to more than a single meaning. A plain reading of §§ 9 and 11 demonstrates that the procedure used by plaintiffs in the present cases is permissible under the HRCA.

The majority casually dismisses this Court's decision in *Walsh v Secretary of State,*[61] which explicitly recognized and permitted a single petition for a multiple–municipality annexation under the HRCA. In *Walsh*, we examined §§ 9 and 11 of the HRCA. The case involved an annexation by the city of Lansing in which it sought to acquire four parcels of land from Lansing Township and one parcel situated in both Lansing Township and Delta Township. A *single* petition was filed with the Secretary of State for this multiple-township annexation. Although voters in the city of Lansing and Lansing Township approved the annexation, voters in Delta Township did not.

The plaintiffs in *Walsh* argued that the annexation attempt was divisible and that we should approve the annexation of the parcels in Lansing Township, given that the Lansing Township voters approved the annexation. This Court disagreed. We held that the annexation was a "package proposition" and that, under the vote tabulation provisions of § 9 in effect at the time, if any one of the "voting units" voted against the proposal, the whole proposal failed.[62]

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[61] 355 Mich 570; 95 NW2d 511 (1959).

[62] *Id.* at 574.

While it is true that *Walsh* involved an analogous annexation rather than a detachment, and that the primary focus in *Walsh* was on the vote tabulation provisions of the HRCA, not the definition of "district to be affected," this Court accepted the use of a single "package" petition even though the land that was to be annexed consisted of five distinct parcels in two separate townships. Accordingly, the single petition procedure used by plaintiffs in the present cases is not "novel" as defendants contend. Indeed, as *Walsh* demonstrates, this Court's own case law has countenanced the use of such a procedure under the HRCA in the closely analogous annexation context.

5. THE MAJORITY'S RELIANCE ON THE HRCA'S "QUALIFIED ELECTOR" REQUIREMENT AND THE ELECTION CODE IS MISPLACED

The majority bases its holding primarily on the "qualified elector" requirement in §§ 6 and 11 of the HRCA.[63] Section 6 provides that detachment proceedings must be initiated by

> proceedings originating by petition therefor signed by *qualified electors* who are freeholders residing within the cities, villages, or townships to be affected thereby . . . .[64]

Section 11 requires affidavits showing that

> each signature affixed [to the petition] is the genuine signature of a *qualified elector* residing in *a* city, village or township *to be affected* by the carrying out of the purposes of the petition and that not less than 25 of such signers reside in *each* city, village or township to be affected thereby.[65]

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[63] *Ante* at 572.

[64] MCL 117.6 (emphasis added).

[65] MCL 117.11 (emphasis added).

The majority concludes that any multiple-township petition always violates the "qualified elector" rule because a signatory who is a qualified elector of township A is obviously not a qualified elector of township B, in that the signatory is not a resident of the territory "to be affected" in township B.

The majority's analysis is flawed. The "qualified elector" provision of § 11 merely requires that each signatory be a qualified elector of "a" city, village, or township affected by the detachment and that there be at least twenty-five signatures from "each" municipality affected. It is uncontested in the present cases that at least twenty-five qualified electors from *each* city and township involved signed the petitions.[66] What the majority's argument is actually advancing is the unstated predicate point that the "district to be affected" cannot encompass more than one township. However, because the Legislature has permitted the "district to be affected" to include multiple townships, as the textual analysis above and the *Walsh* case demonstrate, then every township that is bundled into the single petition is necessarily "affected" within the meaning of the "qualified voter" provision in § 11.[67]

The majority's reliance on § 643a in the Michigan Election Law, MCL 168.643a, is also misplaced.[68]

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[66] Similarly, § 6 simply requires that the signatories be qualified electors of "the citie*s*, village*s*, or township*s* to be affected thereby." The Legislature conspicuously referred to the municipalities in the plural.

[67] The majority also relies on MCL 117.13, which states, "Territory detached from any city shall thereupon become a part of the township or village from which it was originally taken . . . ." *Ante* at 574. Contrary to the majority's assertion, this language does not prohibit the use of a single detachment petition involving multiple townships. It merely delineates which municipality will control the territory after the detachment is effectuated. The language of § 13 applies with equal force if multiple townships are involved in a single detachment proceeding.

[68] *Ante* at 575.

While it is true that § 643a requires electoral questions to be submitted to voters in a "yes or no" format, there is no reason why a single detachment petition and referendum involving multiple townships violates this requirement. Indeed, that was the exact situation in *Walsh*, which held that the multiple-township annexation was a "package" proposition and not divisible.

In fact, the precise case that the majority cites for its § 643a rationale–*Muskegon Pub Schools v Vander Laan*[69]–involved a multiple-issue proposal that was put to the voters in a single "yes or no" format and *upheld* by this Court. In *Vander Laan*, a school district bundled bonding proposals for three separate school buildings into a single question to be submitted to the voters. This Court *unanimously* approved the use of the multiple-issue proposal.[70] Although the *Vander Laan* Court acknowledged the rule established in other jurisdictions that "[s]eparate subjects, separate purposes, or independent propositions should not be combined [in a single electoral question] so that one may gather votes for the other," it noted that there was no statutory basis for the rule in Michigan.[71] Nevertheless, the *Vander Laan* Court still imposed a "separate subjects" rule and ultimately *upheld* the multiple-issue proposal because it "was characterized by one common purpose . . . ."[72]

I question the majority's reliance on *Vander Laan* when the *Vander Laan* Court itself noted that there was no statutory basis for the "separate subjects" electoral rule that it recognized. Rather than rely on a judicially created rule that was premised on policy concerns in an unrelated area, I prefer to base my analysis of the

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[69] 211 Mich 85; 178 NW 424 (1920).

[70] *Id*. at 88-89.

[71] *Id*. at 87.

[72] *Id*. at 88.

multiple-township detachment procedure on the actual text of the HRCA. However, to the extent that *Vander Laan*—a case that did not even involve the HRCA—is controlling in the present cases, I believe that the multiple-township detachments are in accord with its holding because the detachments are united by a "common purpose."

6. DEFENDANTS' REMAINING ARGUMENTS

Defendants argue that to construe the HRCA so as to permit a single, multiple-township petition would lead to "absurd results." However, in *People v McIntire*,[73] this Court rejected the absurd results "rule" of construction, noting that its invocation is usually " 'an invitation to judicial lawmaking.' "[74] It is not the role of this Court to rewrite the law so that its resulting policy is more "logical," or perhaps palatable, to a particular party or the Court. It is our constitutional role to give effect to the intent of the Legislature by enforcing the statute *as written*.[75] What defendants in these cases (or any other case) may view as "absurd" reflects an actual policy choice adopted by a majority of the Legislature and approved by the Governor. If defendants prefer an alternative policy choice, the proper forum is the Legislature, not this Court. After all, the Legislature has shown little reluctance in amending the HRCA over the past century.

The defendants in *Fillmore Twp* also argue that if the detachment of 1.27 acres from the city of Holland

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[73] 461 Mich 147; 599 NW2d 102 (1999).

[74] *McIntire, supra* at 156 n 2, quoting Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p 21.

[75] See *People v Javens*, 469 Mich 1032, 1033 (2004) (YOUNG, J., concurring). The exception, of course, is if the statute is unconstitutional.

for addition to Park Township is permitted, it would violate the "contiguity" rule articulated by this Court in *Genesee Twp v Genesee Co*,[76] a case involving an annexation of land from Genesee Township to the city of Mt. Morris. In *Genesee Twp*, this Court stated:

> "So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. Contiguity is generally required even in the absence of statutory requirement to that effect, and where the annexation is left in the discretion of a judicial tribunal, contiguity will be required as a matter of law."[77]

Recognizing that the requirement of contiguity was not "covered by any specific provision of the [HRCA]," the Court in *Genesee Twp* instead based its holding on non-textual policy grounds: "the purpose sought to be served [by the HRCA] and the practical aspects of annexation . . . ."[78]

However, this Court revisited the contiguity rule eight years later in *Owosso Twp v City of Owosso*.[79] We specifically stated in *Owosso* that "the judicial requirement of 'contiguity' " articulated in *Genesee Twp* had been "superseded" when the Legislature amended § 9 of the HRCA in 1970.[80] We found that the "substantive standards" established by the Legislature when it amended § 9 clearly displaced the court-made contiguity rule.[81] Defendants in the present cases would appar-

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[76] 369 Mich 592; 120 NW2d 759 (1963).

[77] *Id*. at 603, quoting 37 Am Jur, Municipal Corporations, § 27, pp 644-645.

[78] *Id*. at 602.

[79] 385 Mich 587; 189 NW2d 421 (1971).

[80] *Id*. at 588-590.

[81] *Id*. at 590. The Court of Appeals elaborated on this point in *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 34; 654 NW2d 610 (2002).

ently have this Court ignore the legislative intent of § 9 and resuscitate the judicially created contiguity rule in the HRCA context. I would decline the invitation.

7. CONSTITUTIONALITY OF THE HRCA

Because I believe that the HRCA permits the use of a single detachment petition involving multiple townships, it is necessary to determine whether the HRCA's authorization of such a procedure is constitutional. Defendants, particularly those in *Fillmore Twp*, contend that bundling numerous townships into a single petition and referendum unconstitutionally dilutes the vote of city residents.[82] Defendants argue that such vote dilution is prohibited under the Equal Protection Clause of US Const, Am XIV.[83]

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[82] It is worth noting that these consolidated cases do not involve any allegations of discrimination, or the impairment of voting rights, on the basis of race or any other suspect classification. See, e.g., Gerken, *Understanding the right to an undiluted vote*, 114 Harv L R 1663 (2001). The sole issue of contention here is one of pure numerical vote dilution. Defendants claim that *too many* township voters would be included in the voting base if these referenda are allowed to proceed, to the extent that city voters would no longer have a *meaningful* vote.

[83] While defendants allege violations of both the federal and state equal protection clauses, they base their vote dilution argument almost entirely on federal case law. They cite no Michigan cases analyzing vote dilution under Const 1963, art 1, § 2. Instead, defendants simply state in their brief that "Michigan courts interpret the state equal protection clause similarly to the Fourteenth Amendment." City of Holland brief at 39.

It is important to note that the text of our state Equal Protection Clause is not entirely the same as its federal counterpart:

US Const, Am XIV provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*. [Emphasis added.]

Given the facts surrounding defendants' vote dilution claim, it is easy to understand their argument. As discussed in part I(B) of this opinion, it is obvious, for example, that the plaintiffs in *Fillmore Twp* deliberately included the three additional townships—Laketown, Holland Charter, and Park—as a means to equalize the voting disparity between the city of Holland and Fillmore Township. In the initial August 2000

Const 1963, art 1, § 2 provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

See also *Lind v Battle Creek*, 470 Mich 230, 234-235; 681 NW2d 334 (2004) (YOUNG, J., concurring).

Therefore, it is insufficient for defendants to rely solely on federal case law regarding vote dilution, or Michigan cases interpreting the *federal* Equal Protection Clause, and then boldly announce that Const 1963, art 1, § 2 provides the same protections against vote dilution as US Const, Am XIV.

Because defendants have failed to address vote dilution directly under Const 1963, art 1, § 2, I decline to examine the issue. As this Court stated in *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959):

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.

Moreover, the constitutional provision upon which defendants base their argument, Const 1963, art 1, § 2, was not relied on by the Court of Appeals. It was Const 1963, art 1, § 1 that the Court of Appeals referenced in its opinion. *Casco Twp*, *supra*, 261 Mich App at 394 n 27.

Accordingly, I analyze defendants' vote dilution argument solely under US Const, Am XIV—the issue that was fully briefed by the parties.

detachment vote that included only the city of Holland and Fillmore Township, voters rejected the detachment by a vote of 3,917 to 2,614 (approximately sixty percent against, forty percent in favor). Recognizing that the number of voters in the city of Holland exceeded the number of voters in Fillmore Township by 19,771 to 1,854, almost a 10.7 to 1 margin, the plaintiffs bundled the three additional townships into the petition by seeking to detach an additional 5.37 acres (0.77 acres for Laketown Township, 3.33 acres for Holland Charter Township, and 1.27 acres for Park Township). By doing so, the plaintiffs were able to add an additional 31,376 township voters to the voting base of the "district to be affected" and thereby exceed the voting base of the city of Holland. In order to evaluate defendants' claims of unconstitutional vote dilution—an issue on which Michigan courts have been relatively silent—it is necessary to explore briefly the history of federal vote dilution law under the Equal Protection Clause of the Fourteenth Amendment.[84]

The idea of "vote dilution"[85] as a cognizable constitutional harm originated in the context of congressional

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[84] As an initial matter, it is important to note that the state action requirement under Fourteenth Amendment jurisprudence is satisfied here. Although the detachment petitions in both cases were circulated and signed by private citizens, the involvement of the Secretary of State in certifying the petitions and ordering local authorities to hold elections is sufficient to constitute state action. See, e.g., *Ellison v Garbarino*, 48 F3d 192, 195 (CA 6, 1995) ("running elections" is a "typical example[ ]" of state action).

[85] Professor Melvyn R. Durchslag has noted:

> Voter dilution cases fall into two broad categories. First, there are those in which dilution occurs because (1) some persons are given votes weighted more heavily than others similarly situated merely on the basis of residence, (2) votes are weighted according to a factor which the state determines is reflective of "interest," or (3) persons are excluded altogether from voting because the state

and state legislative apportionment cases. Initially, courts refused to get involved in claims regarding vote dilution. The issue was viewed as best left for the political process and considered nonjusticiable. The leading case establishing this view was the United States Supreme Court's decision in *Colegrove v Green*,[86] in which voters challenged the Illinois congressional districting scheme because several of the districts were comprised of larger populations than others. Stating that the harm was one to "Illinois as a polity" and not a private wrong, the Court refused to intervene.[87] In rejecting the notion that the Court should get involved in what it viewed as a political question, Justice Frankfurter wrote that "[c]ourts ought not to enter this political thicket."[88] He went on to note:

> The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. . . . The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.[89]

However, approximately fifteen years after *Colegrove*, the Supreme Court reversed course in the landmark case of *Baker v Carr*.[90] In *Baker*, the Court was

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deems them to be "uninterested." Second, there are those in which dilution occurs because equal franchise is *granted* to persons allegedly without interest, or with significantly less interest than other voters. [Durchslag, Salyer, Ball, and Holt: *Reappraising the right to vote in terms of political "interest" and vote dilution*, 33 Case W Res L R 1, 38-39 (1982) (emphasis in original).]

[86] 328 US 549; 66 S Ct 1198; 90 L Ed 1432 (1946).

[87] *Id*. at 552.

[88] *Id*. at 556.

[89] *Id*.

[90] 369 US 186; 82 S Ct 691; 7 L Ed 2d 663 (1962).

presented with a constitutional challenge to the apportionment of the Tennessee General Assembly. Despite significant demographic shifts that occurred within Tennessee, the state had not reapportioned its legislative districts in over sixty years. Voters filed suit and claimed that, in light of the drastic change in population, the state's failure to reapportion the General Assembly amounted to a violation of their equal protection rights under the Fourteenth Amendment.

The Court rejected the "political question" rationale used in *Colegrove* and held that the issue presented by the voters was justiciable. Justice Brennan, writing for the Court, stated that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."[91] The Court went on to hold that the Equal Protection Clause provided a proper vehicle by which to challenge the Tennessee apportionment system.[92] In its sweeping holding, the Court did not

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[91] *Id*. at 209.

[92] *Id*. at 237. Commentators have questioned the Supreme Court's reliance on the Equal Protection Clause in *Baker*, suggesting, instead, that the Republican Form of Government Clause, US Const, art IV, § 4, would have been more appropriate. As Judge Michael W. McConnell has written:

> A districting scheme so malapportioned that a minority faction is in complete control, without regard to democratic sentiment, violates the basic norms of republican government. It would thus appear to raise a constitutional question under Article IV, Section 4, which states that "the United States shall guarantee to every State in this Union a Republican Form of Government." Constitutional standards under the Republican Form of Government Clause are ill-developed, but surely a government is not "republican" if a minority faction maintains control, and the majority has no means of overturning it. [McConnell, *The redistricting cases: Original mistakes and current consequences*, 24 Harv J L & Pub Policy 103, 105-106 (2000).]

Professor Pamela S. Karlan has noted:

provide any guidelines regarding how the Equal Protection Clause should be applied to voting rights cases nor establish any standards by which to implement the new role for the judiciary in such cases. Instead, the Court simply stated, "Nor need the [voters challenging the apportionment], in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar . . . ."[93]

> [T]he doctrinal move to one person, one vote was in no sense compelled, either by precedent or by the absence of any alternative avenues to judicial oversight. The decision to rely on the Equal Protection Clause, rather than on the Guaranty Clause, has always puzzled me. Justice William Brennan's explanation—that there was precedent suggesting the general nonjusticiability of the Guaranty Clause—would make more sense if not for the fact that there was also absolutely square precedent refusing to entertain malapportionment claims under the Fourteenth Amendment [citing *Colegrove*]. If the Court had to overrule some precedent to review apportionment and the refusal to reapportion, then why was overruling Fourteenth Amendment precedent—and developing a unique set of equal protection principles that apply nowhere else in constitutional law—the superior alternative? [Karlan, *Politics by other means*, 85 Va L R 1697, 1717-1718 (1999).]

[93] *Baker*, *supra* at 226. In dissent, Justice Frankfurter sharply criticized the Court for casting aside the "political question" rationale of *Colegrove*. He challenged the majority's conclusion that courts were equipped to handle such voting rights cases. Justice Frankfurter stated:

> The Framers carefully and with deliberate forethought refused . . . to enthrone the judiciary. In this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. . . .
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> * * *
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> Unless judges, the judges of this Court, are to make their private views of political wisdom the measure of the Constitution —views which in all honesty cannot but give the appearance, if not

With *Baker* creating the opening, courts soon began to wade head-high into the thicket of vote dilution claims. Two years after *Baker*, the Supreme Court decided *Wesberry v Sanders*[94] and *Reynolds v Sims*,[95] which established, as a fundamental tenet of equal protection jurisprudence, the "one-person, one-vote" standard for congressional districts and state legislative districts, respectively. In *Reynolds*, the Court stated that "the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."[96]

The Court later made the one-person, one-vote standard applicable to local governments in *Avery v Midland Co*.[97] In *Avery*, the Court invalidated the apportionment system for the Commissioners Court of Midland County, Texas, because it consisted of "single-member districts of substantially unequal population," which favored rural voters over city voters.[98] The Court reasoned that, because the Commissioners Court exercised "general governmental powers"[99] and its actions

> reflect the reality, of involvement with the business of partisan politics so inescapably a part of apportionment controversies—the Fourteenth Amendment, "itself a historical product," provides no guide for judicial oversight of the representation problem. [*Id*. at 270, 301-302 (citation omitted).]

[94] 376 US 1; 84 S Ct 526; 11 L Ed 2d 481 (1964).

[95] 377 US 533; 84 S Ct 1362; 12 L Ed 2d 506 (1964).

[96] *Id*. at 579.

[97] 390 US 474; 88 S Ct 1114; 20 L Ed 2d 45 (1968).

[98] *Id*. at 475-476.

[99] *Id*. at 476, 484-485. Under Texas law, the Commissioners Court possessed wide-ranging powers, including the authority to appoint officials and fill vacancies in county offices, contract on behalf of the county, build roads, administer welfare programs, run elections, issue bonds, set tax rates, and adopt the county budget. *Id*. at 476.

had a "broad range of impacts on all the citizens of the county,"[100] the one-person, one vote standard should apply.[101]

As *Wesberry*, *Reynolds*, *Avery*, and their progeny demonstrate, the one-person, one-vote standard has become a well-established principle in equal protection jurisprudence. At the same time, two notable exceptions to the one-person, one-vote rule are just as firmly entrenched in equal protection analysis. The first involves so-called "special purpose districts." Under this exception, electoral districts that serve a specialized purpose, such as a water storage district, are exempt from strict scrutiny and the rigid one-person, one-vote standard because they perform functions that " 'so disproportionately affect different groups that a popular election' " is not warranted.[102]

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[100] *Id*. at 483.

[101] *Id*. at 484-485. After *Avery*, the Supreme Court struck down numerous other local voting arrangements. See *Kramer v Union Free School Dist No 15*, 395 US 621; 89 S Ct 1886; 23 L Ed 2d 583 (1969) (invalidating a New York law that restricted voting in school district elections to owners and lessees of taxable property within the school district and to parents of children attending the schools); *Cipriano v City of Houma*, 395 US 701; 89 S Ct 1897; 23 L Ed 2d 647 (1969) (invalidating a state law that limited the vote in a municipal bond election to taxpayers); *City of Phoenix v Kolodziejski*, 399 US 204; 90 S Ct 1990; 26 L Ed 2d 523 (1970) (same); *Hadley v Junior College Dist of Metro Kansas City*, 397 US 50; 90 S Ct 791; 25 L Ed 2d 45 (1970) (applying the one-person, one-vote standard to a junior college electoral district); *Bd of Estimate of New York City v Morris*, 489 US 688; 109 S Ct 1433; 103 L Ed 2d 717 (1989) (invalidating the city of New York's Board of Estimate because each of the five New York City borough presidents possessed an equal vote on the Board, even though the boroughs had "widely disparate populations").

[102] *Salyer Land Co v Tulare Lake Basin Water Storage Dist*, 410 US 719, 728-729; 93 S Ct 1224; 35 L Ed 2d 659 (1973), quoting *Hadley, supra* at 56. Nearly a decade after *Salyer*, in *Ball v James*, 451 US 355; 101 S Ct 1811; 68 L Ed 2d 150 (1981), the Supreme Court extended the *Salyer* "special purpose district" exception to a water district that served many

The second, and more relevant, exception to the one-person, one-vote standard involves changes to municipal boundaries. Indeed, the Supreme Court recognized the unique nature of boundary changes as early as 1907 in the seminal case of *Hunter v Pittsburgh*,[103] nearly sixty years before the one-person, one-vote standard was established. In *Hunter*, the city of Allegheny was annexed to the city of Pittsburgh. Under state law, the votes in both cities on the annexation were aggregated. Voters in Allegheny, who were greatly outnumbered by voters in Pittsburgh, claimed that their votes were unconstitutionally diluted. The Supreme Court rejected the dilution claim and held that states have complete control over municipalities:

> The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the

urban customers (including the city of Phoenix), unlike the district in *Salyer*, which served mostly agricultural users. See also Briffault, *Who rules at home?: One person/One vote and local governments,* 60 U Chi L R 339, 359-360 (1993).

[103] 207 US 161; 28 S Ct 40; 52 L Ed 151 (1907).

> State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[104]

This Court fully embraced the rationale of *Hunter* in *Midland Twp v State Boundary Comm*.[105] The case involved an equal protection challenge to provisions of the HRCA that provided for a referendum if the area to be affected included more than one hundred persons, but excluded the possibility of a referendum when one hundred or fewer persons were affected. In rejecting the equal protection argument, Justice LEVIN, writing for the Court, directly relied on *Hunter* and held, "No city, village, township *or person* has any vested right or legally protected interest in the boundaries of such governmental units."[106]

Although *Hunter* preceded the establishment of the one-person, one-vote standard by half a century, its holding has endured throughout modern equal protection jurisprudence.[107] Indeed, municipal boundary changes have traditionally been exempted from the one-person, one-vote rule and strict scrutiny review.[108]

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[104] *Id*. at 178-179.

[105] 401 Mich 641, 664-666; 259 NW2d 326 (1977).

[106] *Id*. at 664 (emphasis added). See also *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Twp*, 237 Mich App 721, 736; 605 NW2d 18 (1999) (" 'No . . . person has any vested right or legally protected interest in the boundaries of . . . governmental units.' Changing the boundaries of political subdivisions is a legislative question. The Legislature is free to change city, village, and township boundaries at will." [citations omitted].).

[107] *Holt Civic Club v City of Tuscaloosa*, 439 US 60, 71; 99 S Ct 383; 58 L Ed 2d 292 (1978) ("[W]e think that [*Hunter*] continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them.").

[108] Note, *Interest exceptions to one-resident, one-vote: Better results from the Voting Rights Act?*, 74 Tex L R 1153, 1168-1169 (1996) ("Even after political questions like that in *Hunter* were found to be justiciable, the

This issue was addressed in detail by the Supreme Court in the leading case of *Town of Lockport v Citizens for Community Action at the Local Level, Inc*,[109] which involved a claim by city voters that their votes were unconstitutionally diluted by rural voters.

In *Lockport*, Niagara County, New York, sought to amend its charter in order to provide for a strong form of county government headed by a county executive. New York law provided that such an amendment could only become effective upon approval by separate majorities of the voters who lived in the cities within the county and of the voters who lived outside the cities. The amendment to the charter failed both times that it was put to a vote. Although a majority of the city voters and a majority of the overall votes cast were in favor of the amendment, a separate majority of non-city voters in favor of the amendment was never achieved in either election. Residents of the cities filed suit, claiming that the concurrent-majority voting scheme unconstitutionally diluted their voting strength because it gave a small number of rural voters disproportionate voting strength.

Court has generally adhered to the rule of *Hunter* to decide equal protection challenges to jurisdictional boundary changes. Defining residency is a matter of state discretion subject only to rational basis review."). See also Briffault, *supra* at 342-343 ("Boundary change[s] . . . have been defined as largely outside the scope of constitutional protection. This has limited the impact of one person/one vote on many traditional state-authorized local arrangements, preserving considerable flexibility for state regulation of governance at the local level.").

In 1992, the California Supreme Court held that rational basis review applies to limitations on the right to vote when a municipal boundary change is at issue. *Sacramento Co Bd of Supervisors v Sacramento Co Local Agency Formation Comm*, 3 Cal 4th 903; 838 P2d 1198; 13 Cal Rptr 2d 245 (1992). In doing so, the California Supreme Court reversed precedent that held that strict scrutiny was applicable. *Id*. at 917-922.

[109] 430 US 259; 97 S Ct 1047; 51 L Ed 2d 313 (1977).

The Supreme Court *unanimously* rejected the equal protection challenge.[110] In upholding the New York voting scheme, the Court focused on two points. First, it found that the *Reynolds* line of cases dealing with one person, one vote in the context of legislative *representation* were of "limited relevance" in analyzing the "single-shot" type of referendum facing the voters in Niagara County because the "expression of voter will is direct" in a referendum.[111] Second, the Court found significant the fact that the voters within the cities and those outside the cities would be affected differently if the county were to adopt a county executive model of government.[112] The Court directly compared the situation at hand to one involving an annexation of land by municipalities and the distinct interests that would exist in such a context.[113] Applying rational basis review, the Court went on to hold that the statute's concurrent-majority voting provision merely recognized "substantially differing electoral interests" and that it did not amount to a violation of the Equal Protection Clause.[114]

Lockport is particularly instructive in resolving defendants' equal protection claims. Similar to the Niagara County referendum in *Lockport*, the detachment elections in the present cases are also "single-shot" referenda, thus marginalizing much of the rationale surrounding the *Reynolds* line of cases pertaining to legislative *representation*. The expressed will of the voters in the detachment elections will be direct and unfiltered.

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[110] Chief Justice Burger concurred in the judgment, but did not write a separate opinion.

[111] *Lockport*, *supra* at 266.

[112] *Id*. at 269-272.

[113] *Id*. at 271. See Briffault, *Voting rights, home rule, and metropolitan governance: The secession of Staten Island as a case study in the dilemmas of local self-determination*, 92 Colum L R 775, 797-798 (1992).

[114] *Lockport*, *supra* at 272-273.

Like the Supreme Court in *Lockport*, I also find significant the existence of disparate electoral interests between city and township residents. In the present cases, it is undisputed that the voters in the townships and those in the cities have "substantially differing electoral interests." If the detachments are approved, one municipality will lose land and others will gain land, thereby implicating divergent interests in the city and the townships on a wide range of issues, including police and fire protection, school districts, taxes, sewer systems, road construction, commercial development, garbage collection, etc.[115] Indeed, the majority itself recognizes this fact by noting the "potential for dramatically different consequences" among municipalities if the detachments are permitted.[116]

Given these differing electoral interests, I believe it is rational for the Legislature to permit the use of a single detachment petition to transfer land to multiple townships and that such a procedure does not violate the Equal Protection Clause. As the parties noted in their briefs and at oral argument, boundary disputes between townships and cities are nothing new. Indeed, such gamesmanship is not only commonplace, but to be expected given the inherently valuable nature of land in our society. For example, cities often craft annexation proposals with surgical precision so that the territory to be acquired from a township contains one hundred or fewer inhabitants and is thus exempt from a public referendum.[117] By repeating this process numerous

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[115] See, e.g., *Lockport*, *supra* at 269-271.

[116] *Ante* at 574.

[117] Amicus brief of the Michigan Townships Association at 2-3. As discussed in n 6 of this opinion, an annexation of territory that contains one hundred or fewer residents is subject only to approval by the SBC. MCL 117.9(4).

times, a city may be able to acquire large amounts of land without ever seeking approval from voters.

In light of such tactical territorial disputes between cities and townships, it is not irrational for the Legislature to permit several townships to amplify their voting strength by combining several different parcels into a single detachment petition. In fact, with the significant population disparities that exist between large cities and small townships, such a bundled petition may be the only way that certain detachments could ever be effectuated. By permitting several townships to combine efforts in a single petition, the Legislature has simply recognized that differing electoral interests exist and that, occasionally, similar entities will need to combine forces in order to have any meaningful opportunity at advancing their interests and achieving the various boundary changes authorized under the HRCA.[118] I believe that such a view by the Legislature is entirely reasonable.[119]

Justice LEVIN recognized the gamesmanship that occurs between cities and townships in *Midland Twp*, *supra* at 679, stating that "[c]ity and township strategies based on [the one hundred-resident referendum threshold] are unavoidable. In general, the city will seek to limit the area proposed for annexation so that there are insufficient residents for a referendum and the township will seek to extend the area to require a referendum. The motive or purpose of the city or township in drawing the proposed boundaries or in requesting a revision of boundaries is not material."

[118] In addition to minimizing the effects of population disparities between cities and townships, there are numerous other reasons why the Legislature may have permitted the use of a single petition to transfer land to multiple townships. For example, it is possible that the Legislature recognized the substantial financial expense that townships and cities face when holding elections and that, by combining numerous detachments in one election, it would be less expensive for the taxpayers to have a single election than to have several separate detachment elections.

[119] I find the cases on which defendants rely unpersuasive. In *Hayward v Clay*, 573 F2d 187 (CA 4, 1978), the Fourth Circuit Court of Appeals

Lockport and *Hunter* demonstrate that the one-person, one-vote standard does not apply in cases involving municipal boundary changes as it does, for example, in the context of legislative representation.[120] Instead, states maintain broad discretion over municipal boundary changes—discretion that is subject to rational basis review.[121] The fact that the state has

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applied strict scrutiny to an annexation proceeding that required separate majority approval by freeholders. *Hayward* is easily distinguishable from the present cases. *Hayward* involved a grant of disproportionate voting strength to *freeholders*. No such land-based distinction in voting strength exists in the present cases. Instead, the franchise is extended to *all* registered voters in the affected municipalities, regardless of land ownership status. Defendants also cite *Carlyn v City of Akron*, 726 F2d 287 (CA 6, 1984), in which the Sixth Circuit Court of Appeals *refused* to apply strict scrutiny to an annexation proceeding. While I appreciate the dicta that defendants cite from *Carlyn* regarding when strict scrutiny is to apply, I would choose instead to base our resolution of this federal law question on clear precedent from the United States Supreme Court.

[120] Indeed, *Lockport* and *Hunter*, taken together, illustrate that any claim of vote dilution in the municipal boundary change context will be difficult to sustain, absent dilution based on some suspect category such as race. The Supreme Court explicitly rejected "dilution by *aggregation*" in *Hunter* and "dilution by *disproportionate weight*" in *Lockport*. With both types of dilution having been flatly rejected by the Supreme Court, it seems quite clear that such cases are not viewed as traditional vote dilution matters, but as matters involving a state's absolute authority over municipal boundaries.

[121] As Professor Briffault has written in discussing the effect of *Lockport*:

> To apply strict scrutiny to the distribution of the vote concerning boundary changes would inevitably entail a constitutional review of the states' municipal formation and boundary change policies. But there are no generally accepted principles for determining whether a particular local government ought to exist, what that unit's geographic dimensions ought to be, or whether a particular territory ought to be in that or another local unit. Thus, deference to the states is consistent with both the lack of a constitutional vantage point for examining state municipal formation and boundary change policies and the traditional jurisprudence of federalism that treats local governments as state instru-

chosen to exercise this power partially through mechanisms provided under the HRCA, which includes public referenda on privately initiated boundary changes, in no way diminishes the state's plenary control over municipal boundaries. Therefore, considering the differing electoral interests that undoubtedly exist between municipalities in a detachment proceeding and the gross disparities in population that arise, I believe that the Legislature acted rationally in permitting, under the HRCA, the use of a single detachment petition when transferring land to more than one municipality.

While the wisdom of such a policy choice by the Legislature might be debated, this Court is not the proper forum for such an undertaking. Our role is limited to determining whether the HRCA conforms to the Constitution. For the foregoing reasons, I believe that it does.

B. MANDAMUS RELIEF

1. NATURE OF THE REMEDY

A writ of mandamus is an extraordinary remedy used to enforce duties mandated by law.[122] It is entirely discretionary in nature.[123] Before seeking mandamus

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mentalities and leaves the creation and structure of local governments to the states. [Briffault, *supra*, 60 U Chi L R at 395-396.]

[122] *State Bd of Ed v Houghton Lake Community Schools*, 430 Mich 658, 666; 425 NW2d 80 (1988); *Teasel v Dep't of Mental Health*, 419 Mich 390, 409; 355 NW2d 75 (1984); *Howard Pore, Inc v Revenue Comm'r*, 322 Mich 49, 75; 33 NW2d 657 (1948); *Sumeracki v Stack*, 269 Mich 169, 171; 256 NW 843 (1934); *Gowan v Smith*, 157 Mich 443, 470; 122 NW 286 (1909).

[123] *Donovan v Guy*, 344 Mich 187, 192; 73 NW2d 471 (1955); *Fellinger v Wayne Circuit Judge*, 313 Mich 289, 291-292; 21 NW2d 133 (1946); *Geib v Kent Circuit Judge*, 311 Mich 631, 636; 19 NW2d 124 (1945); *Toan v*

relief, a plaintiff must complete all conditions precedent to the act that the plaintiff seeks to compel,[124] including a demand of performance made on the official charged with performing the act.[125] Once this threshold is met, the plaintiff, bearing the burden of proof,[126] must demonstrate: (1) a clear legal right to the act sought to be compelled; (2) a clear legal duty by the defendant to perform the act; (3) that the act is ministerial, leaving nothing to the judgment or discretion of the defendant; and (4) that no other adequate remedy exists.[127]

2. PLAINTIFFS ARE NOT ENTITLED TO MANDAMUS RELIEF

While I agree with the majority that plaintiffs are not entitled to mandamus relief, I disagree with the majority's rationale. The majority concludes that mandamus relief is improper because the HRCA does not permit the use of a single detachment petition involving multiple townships and, therefore, plaintiffs have no "clear

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McGinn, 271 Mich 28, 33; 260 NW 108 (1935); *Sumeracki*, *supra* at 171; *Industrial Bank of Wyandotte v Reichert*, 251 Mich 396, 401; 232 NW 235 (1930); *Miller v Detroit*, 250 Mich 633, 636; 230 NW 936 (1930); *Taylor v Isabella Circuit Judge*, 209 Mich 97, 99; 176 NW 550 (1920); *Stinton v Kent Circuit Judge*, 37 Mich 286, 287 (1877).

[124] *Cook v Jackson*, 264 Mich 186, 188; 249 NW 619 (1933); *Hickey v Oakland Co Bd of Supervisors*, 62 Mich 94, 99-101; 28 NW 771 (1886).

[125] *Stack v Picard*, 266 Mich 673, 673-674; 254 NW 245 (1934); *Owen v Detroit*, 259 Mich 176, 177; 242 NW 878 (1932) ("[T]he discretionary writ of mandamus will not issue to compel action by public officers without prior demand for such action."); *People ex rel Butler v Saginaw Co Bd of Supervisors*, 26 Mich 22, 26 (1872).

[126] *Baraga Co*, *supra* at 268; *In re MCI*, *supra* at 442-443.

[127] *Baraga Co, supra* at 268; *In re MCI, supra* at 442-443; *Houghton Lake Community Schools, supra* at 666; *Pillon v Attorney General*, 345 Mich 536, 539; 77 NW2d 257 (1956); *Janigian v Dearborn*, 336 Mich 261, 264; 57 NW2d 876 (1953); *Howard Pore, Inc, supra* at 75; *McLeod v State Bd of Canvassers*, 304 Mich 120, 125; 7 NW2d 240 (1942); *Rupert v Van Buren Co Clerk*, 290 Mich 180, 183-184; 287 NW 425 (1939); *Toan, supra* at 34; *Sumeracki, supra* at 171; *Gowan, supra* at 470-473.

legal right" to the relief they seek.[128] For the reasons stated, I disagree with that conclusion. However, I believe that plaintiffs are not entitled to writs of mandamus because a request for such relief is premature at this time.

As already discussed, before a writ of mandamus will be issued, a plaintiff must complete *all* conditions precedent to the act that the plaintiff seeks to compel.[129] While it is possible that plaintiffs may have already satisfied all requirements imposed by the HRCA, the Secretary of State has yet to make such a determination. The Secretary of State deferred her examination of the petitions until the antecedent question of whether the HRCA permits the use of a single petition involving multiple townships was resolved. The Secretary of State has not yet examined the petitions to determine whether they comply with all the *other* requirements of the HRCA. Therefore, plaintiffs' requests for mandamus relief are premature.

IV. CONCLUSION

The HRCA is not ambiguous. A plain reading of §§ 9 and 11 demonstrates that the use of a single detachment petition is permitted when seeking to transfer land to multiple townships. Moreover, such a procedure comports with the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs are not entitled to mandamus relief, however, because the Secretary of State has yet to examine the petitions to determine whether all the conditions mandated by the HRCA have been satisfied. Accordingly, in *Casco Twp*, I would reverse the decisions of the Court of Appeals and the

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[128] *Ante* at 577.

[129] See n 124 of this opinion.

trial court and grant declaratory relief. Because the plaintiffs in *Fillmore Twp* did not seek declaratory relief, I would affirm the dismissal of their mandamus action.

For the foregoing reasons, I respectfully concur in part and dissent in part.

PEOPLE v STEWART

Docket No. 124055. Argued March 9, 2005 (Calendar No. 1). Decided June 28, 2005.

Leonard L. Stewart was convicted by a jury in the Saginaw Circuit Court of possession with intent to deliver more than 650 grams of cocaine and conspiracy to commit possession with intent to deliver more than 650 grams of cocaine. He was sentenced to two consecutive life sentences without the possibility of parole. Three years later, in 1998, certain statutory amendments allowed the defendant to be eligible for parole after 17.5 years of imprisonment. The defendant then petitioned the trial court to be certified as having cooperated with law enforcement under MCL 791.234(10), thereby making him eligible for parole 2.5 years earlier than he would be without such certification. The court, Leopold P. Borrello, J., denied the request. The Court of Appeals, GRIFFIN, P.J., and OWENS and SCHUETTE, JJ., denied the defendant's delayed application for leave to appeal in an unpublished order, entered May 21, 2003 (Docket No. 243562). The Supreme Court granted the defendant's application for leave to appeal. 470 Mich 879 (2004).

In an opinion by Justice WEAVER, joined by Chief Justice TAYLOR, and Justices CAVANAGH, CORRIGAN, and YOUNG, the Supreme Court *held*:

1. The cooperation of a prisoner under MCL 791.234(10) may occur at any time before the filing of a motion for judicial determination of cooperation and before the prisoner is released on parole. The statute imposes no limits on when a sentencing court may make a determination that cooperation occurred. The court may make the determination at any time before an order of parole is entered.

2. A prisoner who never provided any information or who had relevant or useful information to provide and chose not to provide the information when it was still relevant and useful cannot be considered to have cooperated. The defendant did have relevant and useful information that he could have given to law enforcement personnel at the time of his arrest or conviction and chose

not to provide the information. Therefore, the defendant cannot be considered to have cooperated with law enforcement.

3. The statute does not limit the relevant or useful information provided in cooperation with law enforcement to information about the crime for which the prisoner was convicted. A prisoner bears the burden of proving that he or she has provided all the information he or she possesses about a crime and cannot pick and choose what information he or she is prepared to disclose.

4. It is not sufficient for purposes of the statute that a prisoner, like the defendant, allege that he or she would be willing to cooperate in the future.

5. "Cooperation" for purposes of the statute includes conduct amounting to working with law enforcement personnel for or toward a common purpose, providing useful or relevant information to law enforcement, or establishing that although the prisoner provided law enforcement any information he or she had, and it turned out not to be relevant or useful, the prisoner never had any relevant or useful information to provide. The defendant's alleged actions of not hiding or destroying evidence, not intimidating witnesses, not fleeing to avoid prosecution, and being courteous to investigating officers do not amount to cooperation with law enforcement.

6. A prisoner has the burden of initially showing, by affidavit or otherwise, that he or she has already cooperated with law enforcement or that he or she provided any information he or she had to law enforcement, but at no time before filing the motion for judicial certification of cooperation did he or she have any relevant or useful information to provide. The sentencing court would then have the discretion to conduct an evidentiary hearing to determine whether the prisoner has cooperated if the court, after reviewing the evidence, concludes that a genuine and material factual issue exists regarding whether the prisoner cooperated. The defendant has not met his burden of initially showing that he has cooperated with law enforcement; therefore, he is not entitled to an evidentiary hearing.

7. The opinions in *People v Matelic*, 249 Mich App 1 (2001), and *People v Cardenas*, 263 Mich App 511 (2004), must be overruled to the extent that they conflict with this opinion.

Justice MARKMAN, concurring, wrote separately to set forth two areas of concern. First, he disagreed with the majority that MCL 791.234(10), which states that a "prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide," requires a prisoner to have provided *some* information to

law enforcement to be considered as having cooperated. Second, he would not address whether cooperation includes participation in a controlled drug buy or providing information about unrelated crimes because such discussion is dictum in this case.

Justice KELLY, concurring in the result only, agreed that the defendant did not qualify for a certificate of cooperation. She disagreed that the language of MCL 791.234(10) requires a prisoner to provide all the information the prisoner has about a crime to be eligible for credit for cooperation. The Legislature did not indicate how much cooperation is enough or even limit the benefits of the statute to prisoners who provide relevant and useful information, leaving the decision to the discretion of the trial court.

Affirmed.

1. PAROLE — EXPEDITED PAROLE ELIGIBILITY — COOPERATION WITH LAW ENFORCEMENT.

A prisoner's cooperation with law enforcement, for purposes of a motion for judicial determination of cooperation under MCL 791.234(10), may occur at any time before the motion is filed and the prisoner is released on parole; a pledge of future cooperation does not constitute cooperation.

2. PAROLE — EXPEDITED PAROLE ELIGIBILITY — COOPERATION WITH LAW ENFORCEMENT.

A prisoner may be considered to have cooperated with law enforcement for purposes of a motion for judicial determination of cooperation under MCL 791.234(10) where the prisoner engaged in conduct where he or she worked with law enforcement toward a common purpose, provided useful or relevant information to law enforcement, or establishes that although the prisoner provided law enforcement any information he or she had, and it turned out not to be relevant or useful, the prisoner never had any relevant or useful information to provide; a prisoner who never provided any information or who had relevant or useful information but chose not to provide it while it was relevant or useful may not be considered to have cooperated.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael D. Thomas*, Prosecuting Attorney, and *Janet M. Boes, John T. Horiszny*, and *A. George Best, II*, Assistant Prosecuting Attorneys, for the people.

Carolyn A. Blanchard for the defendant.

Amicus Curiae:

Stuart J. Dunnings III, President, *Jeffrey L. Sauter*, Prosecuting Attorney, and *William M. Worden*, Senior Assistant Prosecuting Attorney, for the Prosecuting Attorneys Association of Michigan.

WEAVER, J. This case is one of statutory interpretation. Under MCL 791.234(10), a prisoner may apply for a judicial certificate of cooperation. If the prisoner is found to have cooperated with law enforcement, then the prisoner is eligible for parole 2.5 years sooner than otherwise. The questions presented are: (1) when the prisoner's cooperation must occur, and when a court may make a determination that cooperation has occurred; (2) what constitutes "cooperation" under MCL 791.234(10), and whether defendant's actions met that standard; and (3) whether this case should be remanded to the circuit court for an evidentiary hearing to determine whether defendant has cooperated within the meaning of the statute.

We hold that a prisoner's cooperation may occur at any time before the prisoner is released on parole. But the cooperation must occur before the filing of a motion for judicial determination of cooperation. Similarly, the statute imposes no limits on when a court may make a determination that cooperation occurred.

Cooperation means that a prisoner engages in conduct where the prisoner is working with law enforcement for a common purpose, provides useful or relevant information to law enforcement, or establishes that although the prisoner provided law enforcement any information he or she had, and it turned out not to be relevant or useful, the prisoner never had any relevant

or useful information to provide. A prisoner who had relevant or useful information to provide and chose not to provide this information, however, cannot be considered to have cooperated with law enforcement.

Under these standards, defendant did not meet his burden of initially showing, by affidavit or otherwise, that he had cooperated with law enforcement. Accordingly, defendant is not entitled to an evidentiary hearing.

To the extent that *People v Matelic,* 249 Mich App 1; 641 NW2d 252 (2001), and *People v Cardenas,* 263 Mich App 511; 688 NW2d 544 (2004), conflict with this opinion, they are overruled.

We affirm the trial court's order denying defendant's motion for judicial certification of cooperation.

I. FACTS & PROCEDURAL HISTORY

The police intercepted a package of cocaine at the Saginaw office of United Parcel Service. The police set up surveillance at the house to which the package was addressed and had a police officer deliver the package. David Harrell, a codefendant, signed for the package. A short time later, police officers raided the house. Harrell told the police that defendant asked him if defendant could have packages delivered to Harrell's house, and that three or four packages had been delivered in 1994. Harrell stated that defendant had come to the house earlier with Bryant Fields, and that defendant had said that Fields would be picking the package up. During the raid, Fields came to the house to pick up the package. When the police arrested Fields, they found two rocks of cocaine wrapped in $50 and a green pager. Fields stated that the pager belonged to the man for whom he was picking up the package; Harrell said that the pager looked like the one that defendant carried. During the

raid, the pager went off three times, displaying defendant's home phone number. The package originated in Pomona, California, and there were several calls made from defendant's home phone to Pomona.

Following a jury trial, defendant was convicted of possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i), and conspiracy to commit possession with intent to deliver over 650 grams of cocaine, MCL 750.157a(a). At the time that defendant was convicted and sentenced in 1995, MCL 333.7401(2)(a)(i) provided that an individual found guilty of possessing with the intent to deliver over 650 grams of cocaine would receive a mandatory sentence of life imprisonment. Further, there was no possibility of parole for an individual sentenced to a mandatory life sentence "for a major controlled substance offense . . . ." MCL 791.234(4).[1] Consequently, defendant was sentenced to two consecutive life sentences without the possibility of parole.

In 1998, three years after defendant was sentenced, the Legislature revised the statutes. The revisions removed the mandatory life imprisonment for those convicted of possession with intent to deliver over 650 grams of cocaine and replaced that punishment with "life or any term of years but not less than 20 years." MCL 333.7401(2)(a)(i). The revisions further provided that such an offender would be eligible for parole after either twenty years (if the offender "has another conviction for a serious crime") or after 17.5 years' imprisonment (if the offender "does not have another conviction for a serious crime . . . ."). MCL 791.234(6). These same amendments also created MCL 791.234(10), which permits an offender convicted of possession with

[1] The substance of MCL 791.234(4) is now contained in MCL 791.234(6).

intent to distribute over 650 grams of cocaine to be eligible for parole 2.5 years earlier if the offender is found to have "cooperated with law enforcement . . . ."

Under MCL 333.7401(2)(a)(i), defendant was found to be eligible for parole after 17.5 years' imprisonment. Defendant subsequently petitioned to be certified as having cooperated with law enforcement under MCL 791.234(10). The trial court denied defendant's request, stating:

> The Defendant states that he had no relevant or useful information to provide to law enforcement officers previously. Additionally, he states that he is "ready and willing to proffer any relevant or useful information that he may have, without undue haste.["] He, however, fails to allege how he will have any relevant or useful information for law enforcement officials approximately eight years after his arrest. The Court finds that due to a lack of facts, it cannot enter an order of cooperation.

Defendant sought leave to appeal, and the Court of Appeals denied defendant's delayed application for leave to appeal. Unpublished order, entered May 21, 2003 (Docket No. 243562).

This Court then granted defendant leave to appeal, asking the parties to address the following:

> (1) What constitutes "cooperation" for the purpose of MCL 791.234(10), and did defendant's actions satisfy that requirement? (2) Does MCL 791.234(10) contain a temporal limitation on when cooperation must occur? (3) Does MCL 791.234(10) contain a temporal limitation on when a court may make a determination that cooperation occurred? (4) Was *People v Matelic,* 294 Mich App 1 (2001), properly decided?[2] (5) Should this case be remanded to the Saginaw Circuit Court for an evidentiary hearing to deter-

[2] This issue is now irrelevant because *People v Matelic* was largely overruled by a conflict panel in *People v Cardenas,* 263 Mich App 511; 688

mine whether defendant has cooperated within the meaning of MCL 791.234(10)? [*People v Stewart,* 470 Mich 879 (2004).]

II. STANDARD OF REVIEW

This case involves the interpretation of MCL 791.234(10). We review questions of statutory interpretation de novo. *People v Jones,* 467 Mich 301, 304; 651 NW2d 906 (2002). The primary goal in construing a statute is "to give effect to the intent of the Legislature." *In re MCI Telecom Complaint,* 460 Mich 396, 411; 596 NW2d 164 (1999). We begin by examining the plain language of the statute. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999).

III. ANALYSIS

The statute at issue, MCL 791.234(10), provides:

> If the sentencing judge, or his or her successor in office, determines on the record that a prisoner described in subsection (6) sentenced to imprisonment for life for violating or conspiring to violate section 7401(2)(a)(i) of the public health code, 1978 PA 368, MCL 333.7401, has cooperated with law enforcement, the prisoner is subject to the jurisdiction of the parole board and may be released on parole as provided in subsection (6), 2-1/2 years earlier than the time otherwise indicated in subsection (6). The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide. The court shall not make a determination that the prisoner failed or refused to cooperate with law enforcement on grounds that the defendant exercised his or her constitutional right to trial by jury. If the court determines at

NW2d 544 (2004), convened pursuant to MCR 7.215(J) after the order granting leave to appeal was entered.

> sentencing that the defendant cooperated with law enforcement, the court shall include its determination in the judgment of sentence.

A

The first issue we must address is what temporal limits MCL 791.234(10) imposes on when cooperation must occur and when a court may make a determination that cooperation occurred.

We agree with the conflict panel in *People v Cardenas* that the only temporal limitation the statute places on a prisoner's cooperation is that the cooperation must occur before the filing of a motion for judicial determination of cooperation. Other than that limitation, the cooperation may occur at any time before the prisoner is released on parole. Specifically, we agree with the following reasoning set out by Judge WILDER in his partial dissent in *Matelic* and adopted by the *Cardenas* conflict panel:

> "Giving the phrases 'has cooperated' and 'have cooperated' their plain meaning, then, it is clear that the Legislature intended that the prisoner's cooperation must have occurred at some time before the prisoner's application for parole release under MCL 791.234(10). Similarly, the phrase 'had no relevant or useful information to provide', when given its plain meaning and considered in relation to the present perfect tense clause 'have cooperated,' expresses the Legislature's intent that the prisoner must have lacked information before the prisoner's application for treatment under MCL 791.234(10), in order to be found as a matter of law to have cooperated." [*Cardenas, supra* at 518, quoting *Matelic, supra* at 31-32.]

We conclude also that the statute imposes no limits on when a court may make a determination that cooperation occurred. The statute refers to the sentenc-

ing judge or that judge's successor in office making the determination of cooperation:

> If the sentencing judge, or his or her successor in office, determines on the record that a prisoner . . . has cooperated with law enforcement . . . . [MCL 791.234(10).]

The statutory language that a successor judge may make a finding of cooperation indicates that there may be cases where such a finding can and would be made after sentencing. Under the language of the statute, a judge may make the determination that a prisoner has cooperated at any time before an order of parole is entered.

B

The next question to consider is what constitutes "cooperation" for the purpose of MCL 791.234(10).

i

The statute specifically provides: "The prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner *had* no relevant or useful information to provide." MCL 791.234(10) (emphasis added). This use of the past tense, "had," indicates that defendant must at no time have had any relevant or useful information, not merely that any information he once had is no longer relevant or useful. We hold that a prisoner who has provided to law enforcement information that was found to be neither useful nor relevant can be considered to have cooperated with law enforcement if that prisoner never had any relevant or useful information to provide. But a prisoner who never provided any information or who had relevant or useful information to provide and chose

not to provide this information when it was still relevant or useful cannot be considered to have cooperated with law enforcement.

Defendant alleges that he should be found to have cooperated because he never had any useful or relevant information to provide. Before sentencing, in 1995, defendant stated that he had nothing to say about the offense, that he was being framed, and that he knew the police "let the perpetrators get away scott free." When petitioning for the certification of cooperation, eight years after his conviction, defendant advised the trial court that at the time he was sentenced he "had no useful or relevant information to provide." In his brief on appeal to this Court, defendant also asserted that he "answered the questions the police asked of him, but was not able to tell the police anything about drugs and drug sales for he knew nothing about those things." Because defendant never provided any information to law enforcement, he cannot be considered to have cooperated.

Further, despite defendant's protestations of innocence, defendant was convicted of possession with intent to deliver over 650 grams of cocaine and conspiracy to commit possession with intent to deliver over 650 grams of cocaine. We note that MCL 791.234(10) applies only to prisoners who have been convicted of violating or conspiring to violate MCL 333.7401(2)(a)(i), which prohibits manufacturing, creating, delivering, or possessing with intent to manufacture, create, or deliver a schedule 1 or 2 controlled substance that is in an amount of 650 grams or more. It may be presumed that a prisoner convicted of one of these crimes would have the following relevant or useful information for law enforcement: where the prisoner got the drug, how he or she processed it, how he or she intended to deliver it,

and to whom he or she intended to deliver it. On the basis of defendant's convictions, and the facts surrounding them, we conclude that defendant did have relevant or useful information that he could have given to law enforcement at the time of his arrest or conviction.

Defendant could have disclosed to the police the name of the person who shipped the cocaine to him, the names of the other people involved in the drug ring, and how he was planning to distribute the drugs. At the time of defendant's arrest or conviction, this information would have been relevant or useful. Because defendant had relevant or useful information to provide and chose not to provide this information, defendant cannot be considered to have cooperated with law enforcement.

ii

Cooperation can also include providing useful or relevant information to law enforcement. MCL 791.234(10) states that "[t]he prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide." The clear implication is that a prisoner is also considered to have cooperated with law enforcement if the prisoner has provided relevant or useful information. The prisoner bears the burden of proving that he or she has provided all the information he or she possesses about a crime; the prisoner cannot pick and choose what information he or she is prepared to disclose.

We note that the statute does not limit the relevant or useful information to information about the crime for which the prisoner was convicted. If a prisoner who was convicted of possession with intent to deliver over

650 grams of cocaine had relevant or useful information on a murder, providing that information to law enforcement could be cooperation.

Defendant alleges that he should be found to have cooperated because he is willing to provide relevant and useful information to law enforcement in the future. Defendant's statement in his petition for certification of cooperation that he was "ready and willing to proffer any relevant or useful information that he may have, without undue haste," is an offer of future cooperation. But, as we stated in part III(A) of this opinion, a prisoner's cooperation must have occurred before the petition for certification of cooperation is filed. It is not sufficient for defendant to allege that he would be willing to cooperate in the future.

iii

Finally, defendant alleges that on the basis of his conduct before and following his arrest, he should be found to have cooperated with law enforcement. "Cooperate" is defined as "to work together; 1) to act or work together with one another or others for a common purpose." *Webster's New World Dictionary, Second College Edition*. Considered in light of the statute, cooperation would include conduct such as participating in a controlled drug buy or a sting operation, or engaging in some other conduct to work with law enforcement toward a common goal.[3] The trial judge would determine, on the basis of the evidence in each individual

[3] The discussion of whether conduct, rather than providing information, can constitute cooperation under MCL 791.234(10) is not dicta, because the defendant in this case alleged that on the basis of certain conduct on his part he should be found to have cooperated with law enforcement.

case, whether the prisoner had cooperated within the meaning of MCL 791.234(10).

Defendant asserts that he should be found to have cooperated with law enforcement on the basis of the following conduct:

> [D]efendant did not endeavor to hide or destroy evidence after his co-defendants[’] arrest; and he did not tamper with or intimidate witnesses. Defendant did not flee to avoid prosecution prior to his arrest nor during the interval between his release on bond and subsequent conviction. At all times Defendant was polite and courteous to investigating officers and officers of the court. [Defendant’s August 6, 2002, brief in support of motion for certification of cooperation, p 6.]

But defendant’s alleged conduct does not constitute cooperation under the statute. Defendant’s actions in not hiding or destroying evidence, not intimidating witnesses, not fleeing to avoid prosecution, and being courteous to the investigating officers did not amount to working with law enforcement for a common purpose. Defendant refrained from impeding law enforcement personnel in their purpose, but did nothing to work toward that purpose with the law enforcement personnel.

C

The final question concerns when a prisoner is entitled to an evidentiary hearing to determine whether the prisoner has cooperated within the meaning of MCL 791.234(10).

We agree with the *Cardenas* conflict panel that the prisoner has the burden of initially showing, by affidavit or otherwise, that he or she has already cooperated with law enforcement or that he or she provided any information he or she had to law enforcement, but at no

time before filing the motion did he or she have any relevant or useful information to provide. The sentencing court would then have the discretion to conduct such a hearing after reviewing the evidence, in the event it concludes that a genuine and material factual issue exists regarding whether the prisoner cooperated.

Here, we have already found that defendant's alleged conduct did not constitute cooperation; defendant has not alleged that he has provided any useful or relevant information; and we have concluded that defendant cannot be considered to have cooperated because he previously had useful or relevant information that he did not provide to the police. Defendant has not met his burden of initially showing that he has cooperated with law enforcement and, therefore, is not entitled to an evidentiary hearing.

IV. CONCLUSION

We affirm the trial court's order denying defendant's motion for judicial certification of cooperation.

TAYLOR, C.J., and CAVANAGH, CORRIGAN, and YOUNG, JJ., concurred with WEAVER, J.

MARKMAN, J. (*concurring*). I agree with the majority that defendant has not met his burden of establishing that he has cooperated with law enforcement, and, thus, I agree with its affirmance of the trial court's order denying defendant's motion for certification of cooperation. I write separately to set forth two areas of concern.

First, I disagree with the majority that "a prisoner who never provided any information . . . cannot be considered to have cooperated with law enforcement." *Ante* at 633-634. While this may be reasonable as a matter of policy, it is simply inconsistent with the

direction of the Legislature. MCL 791.234(10) states that a "prisoner is considered to have cooperated with law enforcement if the court determines on the record that the prisoner had no relevant or useful information to provide." The majority appends to the Legislature's definition the *further* requirement that a prisoner must have provided some information to law enforcement. It thus adds language to the statute that is not there. While I can conceive of few instances in which a silent prisoner will ever be able to satisfy his burdens under the statute, I nonetheless disagree with the majority's substitution of its own definition of "cooperation" for that of the Legislature.

Second, I would not address, in dictum, as the majority does, whether "cooperation" under MCL 791.234(10) "include[s] conduct such as participating in a controlled drug buy or a sting operation," and whether "cooperation" pertains to providing information about crimes unrelated to the crime for which the prisoner has been convicted. *Ante* at 635, 636.[1] Perhaps precisely because it is dictum, and because these matters have not been briefed by the parties, I find the majority's discussion to be cursory and insufficiently respectful of the fact that there may be alternative, plausible understandings of MCL 791.234(10). Again, the majority sets forth a reasonable policy, but it fails to

[1] I am puzzled by the majority's assertion that its discussion of these matters does not constitute dictum. *Ante* at 636 n 3. The prosecutor has not argued that defendant did not "cooperate" by failing to participate in a controlled drug buy, and defendant has not argued to the contrary. And the prosecutor has not argued that defendant did not "cooperate" by failing to provide information about an unrelated crime, and defendant has not argued to the contrary. That defendant has asserted one form of conduct as "cooperation"—namely, his failure to *resist* the police, an absurd argument correctly rejected by the majority—does not properly allow the majority to decide whether every other conceivable form of "conduct" constitutes "cooperation."

adequately explain why such policy is compelled by the statute. I would avoid this dictum, and await a case in which these issues can be explored more thoroughly, and in a more relevant setting.

KELLY, J. (*concurring in result only*). I concur that defendant did not qualify for a certificate of cooperation. However, I disagree with several crucial aspects of the majority's interpretation of MCL 791.234(10).

The majority opinion creates the requirement that, to be eligible for credit for cooperation under MCL 791.234(10), a prisoner must provide law enforcement with all the information he has about a crime. The statute does not contain this requirement. Moreover, I believe that the Legislature did not intend that the statute should be interpreted to include it.

One might reflect that a prisoner providing less than all the information he possesses about a crime could nonetheless be very helpful to law enforcement. That may explain why the Legislature chose to confer the benefit of early parole eligibility using such general terms. It permitted the benefits to be conferred if the prisoner is shown to have "cooperated with law enforcement," and it refrained from indicating what constitutes cooperation and how much cooperation is enough.

Moreover, the Legislature chose not to limit the statute's benefit to prisoners who provide information that is relevant and useful. Rather, it specified that the prisoner may be found to have cooperated with law enforcement even if the court determines that he had no relevant or useful information to provide. MCL 791.234(10). The Legislature pointedly left it to the discretion of the judge to determine how much cooperation is sufficient to earn the benefit of early parole eligibility.

For these reasons, I concur only in the result of Justice WEAVER's majority opinion.

STUDIER v MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

Docket Nos. 125765, 125766. Argued January 12, 2005 (Calendar No. 2). Decided June 28, 2005.

Alberta Studier and five other retirees from public schools brought an action in the Ingham Circuit Court against the Michigan Public School Employees' Retirement Board and others, alleging that the defendants violated US Const, art I, § 10, Const 1963, art 1, § 10, and Const 1963, art 9, § 24 by increasing the plaintiffs' prescription drug copayments and deductibles under their health care plan. The court, Lawrence M. Glazer, J., granted summary disposition in favor of the defendants, refusing to find that health care benefits constitute "accrued financial benefits" under Const 1963, art 9, § 24 and finding no impairment of contract. The plaintiffs appealed. The Court of Appeals, FITZGERALD, P.J., and NEFF and WHITE, JJ., affirmed, holding that the health care benefits are not "accrued financial benefits" under Const 1963, art 9, § 24 and that the Legislature's enactment of MCL 38.1391(1) created a contract with the plaintiffs, but that the impairment of the contract was *de minimis* and was not unconstitutional. 260 Mich App 460 (2004). The Supreme Court granted leave to appeal on applications by the plaintiffs and the defendants. 471 Mich 875 (2004).

In an opinion by Chief Justice TAYLOR, joined by Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The Court of Appeals properly held that health care benefits paid to public school retirees do not constitute "accrued financial benefits" that are subject to protection from diminishment or impairment by Const 1963, art 9, § 24. The statute establishing the health care benefits, MCL 38.1391(1), did not create a contract that could not be changed by a later legislature without impairing a contractual obligation in violation of US Const, art I, § 10 and Const 1963, art 1, § 10. The Court of Appeals erred in holding that the statute created a contract. However, because the Court of Appeals reached the correct result, the Court's affirmance of the trial court's order of summary disposition in favor of the defendants must be affirmed.

1. The primary objective in determining whether health care benefits are included within the phrase "accrued financial benefits" in Const 1963, art 9, § 24 is to determine the interpretation that the people would have given the provision when they adopted it. A review of the common dictionary definitions of the terms "accrued" and "financial" at the time of the ratification of the provision shows that the ratifiers of our Constitution would have commonly understood the phrase "accrued financial benefits" to include only those pension benefits consisting of monetary payments that increase or grow over time, such as pension payments or a retirement allowance, and, thus, only intended for art 9, § 24 to protect such benefits. The ratifiers would not have interpreted the phrase to include health care benefits.

2. MCL 38.1391(1) did not create a contractual right on the part of the plaintiffs to receive health care benefits. The plaintiffs failed to overcome the presumption that statutes do not create contractual rights unless the statutory language is plain and susceptible of no other reasonable construction than that the Legislature intended to be bound by a contract.

Justice WEAVER, concurring, wrote separately to state her agreement with the reasoning and conclusions of the majority that the Legislature did not intend to create a contractual right subject to Const 1963, art 1, § 10 and US Const, art I, § 10 when it provided for the payment of health care benefits to retired public school employees through MCL 38.1391(1). Citing Justice RILEY's reasoning in *Musselman v Governor,* 448 Mich 503, 526 (1995) (*Musselman I)* and her concurrence in *Musselman v Governor (On Rehearing),* 450 Mich 574 (1996) (*Musselman II*), Justice WEAVER also agreed with the majority's conclusion that health care benefits paid to public school retirees are not "accrued financial benefits" under Const 1963, art 9, § 24.

Affirmed.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that retirement health care benefits earned by public school employees constitute "accrued financial benefits" that are protected from diminishment or impairment under Const 1963, art 9, § 24. Retirement health care benefits for public school employees are a contractual right created by MCL 38.1391, and the contractual right is subject to the protections of US Const, art I, § 10 and Const 1963, art 1, § 10 against impairment of the state's contractual obligation through subsequent legislation. There are significant questions regarding the accuracy of the

record used by the lower courts to determine if a substantial impairment has occurred. The matter should be remanded for further review.

1. SCHOOLS — PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM — HEALTH CARE BENEFITS.

Health care benefits paid to public school retirees do not constitute "accrued financial benefits" that are subject to protection from diminishment or impairment under Const 1963, art 9, § 24 (MCL 38.1391[1]).

2. SCHOOLS — PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM — HEALTH CARE BENEFITS.

The statute that established health care benefits for public school retirees did not create for retirees a contractual right to receive health care benefits that could not be changed by a later legislature without impairing a contractual obligation in violation of the federal and state constitutions (US Const, art I, § 10; Const 1963, art 1, § 10; MCL 38.1391[1]).

White, Schneider, Young & Chiodini, P.C. (by *Karen Bush Schneider, James A. White*, and *J. Matthew Serra*), for the plaintiffs.

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Amici Curiae:

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Miller, Canfield, Paddock and Stone, PLC (by *Orin D. Brustad* and *Larry J. Saylor*), and *Butzel Long* (by *Robert G. Buydens* and *John H. Dudley, Jr.*) for the Board of Governors of Eastern Michigan University, Central Michigan University, Lake Superior State Uni-

versity, Western Michigan University, Northern Michigan University, Ferris State University, and Michigan Technological University.

Fletcher Clark Tomlinson Fealko & Monaghan, P.C. (by *Gary A. Fletcher* and *William L. Fealko*), for County of St. Clair.

Thrun Law Firm, P.C. (by *C. George Johnson* and *Roy H. Henley*), for Michigan Association of School Boards, Michigan School Business Officials, and Michigan Association of School Administrators.

TAYLOR, C.J. We granted leave in this case to consider two issues. The first is whether health care benefits paid to public school retirees constitute "accrued financial benefits" subject to protection from diminishment or impairment by Const 1963, art 9, § 24. We hold that they do not and, accordingly, affirm the Court of Appeals determination on this issue.[1] The second issue is whether the statute establishing the health care benefits, MCL 38.1391(1), created a contract with the public school retirees that could not be changed by a later legislature because to do so would unconstitutionally impair an existing contractual obligation in violation of US Const, art I, § 10 and Const 1963, art 1, § 10. The Court of Appeals determined that MCL 38.1391(1) established a contract, but that the Legislature's subsequent changes were insubstantial and, thus, there was no constitutionally impermissible impairment of contract. The Court of Appeals erred on this issue because MCL 38.1391(1) did not create a contract. However, because the Court of Appeals reached the correct result, we affirm its determination that the

[1] 260 Mich App 460; 679 NW2d 88 (2004).

circuit court properly entered summary disposition in defendants' favor.

I. FACTUAL HISTORY AND PROCEDURAL POSTURE

The Michigan Public School Employees' Retirement Board (board) began providing a health care plan for public school retirees in 1975 pursuant to amendments made by 1974 PA 244 to the former Public School Employees Retirement Act, 1945 PA 136, which was the predecessor of the current Public School Employees Retirement Act, 1980 PA 300, MCL 38.1301 *et seq*. Since that time, participants in the plan have been required to pay deductibles and copays for prescription drugs, and the amounts of the deductibles and copays have gradually increased throughout the years because of numerous amendments the board has made to the plan to reflect the rising costs of health care and advances in medical technology. The present case arises from the two most recent amendments made to the plan by the board. The first amendment became effective on January 1, 2000, and increased the amount of the deductibles that retirees are required to pay. The second amendment occurred on January 21, 2000, and increased the copays and out-of-pocket maximums that retirees are required to pay for prescription drugs. The Court of Appeals succinctly summarized those amendments as follows:

> The amendments modified the plan's prescription drug copayment structure and out-of-pocket maximum for prescription drugs effective April 1, 2000, and also implemented a formulary effective January 1, 2001. A formulary is a preferred list of drugs approved by the federal Food and Drug Administration that is designed to give preference to those competing drugs that offer the greatest therapeutic

> benefit at the most favorable cost. Existing maintenance prescriptions outside the formulary were grandfathered in and subject only to the standard copayment of twenty percent of the drug's cost, with a $4 minimum and a $20 maximum.
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> The prescription drug copayment was changed to a twenty percent copay, with a $4 minimum and $20 maximum for up to a one-month supply. The copay maximum for mail-order prescription copayment was set at $50 for a three-month supply. A $750 maximum out-of-pocket copay for each calendar year was also established. [The plan did not previously contain an annual out-of-pocket maximum.] Under the formulary, eligible persons pay an additional twenty percent of a new nonformulary drug's approved cost only when use of the nonformulary drug is not preapproved by the drug plan administrator.
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> The board also adopted a resolution to increase health insurance deductibles from $145 for an individual to $165, and from $290 to $330 for a family, effective January 1, 2000. The deductibles do not apply to prescription drugs.[2]

Plaintiffs, six public school retirees, filed suit for declaratory and injunctive relief against the board, the Michigan Public School Employees' Retirement System (MPSERS), the Michigan Department of Management and Budget, and the Treasurer of the state of Michigan. Although plaintiffs' complaint contained three counts, only counts I and II remain for our consideration. Count I alleged that the copay and deductible increases violate Const 1963, art 9, § 24, which prohibits the state or a political subdivision from diminishing or impairing the "accrued financial benefits" of any pension plan or retirement system it offers. Count II alleged that the copay and deductible increases violate Const 1963, art 1, § 10 and US Const, art I, § 10, both of which prohibit

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[2] 260 Mich App at 466-467.

the enactment of a law that impairs an existing contractual obligation.

Both sides moved for summary disposition on these counts and the trial court granted defendants' motion pursuant to MCR 2.116(C)(10). With respect to count I, the trial court rejected plaintiffs' claim that health care benefits are "accrued financial benefits" under Const 1963, art 9, § 24, holding that the Court of Appeals and this Court " 'have been squarely faced with the opportunity to rule on this question and have declined to do so . . . .' " 260 Mich App at 462. With respect to count II, the trial court, after noting the similarity between the MPSERS health care plan and those offered by other states, concluded that MCL 38.1391(1) does establish a contract with the plaintiffs but that, because the proportions of the total costs for deductibles and copays borne by the plaintiffs were essentially unchanged, the impairment was too insubstantial to create an impairment the law would recognize.

Plaintiffs appealed to the Court of Appeals, which affirmed the trial court's ruling entirely. Thus, the panel held that health care benefits are not "accrued financial benefits" subject to protection by Const 1963, art 9, § 24, and that the Legislature's enactment of MCL 38.1391(1) created a contract, but the impairment was too *de minimis* to be recognized.

Plaintiffs applied for leave to appeal to this Court, seeking to challenge the Court of Appeals determinations that health care benefits are not "accrued financial benefits" protected by Const 1963, art 9, § 24 and that the deductible and copay increases implemented by the health care plan amendments are not a substantial impairment of plaintiffs' contractual right to receive health care benefits. Defendants filed an application for

leave to appeal, seeking to challenge the Court of Appeals conclusion that MCL 38.1391(1) vests plaintiffs with a contractual right. We granted both applications and ordered that they be submitted together.[3]

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Taxpayers of Michigan Against Casinos v Michigan,* 471 Mich 306, 317; 685 NW2d 221 (2004). This case also involves constitutional issues, as well as issues of statutory construction. These issues are reviewed de novo by this Court. *Wayne Co v Hathcock,* 471 Mich 445, 455; 684 NW2d 765 (2004).

III. ANALYSIS OF CONST 1963, ART 9, § 24

Const 1963, art 9, § 24 provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

These two clauses unambiguously prohibit the state and its political subdivisions from diminishing or impairing "accrued financial benefits," and require them to fund "accrued financial benefits" during the fiscal year for which corresponding services are rendered. To apply this, we are called upon to determine what is an

[3] 471 Mich 875 (2004).

"accrued financial benefit" and, in particular, whether health care benefits are such a benefit.

This Court has twice considered the issue whether health care benefits fall within the ambit of "accrued financial benefits" protected by art 9, § 24. In the first instance, *Musselman v Governor*, 448 Mich 503; 533 NW2d 237 (1995) (*Musselman I*), six members of this Court[4] considered a constitutional challenge to the state's failure to fund retirement health care benefits being earned by nonretired public school employees during the 1990-1991 school year. In determining whether the state's failure to do so violated the "pre-funding" requirement of the second clause of art 9, § 24, a four-member majority of this Court determined that health care benefits are, indeed, included within the term "accrued financial benefits." Focusing primarily on statements by some of the constitutional delegates who supported art 9, § 24 that they were concerned about the future ability of governmental entities to pay retirement benefits if the entities did not set aside funding to do so during each year of a public employee's service,[5] the majority reasoned that "because the purpose of the provision is to prevent governmental units from amassing bills for pension payments that they do not have money to pay, we hold that the term 'financial benefits' must include retirement health care benefits." *Musselman I, supra* at 513. Justice RILEY, joined by Justice LEVIN, dissented from this portion of the majority's analysis primarily on the basis of her conclusion that the term "financial" is commonly understood to

[4] Justice WEAVER did not participate. 448 Mich at 503.

[5] *Musselman I, supra* at 512-513, quoting 1 Official Record, Constitutional Convention 1961, p 772 (delegate Stafseth); *Musselman I, supra* at 512 n 5, quoting 1 Official Record, Constitutional Convention 1961, p 771 (delegate Van Dusen).

connote monetary obligations and, thus, the term "financial benefits" does not encompass health care benefits. *Id*. at 525-532.

This Court subsequently granted rehearing in *Musselman v Governor (On Rehearing),* 450 Mich 574; 545 NW2d 346 (1996) (*Musselman II*), and the prior majority lost a vote because Justice BRICKLEY stated that he no longer believed that interpretation of art 9, § 24 was necessary to resolve the case. *Musselman II, supra* at 576-577. Justice WEAVER, now participating, joined Justice RILEY's dissent on the issue and also wrote separately, saying that the electorate could not have intended the phrase "accrued financial benefits" to include health care benefits because the pension and retirement systems in place at the time art 9, § 24 was adopted consisted only of monthly stipends. *Id.* at 579-580. Justice WEAVER further concluded that statements by constitutional convention delegates show that they had employed the phrase "accrued financial benefits" for the specific purpose of limiting the contractual right of public school employees under art 9, § 24 to deferred compensation embodied in a pension plan. *Musselman II, supra* at 580, quoting 1 Official Record, Constitutional Convention 1961, pp 771, 773-774 (delegate Van Dusen). Thus, with six justices splitting three to three on the issue, the question whether health care benefits are included within the phrase "accrued financial benefits" remained unresolved by this Court. However, as did the Court of Appeals in the present case,[6] we agree with Justices RILEY, WEAVER, and LEVIN that they are not.

As Justice RILEY correctly pointed out in her dissent in *Musselman I*, the majority "misse[d] the mark" by focusing on the history behind art 9, § 24 and the intent

[6] 260 Mich App at 473.

of the constitutional convention delegates in proposing it, rather than on the interpretation that the people would have given the provision when they adopted it. *Musselman I, supra* at 526. Indeed, we recently stated the correct standard to be applied when interpreting constitutional provisions in *Hathcock, supra* at 468:

> The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. [*People v Nutt,* 469 Mich 565, 573; 677 NW2d 1 (2004).] This rule of "common understanding" has been described by Justice COOLEY in this way:
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> "A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great* mass *of the people themselves, would give it*. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people,* and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.' " [*Traverse City School Dist v Attorney General,* 384 Mich 390, 405; 185 NW2d 9 (1971) (emphasis in original), quoting 1 Cooley, Constitutional Limitations (6th ed), p 81.]
>
> In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.

In order to reach the objective of discerning the intent of the people when ratifying a constitutional provision, we apply the plain meaning of each term used therein at the time of ratification unless technical, legal terms were employed. *Phillips v Mirac, Inc,* 470 Mich 415, 422; 685 NW2d 174 (2004). In this case, the term

"benefits" is modified by the words "financial" and "accrued." Because these adjectives are not technical, legal terms that would have been ascribed a particular meaning by those learned in the law at the time the Constitution was ratified,[7] we discern the intent of the people in ratifying art 9, § 24 by according the adjectives their plain and ordinary meanings at the time of ratification.[8]

We first note that, despite specifically stating that the threshold issue in determining whether health care benefits were subject to the prefunding requirement of the second clause of art 9, § 24 is whether they constitute "accrued financial benefits" within the meaning of the first clause of art 9, § 24,[9] the majority in *Musselman I* did not address the term "accrued." At the time that our 1963 Constitution was ratified, the term "accrue" was commonly defined as "to increase, grow," "to come into existence as an enforceable claim; vest as a right," "to come by way of increase or addition: arise as a growth or result," "to be periodically accumulated in the process of time whether as an increase or a decrease," "gather, collect, accumulate," *Webster's Third New Int'l Dictionary* (1961), p 13, or "to happen or result as a natural growth; arise in due course; come or fall as an addition or increment," "to become a present and enforceable right or demand," *Random House*

[7] *Id.* at 425.

[8] It seems apparent, but to foreclose confusion that the dissent may engender, that the 2004 view of the Governmental Accounting Standards Board (GASB) that the dissent relies on to define terms is entirely irrelevant to what ratifiers in 1963 would have understood. Furthermore, the passage quoted from the GASB by the dissent does not even purport to define any of these terms but merely directs how to handle the *accounting* fringe benefits entail.

[9] *Musselman I, supra* at 510.

American College Dictionary (1964), p 9. Thus, according to these definitions, the ratifiers of our Constitution would have commonly understood "accrued" benefits to be benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed.[10] Health care benefits, however, are not benefits of this sort. Simply stated, they are not accrued. Under MCL 38.1391(1),[11] which the plaintiffs in this case rely on, neither the amount of health care benefits a public school employee receives nor the amount of the premium, subscription, or membership fee that MPSERS pays increases in relation to the number of years of service the retiree has performed.

That art 9, § 24 only protects those financial benefits that increase or grow over time is not only supported but, indeed, confirmed by the interaction between the first and second clauses of that provision. Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits . . . ." Thereafter, the second clause seeks to ensure that the state and its political subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those "[f]inancial benefits arising on account of service rendered in each fiscal year . . . ." Thus, because the second clause only requires the state and its political subdivision to set aside funding for "[f]inancial benefits arising on account of service ren-

[10] See, e.g., MCL 38.1384.

[11] MCL 38.1391(1) provides that "[t]he retirement system shall pay the entire monthly premium or membership or subscription fee for hospital, medical-surgical, and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the retirement board and the department."

dered in each fiscal year" to fulfill their contractual obligation of paying for "accrued financial benefits," it reasonably follows that "accrued" financial benefits consist only of those "[f]inancial benefits arising on account of service rendered in each fiscal year . . . ."[12]

Moreover, health care benefits do not qualify as "financial" benefits. At the time Const 1963, art 9, § 24 was ratified, the term "financial" was commonly defined as "pertaining to monetary receipts and expenditures; pertaining or relating to money matters; pecuniary," *Random House, supra,* p 453, or "relating to finance or financiers," *Webster's, supra,* p 851, and "finance" was commonly defined as "pecuniary resources, as of . . . an individual; revenues," *Random House, supra*; accord *Webster's, supra*. "Pecuniary," in turn, was commonly defined as "consisting of or given or extracted in money," or "of or pertaining to money." *Random House, supra,* p 892; accord *Webster's, supra,* p 1663. Accordingly, the ratifiers of our Constitution would have commonly understood "financial" benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits.

We further point out that, even if the phrase "accrued financial benefits" were ambiguous and, thus, it would be permissible or necessary to consult the statements of delegates during the constitutional convention debates, the majority's approach in doing so in *Musselman I* was fundamentally flawed. Specifically, although

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[12] The dissent claims that we are not defining words with any reference to context. This is not the case. Indeed, we are as committed to that interpretive tool as the dissent claims to be, and this opinion bears witness to that. The difference between us, however, is that we are endeavoring to place words in the context of other words while the dissent places words in the context of something far more vague, apparently nothing more than its own sense of the preferred result.

this Court has continually recognized that constitutional convention debates are relevant to determining the meaning of a particular provision, *Lapeer Co Clerk v Lapeer Circuit Court,* 469 Mich 146, 156; 665 NW2d 452 (2003); *People v Nash,* 418 Mich 196, 209; 341 NW2d 439 (1983) (opinion by BRICKLEY, J.), we take this opportunity to clarify that, when necessary, the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision, *Nutt, supra* at 574.[13] We highlighted this distinction in *Univ of Michigan Regents v Michigan,* 395 Mich 52, 59-60; 235 NW2d 1 (1975), in which we stated:

> The debates must be placed in perspective. They are individual expressions of concepts as the speakers perceive them (or make an effort to explain them). Although they are sometimes illuminating, affording a sense of direction, they are not decisive as to the intent of the general convention (or of the people) in adopting the measures.
>
> Therefore, we will turn to the committee debates only in the absence of guidance in the constitutional language . . . or when we find in the debates a recurring thread of explanation binding together the whole of a constitutional concept.

Bearing this principle in mind, the primary focus of the majority in *Musselman I* should not have been on the intentions of the delegates in supporting art 9, § 24 but, rather, on any statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to

[13] "Constitutional Convention debates and the Address to the People are certainly *relevant as aids in determining the intent of the ratifiers.*" (Emphasis added.)

aid in discerning what the common understanding of those terms would have been when the provision was ratified by the people.[14] In this regard, it is important to note that the majority in *Musselman I* did, in fact, locate such evidence but chose to disregard it, stating:

> The only explicit elaboration on the term "accrued financial benefits" was this remark by delegate Van Dusen:
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> "[T]he words 'accrued financial benefits' were used designedly, so that the contractual right of the employee would be limited to the deferred compensation embodied in any pension plan, and that we hope to avoid thereby a proliferation of litigation by individual participants in retirement systems talking about the general benefits structure, or something other than his specific right to receive benefits."
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> Unfortunately, he addresses which rights are contractual, and thus enforceable at law under the first clause of Const 1963, art 9, § 24—a question distinct from what must be prefunded under the second clause. [*Musselman I, supra* at 510 n 8, quoting 1 Official Record, Constitutional Convention 1961, pp 773-774.]

This statement by delegate Van Dusen is directly relevant to discerning the common understanding of the words "accrued" and "financial" at the time of the constitutional convention and, indeed, reinforces our conclusion that the ratifiers would have commonly

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[14] See, generally, *Beech Grove Investment Co v Civil Rights Comm*, 380 Mich 405, 425-428; 157 NW2d 213 (1968), in which this Court examined, among other things, the statements of delegates to the constitutional convention and the Address to the People in order to discern the meaning of the term "civil rights" as used in Const 1963, art 5, § 29, but, in doing so, expressly recognized that "it is the Constitution, not the debates, that was finally submitted to the people. While the debates may assist in an interpretation of the Constitution, neither they nor even the Address to the People is controlling." *Beech Grove, supra* at 427.

understood the phrase "accrued financial benefits" to be one of limitation that would restrict the scope of protection provided by art 9, § 24 to monetary payments for past services. The *Musselman I* majority's stated reason for disregarding this statement, that delegate Van Dusen was stating why that phrase was used in the first clause of art 9, § 24, and not why it was used in the second clause, is illogical. Stated simply, there is no reason to believe that the ratifiers would have interpreted the phrase "accrued financial benefits" any differently when reading the second clause than they would have when reading the first. Indeed, it would be unreasonable to assume, in the circumstance where they were drafted together and presented to the ratifiers at the same time, that there was any other intent. In discussing this concept, Justice COOLEY stated, "[a]s a general thing, it is to be supposed that the same word is used in the same sense wherever it occurs in a constitution." 1 Cooley, Constitutional Limitations (8th ed), p 135.[15]

Thus, in summary, we hold that health care benefits are not protected by Const 1963, art 9, § 24 because they neither qualify as "accrued" benefits nor "finan-

[15] See, also, *Lockwood v Comm'r of Revenue,* 357 Mich 517, 536-537; 98 NW2d 753 (1959) (CARR, J., dissenting):

> It is incredible that the legislature in submitting to popular vote the proposed amendment [of Const 1908, art 10, § 23] at the general election in 1954, or that the people in voting thereon, intended that the term "sales tax" as used in the clauses of said amendment providing for the apportionment of sales tax funds in the manner stated therein, and in inhibiting the legislature from increasing the sales tax above 3%, intended to use the term in question with different meanings. *In other words, it must be assumed that the designation was used* in the proviso imposing limitation on the power of the legislature with reference to the increase in the sales tax *with exactly the same meaning* as clearly intended in the so-called diversion clauses. [Emphasis added.]

cial" benefits as those terms were commonly understood at the time of the Constitution's ratification and, thus, are not "accrued financial benefits."

IV. ANALYSIS OF CONST 1963, ART 1, § 10 AND US CONST, ART I, § 10

The plaintiffs here assert that, by enacting MCL 38.1391(1), the Legislature created a contractual right by public school retirees to receive health care benefits and, further, that this contractual right could not be altered or abolished by successive legislatures without violating Const 1963, art 1, § 10[16] and US Const, art I, § 10,[17] both of which prohibit the state from enacting any law that impairs existing contractual obligations. We disagree.

MCL 38.1391(1) provides:

> The retirement system[18] shall pay the entire monthly premium or membership or subscription fee for hospital, medical-surgical, and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the retirement board and the department.[19]

The Court of Appeals determined that this statute does create for plaintiffs a contractual right to receive health care benefits, but that the copay and deductible increases implemented by the board do not amount to a substantial impairment of that contractual right. How-

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[16] "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted."

[17] "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

[18] "Retirement system" refers to the MPSERS. MCL 38.1307(8).

[19] "Department" refers to the Department of Management and Budget. MCL 38.1304(4).

ever, we conclude that MCL 38.1391(1) does not create for retirees a contractual right to receive health care benefits and, therefore, reverse the Court of Appeals determination on that point.

Of primary importance to the viability of our republican system of government is the ability of elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation. Therefore, a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature.[20] We recently reiterated this principle at length in *LeRoux v Secretary of State,* 465 Mich 594, 615-616; 640 NW2d 849 (2002), quoting *Atlas v Wayne Co Bd of Auditors,* 281 Mich 596, 599; 275 NW 507 (1937):

> "The act of one legislative body does not tie the hands of future legislatures. *Cooper, Wells & Co v City of St Joseph,* 232 Mich 255 [205 NW 86 (1925)]. The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors . . . . [Additionally,] [o]ne legislature cannot enact irrepealable legislation or limit or restrict its own power, or the power of its successors, as to the repeal of statutes; and an act of one legislature is not binding on, and does not tie the hands of, future legislatures."

Although this venerable principle that a legislative body may not bind its successors can be limited in some

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[20] *United States v Winstar Corp,* 518 US 839, 873; 116 S Ct 2432; 135 L Ed 2d 964 (1996) (opinion by Souter, J.); *Community-Service Broadcasting of Mid-America, Inc v Fed Communications Comm,* 192 US App DC 448, 459; 593 F2d 1102 (1978); *Mirac, supra* at 430; *Ballard v Ypsilanti Twp,* 457 Mich 564, 569; 577 NW2d 890 (1998).

circumstances because of its tension with the constitutional prohibitions against the impairment of contracts, thus enabling one legislature to contractually bind another, *Winstar, supra* at 872-874, such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments, *id.* at 874-875. A necessary corollary of these limitations that has been developed by the United States Supreme Court, and followed by this Court, is the strong presumption that statutes do not create contractual rights. *Nat'l R Passenger Corp v Atchison, Topeka & Santa Fe R Co,* 470 US 451, 465-466; 105 S Ct 1441; 84 L Ed 2d 432 (1985); *In re Certified Question (Fun 'N Sun RV, Inc v Michigan),* 447 Mich 765, 777-778; 527 NW2d 468 (1994). This presumption, and its relation to the protection of the sovereign powers of a legislature, was succinctly described by the United States Supreme Court in *Nat'l R, supra* at 465-466:

> For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge* v. *Board of Education,* 302 U.S. 74, 79 [58 S Ct 98; 82 L Ed 57] (1937). See also *Rector of Christ Church* v. *County of Philadelphia,* 24 How. 300, 302 [65 US 300; 16 L Ed 602] (1861) ("Such an interpretation is not to be favored"). This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. *Indiana ex rel. Anderson* v. *Brand,* 303 U.S. 95, 104-105 [58 S Ct 443; 82 L Ed 685] (1938). Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.

> Indeed, " '[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.' " *Keefe* v. *Clark,* 322 U.S. 393, 397 [64 S Ct 1072; 88 L Ed 1346] (1944) (quoting *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 548 [36 US 420; 9 L Ed 773] (1837)). Thus, the party asserting the creation of a contract must overcome this well-founded presumption, *Dodge, supra,* at 79, and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation.

The first step in this cautious procession is to examine the statutory language itself. *Nat'l R, supra* at 466. In order for a statute to form the basis of a contract, the statutory language "must be 'plain and susceptible of no other reasonable construction' than that the Legislature intended to be bound to a contract." *In re Certified Question, supra* at 778, quoting *Stanislaus Co v San Joaquin & King's River Canal & Irrigation Co,* 192 US 201, 208; 24 S Ct 241; 48 L Ed 406 (1904). If the statutory language " 'provides for the execution of a written contract *on behalf of the state* the case for an obligation binding upon the state is clear.' " *Nat'l R, supra* at 466, quoting *Dodge, supra* at 78 (emphasis supplied in *Nat'l R*). But, "absent 'an adequate expression of an actual intent' of the State to bind itself," courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party. *Nat'l R, supra* at 466-467, quoting *Wisconsin & Michigan R Co v Powers,* 191 US 379, 386-387; 24 S Ct 107; 48 L Ed 229 (1903). In addition to the absence of contractual language, some federal courts, when interpreting statutes involving public-employee pension benefit plans, have expressed even greater reluctance to infer a contractual obligation where a legislature has not explicitly precluded amend-

ment of a plan. *Nat'l Ed Ass'n-Rhode Island v Retirement Bd of the Rhode Island Employees' Retirement System,* 172 F3d 22, 27 (CA 1, 1999). This reluctance stems not only from the caution against finding an implied surrender of legislative power, but also from the realization that legislatures frequently need to utilize that power to modify benefit programs and compensation schedules. *Id.* Further, this reluctance is grounded in the realization that "it is easy enough for a statute explicitly to authorize a contract or to say explicitly that the benefits are contractual promises, or that any changes will not apply to a specific class of beneficiaries (*e.g.*, those who have retired)." *Id.* at 27-28 (citations omitted). In the area of worker's compensation, this Court has also followed this principle and stated that, as a general rule, a statute will not be held to have created contractual rights "if 'the Legislature did not covenant not to amend the legislation.' " *In re Certified Question, supra* at 778, quoting *Franks v White Pine Copper Div,* 422 Mich 636, 654; 375 NW2d 715 (1985). Finally, in addition to the absence of such clear and unequivocal statutory language, the circumstances of a statute's passage may "belie an intent to contract away governmental powers." *Nat'l R, supra* at 468.

The plaintiffs in this case have failed to overcome the strong presumption that the Legislature did not intend to surrender its legislative powers by entering into a contractual agreement to provide retirement health care benefits to public school employees when it enacted MCL 38.1391(1). Nowhere in MCL 38.1391(1), or in the rest of the statute, did the Legislature provide for a written contract on behalf of the state of Michigan or even use terms typically associated with contractual relationships,[21] such as "contract," "covenant," or

[21] *Nat'l R, supra* at 467.

"vested rights."[22] Had the Legislature intended to surrender its legislative powers through the creation of contractual rights, it would have expressly done so by employing such terms. Indeed, by its plain language, the statute merely shows a policy decision by the Legislature that the retirement system pay "the entire monthly premium or membership or subscription fee" for the listed health care benefits on behalf of a retired public school employee who chooses to participate in whatever plan the board and the Department of Management and Budget authorize. However, nowhere in the statute did the Legislature require the board and the department to authorize a particular plan containing a specific monthly premium, membership, or subscription fee or, alternatively, explicitly preclude the board and the department from amending whatever plan they authorize.[23] Additionally, nowhere in the statute did the Legislature require the board and the department to authorize a plan containing specified deductibles and copays. In fact, nowhere in the statute

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[22] It is clear that the Legislature can use such nomenclature when it wishes to. For instance, when enacting 1982 PA 259, which requires the state treasurer to pay the principal of and interest on all state obligations, the Legislature provided in MCL 12.64: "*This act shall be deemed a contract* with the holders from time to time of obligations of this state." (Emphasis added.) Similarly, when enacting the State Housing Development Authority Act, 1966 PA 346, the Legislature provided in MCL 125.1434: "*The state pledges and agrees* with the holders of any notes or bonds issued under this act, *that the state will not limit or alter the rights vested in the authority to fulfill the terms of any agreements made with the holders thereof, or in any way impair the rights and remedies of the holders* until the notes or bonds, together with the interest thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceeding by or on behalf of such holders, are fully met and discharged. The authority is authorized to include this pledge and agreement of the state in any agreement with the holders of such notes or bonds." (Emphasis added.)

[23] *Nat'l Ed Ass'n-Rhode Island*, *supra* at 27.

did the Legislature even mention deductibles and co-pays. Further, nowhere in the statute did the Legislature covenant that it would not amend the statute to remove or diminish the obligation of the MPSERS to pay the monthly premium, membership, or subscription fee; nor did it covenant that any changes to the plan by the board and the department, or amendments to the statute by the Legislature, would apply only to a specific class or group of public school retirees.[24] Again, had the Legislature intended to surrender its power to make such changes, it would have done so explicitly.

Although we need not do so because of the absence of clear and unequivocal language showing an intent to contract, we note that the circumstances surrounding the Legislature's enactment of MCL 38.1391(1) provide further evidence that the Legislature did not intend to contract away its legislative powers.[25] As was discussed by the Court of Appeals, initially the Legislature required the MPSERS to pay a portion of the premium for health care benefits for public school retirees through the enactment of the predecessor of MCL 38.1391, former MCL 38.325b of the Public School Employees Retirement Act, 1945 PA 136, and subsequent legislatures have exercised their powers to amend the statute many times throughout the years to change the type of plans that the board could authorize, the criteria for the beneficiaries on whose behalf the MPSERS could pay the premiums for various benefits, and the amounts of those premiums that the MPSERS was required to pay.[26] Thus, there is no indication that the Legislature that enacted MCL 38.1391(1) in 1980 intended to do anything beyond what its predecessors had done—set

[24] *Id*. at 27-28; *In re Certified Question, supra* at 778.

[25] *Nat'l R, supra* at 468.

[26] 260 Mich App at 463-465.

forth a policy to be pursued until one of its successor legislatures ordained a new policy.[27] Additionally, as was also analyzed by the Court of Appeals, the health care plan itself has been amended and modified by the MPSERS numerous times since 1975, not only to increase the benefits available but also to increase the amounts of the copays and deductibles that participants were required to pay.[28] In their appeal to this Court, plaintiffs have not only conceded that these statutory amendments and changes to the plan have occurred, but also expressly conceded during oral argument that the Legislature and the board have the authority to make such changes. Thus, plaintiffs themselves, by the positions they have taken, have effectively recognized that MCL 38.1391(1) merely established a legislative policy that could be changed by a successor legislature rather than providing for a surrender of such legislative power through the creation of a contractual relationship.

We further note that, as part of the 1979 Public School Employees Retirement Act, in which MCL 38.1391(1) is included, the Legislature also enacted MCL 38.1303a(1), which defines "compensation" for

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[27] *Nat'l R, supra* at 466.

[28] The Court of Appeals, 260 Mich App at 465-466, stated:

> The MPSERS provides a health care plan for retirees. Cost-sharing features have been a part of the health plan since its inception in 1975. The individual and family deductible component of the health care plan has gradually increased from 1982 to 1999, beginning with a deductible of $50 for each person and $100 for each family in 1982, and gradually rising to a deductible of $145 for each person and $290 for each family in 1999. Cost sharing for the prescription drug program also had gradual increases, ranging from a copay of ten percent in 1975 to a copay of $4 for generic drugs and $8 for brand name drugs in 1997 through March 31, 2000. There is no dispute that the MPSERS health care plan also gradually increased the benefits available under the plan.

public school employees as "the remuneration earned by a member for service performed as a public school employee." Thus, by enacting this statute, the Legislature recognized that an implied-in-law contractual relationship can arise between the school system and public school employees. Specifically, a public school employee can become contractually entitled to "compensation" by first performing services. However, payment of health care premiums by the MPSERS under MCL 38.1391(1) is not among the list of items that the Legislature specifically set forth as being part of an employee's "compensation" in MCL 38.1303a(2)(a) through (h). Additionally, and more importantly, MCL 38.1303a(3) expressly lists items that are *not* included within the definition of compensation and includes, among other things, *"[p]ayments for hospitalization insurance* and life insurance premiums,"[29] and "[o]ther fringe benefits paid by and from the funds of employers of public school employees."[30] This causes us to conclude that surely the Legislature would not specifically exclude the payment of health care benefits from the list of items that a public school employee could, potentially, become contractually entitled to by having performed services but, at the same time, intend to vest plaintiffs with a contractual right to receive such benefits through the simultaneous enactment of MCL 38.1391(1). Accordingly, it seems evident that the way to understand these enactments is that the Legislature intended for payment of health care benefits by the MPSERS under MCL 38.1391(1) to simply be a "fringe

[29] MCL 38.1303a(3)(c) (emphasis added).

[30] MCL 38.1303a(3)(d).

benefit" to which public school employees would never have a contractual entitlement.[31]

Thus, because the plain language of MCL 38.1391(1) does not clearly indicate that the Legislature intended to surrender its legislative powers through the statute's enactment, we hold that MCL 38.1391(1) does not create for public school employees a contractual right to health care benefits. We therefore reverse the Court of Appeals conclusion to the contrary. However, because the Court of Appeals ultimately reached the correct result, we affirm its ultimate conclusion to uphold the circuit court's entry of summary disposition in favor of defendants.[32]

V. RESPONSE TO THE DISSENT

We would be remiss if we failed to point out that the ad hoc analysis employed by the dissent to determine that public school retirees possess a contractual right to health care benefits, rendering the Legislature powerless to alter or do away with them, is particularly disturbing and, taken to its logical conclusion, would undermine this state's constitutionally guaranteed republican system of government.

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[31] This fact not only belies plaintiffs' claim that MCL 38.1391(1) shows a legislative intent to vest public school retirees with a contractual right to health care benefits, but also renders erroneous the Court of Appeals statement that "[h]ealth insurance is part of an employee's benefit package and the whole package is an element of consideration that the state contracts to tender in exchange for services rendered by the employee." 260 Mich App at 476. Indeed, MCL 38.1303a makes clear that payment of health care benefits by the MPSERS is *not* an element of the consideration that the state contracts to tender as remuneration for a public school employee's services.

[32] Having concluded that MCL 38.1391(1) does not create a contract, we need not address plaintiffs' argument challenging the Court of Appeals determination that the copay and deductible increases do not operate as a substantial impairment of a contractual relationship.

The most treasured civic possession of an American citizen is the right to self-government. It is the central pillar and animating force of our constitutions. Thus, US Const, art IV, § 4 provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." The Michigan Constitution, Const 1963, art 1, § 1 states similarly that "[a]ll political power is inherent in the people," and the importance the founding generation gave to this can be seen by its reiteration repeatedly in the documents preceding, coinciding with, and following the adoption of the United States Constitution in 1789. Thus, Congress provided in the Northwest Ordinance that the constitutions and governments of the states to be formed in the territory, of which states Michigan is one, "shall be republican . . . ." Northwest Ordinance of 1787, art V. This requirement was carried forward by Congress when it severed Michigan from the Northwest Territory in 1800 and made it part of the Indiana Territory, 2 US Stat, Ch XLI, § 2, and again in 1805 when it likewise severed Michigan from the Indiana Territory and established the Michigan Territory, 2 US Stat, Ch V, § 2, by requiring both times that the government established in those territories was to be "in all respects similar" to that provided in the Northwest Ordinance of 1787.

What this means concretely is that what one legislature has done, pursuant to the majority sentiment at that time, a later legislature responding to the then majority can modify or undo. Deprived of this right, self-government is not just hollow, it is nonexistent.

Yet, as the United States Supreme Court has held and we have discussed in this opinion, when the Legislature enters into a contract, a subsequent legislature cannot repudiate that contract. It seems obvious that to

read what is a contract too broadly swallows the right of the people to change the course of their governance. This is the tension that we have attempted to address and thoroughly analyze, whereas the dissent has just blithely assumed that any benefit once conferred is a contract and cannot be altered. This is an ill-considered notion that in cases yet to be seen, but surely to be seen if this were to become the majority position, means that, for example, general assistance welfare benefits could not be altered, Medicaid would be frozen in its first enacted form, and, in short, any financial benefit would be unalterable.

This is not and surely cannot be our law. Yet, the dissent claims that the recipients of the benefits will be surprised it is not. Will they? No one should be surprised that benefit battles are fought out in the Legislature. On the contrary, those who could claim legitimate surprise would be our citizens who, were there two more votes on this Court to join the dissent and make it a majority, would have lost, in the fog of a baffling contract analysis, the right to change the course of their government. Indeed, that would be more than surprising, it would be revolutionary.

VI. CONCLUSION

We hold that health care benefits are not "accrued financial benefits" and, thus, are not protected by Const 1963, art 9, § 24. Accordingly, we affirm the Court of Appeals on this issue. We further hold that the Legislature did not intend to create a contractual relationship with public school employees by enacting MCL 38.1391(1) and, thus, payment of health care benefits by the MPSERS is not a contractual right subject to protection by Const 1963, art 1, § 10 and US Const, art I, § 10. We therefore reverse the Court of

Appeals determination on this issue. However, because the Court of Appeals reached the correct result, we affirm its determination that the circuit court properly entered summary disposition in defendants' favor.

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, C.J.

WEAVER, J. (*concurring*). I concur in the majority conclusion and reasoning that the Legislature did not intend to create a contractual right subject to Const 1963, art 1, § 10 and US Const, art I, § 10 when it provided for payment of health care benefits to public school employees through the enactment of MCL 38.1391(1).

Regarding whether health care benefits paid to public school retirees are "accrued financial benefits" under Const 1963, art 9, § 24, I concur with the majority conclusion that they are not. I agree with the majority that "the ratifiers of our Constitution would have commonly understood 'financial' benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits." *Ante* at 655. As noted by Justice RILEY in her partial concurrence and partial dissent regarding art 9, § 24 in *Musselman v Governor,* 448 Mich 503, 526; 533 NW2d 237 (1995) (*Musselman I)*, "when interpreting the language of the constitution, unambiguous terms are given their plain meaning." Justice RILEY concluded that the "normal usage of the word 'financial' connotes money and 'money' connotes some form of hard currency that can be 'spent.' " *Id.* at 527. When the Court granted rehearing in *Musselman*, I concurred with Justice RILEY's *Musselman I* analysis of the common understanding of the term "accrued financial benefits" and I continue to agree with her

analysis today. In *Musselman v Governor (On Rehearing),* 450 Mich 574; 545 NW2d 346 (1996) (*Musselman II*), I wrote further to note that Justice RILEY's conclusion was supported by the fact that health care benefits did not exist when the people ratified the 1963 Michigan Constitution. Because health care benefits did not exist at that time, the people would not have anticipated that the pension and retirement systems established by Const 1963, art 9, § 24 included health care benefits. *Mussleman II* at 579.

CAVANAGH, J. (*dissenting*). I believe that retirement health care benefits earned by public school employees constitute "accrued financial benefits" that are protected by our Michigan Constitution from diminishment or impairment. I also believe that the statute that provides retirement health care benefits for public school employees, MCL 38.1391, creates a contract with public school employees and retirees that cannot be substantially impaired. Because there are significant questions about the accuracy of the record used by the lower courts to determine if a substantial impairment indeed occurred, I would remand for further review. Accordingly, I respectfully dissent from the majority's position that public school employees and retirees are without protection from the prospect that their retirement health care benefits may be drastically decreased or even eliminated.

I. HEALTH CARE BENEFITS ARE "ACCRUED FINANCIAL BENEFITS" WITHIN THE MEANING OF MICHIGAN'S CONSTITUTION

Const 1963, art 9, § 24 provides the following:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions

> shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

Whether health care benefits are "accrued financial benefits" has already been addressed by this Court in *Musselman v Governor*, 448 Mich 503, 510; 533 NW2d 237 (1995) (*Musselman I*), and *Musselman v Governor (On Rehearing)*, 450 Mich 574; 545 NW2d 346 (1996) (*Musselman II*). In *Musselman I*, this Court examined whether health care benefits are indeed "financial" benefits. We held that because the purpose of the constitutional provision is to prevent the state from amassing bills for pension payments, including health care benefits, for which the state does not have the money to pay, the term "financial benefits" includes retirement health care benefits.

Reflecting on the analysis in *Musselman I*, I fail to see its flaws. This Court reasonably concluded that the goal of the constitutional provision is to ensure that the state can pay for the commitments it has made. Regardless of whether the commitment is for a straightforward monthly cash allowance to a retiree or for payment of health care benefits for a retiree, the state must still pay for its obligations. If the state has failed to set aside an appropriate amount of money, the situation is still the same, meaning the state still has a *financial* consequence.

I believe this interpretation is the one that the people gave the constitutional provision when it was adopted because it best reflects the common understanding of the people. See *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 745; 330 NW2d 346

(1982). The most reasonable interpretation of the phrase "accrued financial benefits" includes health care benefits. Health care benefits are given in lieu of additional compensation to public school employees. A health care benefit is a *financial* benefit because it clearly costs the state money and has an economic value to the employee. Notably, our Constitution was not written to include every conceivable aspect of a pension plan. It was certainly not beyond the understanding of the ratifiers that health care benefits, which cost the state money, would be offered as a retirement benefit. As such, these benefits would need to be protected, just as monthly cash allowances to retirees must be protected.

As we stated in *Musselman I*, *supra* at 516 n 12, "Many delegates to the 1961 Constitutional Convention perceived as unfair the rule that pensions granted by public authorities were not contractual obligations, but rather gratuitous allowances that could be revoked at will." See, e.g., 1 Official Record, Constitutional Convention 1961, pp 770-774. It should not come as a surprise that the ratifiers would believe this to be true about health care benefits that mean as much, if not more, to many retirees.

Moreover, even if the ratifiers did not imagine every conceivable pension plan benefit that would be offered, the "idea behind formulating a general rule, as opposed to a set of specific commands, is that a rule governs possibilities that could not have been anticipated at the time." *Musselman I*, *supra* at 514.[1] The constitutional

[1] We believe that this constitution must be a forward looking document; that it must take cognizance of the problem; that it must spell out for the future the manner in which these funds should be managed, so that our children will not, 50 years hence,

provision was meant to address *all* public employee retirement systems; it is entirely reasonable that the ratifiers would not be aware of every possible retirement benefit being offered to every public employee. See, e.g., 1 Official Record, Constitutional Convention 1961, p 771. In response to a question whether the state could increase benefits and whether an increase in benefits would be a gratuity or an obligation that the state must fulfill, a constitutional convention delegate responded as follows: "Certainly there's nothing here to prohibit the employer from increasing the benefit structure." *Id*. at 774. "Once the employee, by working pursuant to an understanding that this is the benefit structure presently provided, has worked in reliance thereon, he has the contractual right to those benefits which may not be diminished or impaired." *Id*.

The constitutional principle declared is that accrued financial benefits, including health care benefits, will be protected for retirees. Simply, "once an employee has performed the service in reliance upon the then prescribed level of benefits, the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing the plan." *Id*. at 771.

In attempting to define the term "accrued financial benefits," the majority cites numerous definitions for the word "accrue," and I do not quarrel with those definitions.[2] Indeed, as the majority states, "accrue"

> suffer from the fact that we failed to put in enough money to take care of the benefits attendant upon the service currently performed by public employees. [1 Official Record, Constitutional Convention 1961, p 771.]

[2] While I do not quarrel with the definitions used, I must note that the majority yet again insists on relying solely on dictionary definitions to the illogical exclusion of context. "There is no more irritating fellow than the

means "to increase, grow" and "to come into existence as an enforceable claim; vest as a right." *Ante* at 653 (citation and internal quotation marks omitted). However, I disagree with the majority's assertion that the ratifiers of our Constitution would have commonly understood "accrued" to mean that an *individual's* benefits must increase or grow *over time*. The majority seems to believe that to be an accrued financial benefit, an employee's retirement health care benefits must gradually increase on the basis of the number of years that the person is employed, yet this is not accurate. The term "accrued financial benefits" was used to denote benefits that were contractual obligations on the part of the state. The term "accrued financial benefits" was meant to include benefits that an employee *had worked in reliance on and continued to work in reliance on*. This is in contrast to the term "financial benefits," which was used in the second clause of the constitutional provision to denote a system in which the benefits earned for the year were funded annually. Because the second clause only specifically dealt with how to fund benefits earned in a given year, retirement systems would eventually need to address the funding for benefits that had been earned in prior years but had not been properly funded. 1 Official Record, Constitutional Convention 1961, pp 773-774.[3]

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man who tries to settle an argument about communism, or justice, or liberty, by quoting from Webster." Pflug, ed, *The Ways of Language* (New York: The Odyssey Press, Inc, 1967), ch 4, How to Read a Dictionary, p 62. While dictionary definitions are certainly useful, they must be examined *in context*. See also Hayakawa, *Language in Thought and Action* (New York: Harcourt, Brace and Co, 1949), ch 4, p 62 ("Interpretation *must* be based, therefore, on the totality of contexts.").

[3] The constitutional provision does two things:

> [I]n the first paragraph, it provides that the relationship between the employing unit and the employee shall be a contrac-

When a public school employee has fulfilled his commitment and is then entitled to receive health care benefits once he retires, the employee has an enforceable claim to receive the benefits upon retirement. "Accrued" does not mean that the amount of benefits the employee will receive during retirement must grow in conjunction with the employee's years of service. For an employee to have an accrued financial benefit, he must fulfill the obligations set forth by the state. For plaintiffs, all the events that are necessary for them to receive their benefits have come into existence. Simply, plaintiffs went to work and did their jobs for the required number of years. As our Constitution states, accrued financial benefits "shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Const 1963, art 9, § 24. Once an employee has fulfilled his obligation, the state must fulfill its obligation and be prepared to pay retirement health care benefits when necessary.

Additionally, even if the term "accrued financial benefits" were viewed as a term more commonly used by accountants and actuaries than by laypersons, its meaning would still encompass retirement health care benefits. As stated by the Governmental Accounting Standards Board (GASB), cash payments and other retirement benefits, such as health care benefits, "are

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tual relationship so that the municipality may not change the relationship at its will. The benefits that have accrued up to a given time are contractual and must be carried out by the municipality or by the state. The second paragraph provides that each year the system shall pay in enough money to fund the liability arising in that year. It does not require that the system catch up with all of its past liability, which would be an impossibility in connection with some of the state systems, but it does require that they shall not go any further behind. [2 Official Record, Constitutional Convention 1961, p 2659.]

conceptually similar transactions-both involve *deferred compensation* offered in exchange for current services —and should be accounted for in a similar way." Governmental Accounting Standards Board, Accounting and Financial Reporting by Employers for Postemployment Benefits Other Than Pensions, Statement No. 45, June 2004, p 73 (emphasis added).[4] As noted by the majority, " '[t]he words "accrued financial benefits" were used designedly, so that the contractual right of the employee would be limited to the *deferred compensation* embodied in any pension plan . . . .' " *Ante* at 657, quoting *Musselman I*, *supra* at 510 n 8, quoting 1 Official Record, Constitutional Convention 1961, pp 773-774 (emphasis added). By any standard employed, the meaning of the term "accrued financial benefits" encompasses retirement health care benefits for public school employees.

II. HEALTH CARE BENEFITS ARE CONTRACTUAL OBLIGATIONS

The United States Constitution provides in relevant part, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." US Const, art I, § 10, cl 1. Michigan's Constitution provides, "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art 1, § 10.

Information about retirement health care benefits for Michigan's public school employees is set forth in MCL 38.1391. MCL 38.1391(1) states that the state is responsible for paying the monthly premiums for plain-

[4] The GASB also states that retirement health care benefits, like monthly cash allowances, arise "from an exchange of salaries and benefits for employee services rendered and constitute[] part of the compensation for those services." *Id.* at 1. Retirement benefits "are an *exchange of promised benefits for employee services*." *Id*. at 77.

tiffs' health care benefits.[5] In *Musselman I*, *supra* at 516, this Court stated that the obligation to pay retirement health care benefits "is a contractual right arising from the fact that employees have worked in reliance on the statutory promise that the board will pay earned health care benefits of any member receiving a retirement allowance." In *Musselman I*, *supra* at 519 n 19, the defendants even conceded "that retirement health care benefits are contractual benefits subject to Const 1963, art 1, § 10." Further, "the defendants conceded that these statutes create a right to receive health benefits that may not be impaired." *Musselman I, supra* at 505 n 1.

The statute's intent is clear—in exchange for receiving years of an employee's services, the state will pay for retirement health care benefits. This unconditional guarantee is what many public school employees and retirees have relied on throughout the years, and the state has benefited from that reliance. As stated at the constitutional convention, "[T]here is no question that when an employee today takes employment with a governmental unit, he does so with the idea that there is a pension plan or retirement system involved." 1 Official Record, Constitutional Convention 1961, p 773. The majority's position now allows the state to choose, at its whim, not to fulfill its obligation under the contract even though employees have already performed the responsibilities necessary to fulfill their obligations under the contract.

The state did not offer retirement health care benefits to public school employees to be charitable; it did

[5] MCL 38.1391(1) provides, "The retirement system shall pay the entire monthly premium or membership or subscription fee for hospital, medical-surgical, and sick care benefits for the benefit of a retirant or retirement allowance beneficiary who elects coverage in the plan authorized by the retirement board and the department."

so to remain competitive in the marketplace. See 1 Official Record, Constitutional Convention 1961, p 773. And public school employees do not "receive" these benefits for free. Because retirement health care benefits cost money, the monetary compensation for public school employees had to have been factored into the equation. It is unreasonable to now claim that public school employees, who received less compensation because of the benefits they believed they would receive when they retired, are now no longer entitled to the health care benefits they worked to receive. Stability in retirement benefits is likely at least *part* of the reasons why many people chose to accept a position with the public schools or stay in that position, and it is untenable to tell these employees and retirees that it was for naught.

The majority attempts to buttress its argument by noting the definition for "compensation" provided by MCL 38.1303a(1). However, the definition of "compensation" in MCL 38.1303a does not indicate that retirement health care benefits are not to be considered "accrued financial benefits" or are not contractual obligations that the state must fulfill. The items listed in MCL 38.1303a are used to determine a retiree's monthly cash allowance. See, e.g., MCL 38.1309; MCL 38.1379; MCL 38.1384. However, this does not mean that the state is absolved of its responsibility to fulfill its obligations. The majority even states the fundamental concept that is critical to the analysis of this issue: "Specifically, a public school employee can become contractually entitled to 'compensation' by first performing services." *Ante* at 667. Because retirement health care benefits for public school employees are deferred compensation, see *ante* at 657, I fail to comprehend how the majority can justify its misapplication of a basic contract principle. I am quite certain that it comes as a

surprise to the over 140,000 public school employees that their retirement health care benefits are nothing more than a "policy decision" that the Legislature can choose to alter or eliminate at its whim. To many retirees, the health care benefits they receive through their pension plan are every bit as important, if not more so, than the monthly cash allowance they receive through their pension plan. Public school employees surely did not envision that they were afforded no protection against their retirement health care benefits being capriciously eliminated. The provision of health care benefits for retirees is not a gratuitous undertaking by defendants.[6] It is a benefit that is provided to plaintiffs in exchange for years of service. Defendants are not altruistically *giving* plaintiffs these benefits, plaintiffs *earned* them through years of hard work and dedication. Plaintiffs fulfilled their obligations, and the state should fulfill its obligation.

Finally, contrary to the majority's panic-stricken response to the dissent, the Constitution and our system of government are not under attack merely because I disagree with the majority over the interpretation of the words of the Constitution and the applicable statute. Regardless of the majority's attempt to distract the reader from the issues at hand, reading the plain words of the statute to indicate that a contract was made with public school employees and retirees does not mean that no legislative action can ever be amended or repealed. It does not mean that welfare benefits could never be

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[6] In *Ramey v Pub Service Comm*, 296 Mich 449, 462; 296 NW 323 (1941), this Court held that vacation with pay is not a gratuity—*it is compensation for services rendered*. If paid vacation time is not considered a gratuity, then I cannot fathom how retirement health care benefits can be considered a gratuity when they are part of the consideration that was exchanged for the years of service provided by public school employees.

altered, as the majority's rhetoric proclaims. It merely means that when reading *this* statute, it is clear that the words chosen by the Legislature were meant to oblige the state to provide the retirement health care benefits that were promised to public school employees.

While the majority accurately states that benefit battles are fought in the Legislature, it inaccurately states that benefits "won" can then be changed at the whim of a subsequent legislature. Once benefits have been guaranteed to workers and the workers have served the state in reliance on them, it is unconstitutional to substantially impair the receipt of these earned benefits.

The dissent states a concept that is really quite unremarkable. The government, just like any other party to a contract, must fulfill its obligation. When a public school employee has worked for years in reliance on a promise of retirement health care benefits, our system of government is not challenged by the simple notion that the state must provide these benefits.

III. ADDITIONAL DISCOVERY IS NECESSARY TO PROPERLY ASSESS WHETHER DEFENDANTS' ACTIONS CREATE A SUBSTANTIAL IMPAIRMENT OF PLAINTIFFS' CONTRACTUAL RIGHTS

Because plaintiffs' retirement health care benefits are a contractual right, the next step is to determine whether the increases in plaintiffs' copayments and deductibles substantially impaired plaintiffs' contractual rights. *Romein v Gen Motors Corp*, 436 Mich 515, 534; 462 NW2d 555 (1990). If plaintiffs' contractual rights are impaired, the impairment must be the result of a legitimate public purpose. *Id*. at 535. Finally, the means chosen to carry out the public purpose must be reasonable.

I must first address defendants' argument that the

legitimate public purpose of the increases is to ensure that there are sufficient school funds available for children. I believe that ensuring high quality education for our children is a valuable and worthwhile public purpose that should be one of our state's highest priorities. However, defendants' argument essentially pits the quality of education for school children against providing adequate health care benefits for retirees. Yet meeting the needs of school children and meeting the needs of retirees are not mutually exclusive. While it may be challenging, to say the least, to determine the best way to meet the needs of children and retirees, it does not mean that the commitment made to our state's retirees can be ignored. Merely because meeting our responsibilities is difficult does not mean that our responsibilities can be abandoned.

Plaintiffs' legitimate expectations are that retirement health care benefits will be continued and plaintiffs' portion of the costs for these benefits will not be significantly altered. It is not sufficient for defendants to pay the "entire monthly premium" if defendants disproportionately increase the amount that plaintiffs must pay for their deductibles and copayments. Moreover, increasing the amount that plaintiffs must pay over time can certainly amount to a substantial impairment if defendants do in increments what they would not be allowed to do in one large adjustment.

The amount of copayments and deductibles is linked to the amount of the monthly premiums. By increasing copayments and deductibles to extremely high proportions, the defendants could essentially avoid paying any monthly premium. That would not fulfill the terms of the contract. While the statute does not specifically state the amount that the state must pay, like any contract, the words used by the Legislature must be

construed to ascertain the intent of the parties. See *Sobczak v Kotwicki*, 347 Mich 242, 249; 79 NW2d 471 (1956).

Whether there has been a substantial impairment is largely a factual question that is better resolved after additional discovery, especially because there have been claimed inaccuracies in some of the documents submitted by defendants. It is reasonable that the amount that plaintiffs must pay will increase in logical proportion to the amount they have historically paid. However, because plaintiffs raise valid concerns about the accuracy of reports submitted by defendants, I believe it is imprudent to determine on the basis of what may amount to be an inadequate record whether the increases pose a substantial impairment.

IV. CONCLUSION

The years of dedication that public school employees and retirees have committed to educating and caring for the children of our state are worth more than empty promises provided to them by the majority's approach. I believe that retirement health care benefits earned by public school employees constitute "accrued financial benefits" that are protected by our Michigan Constitution from diminishment or impairment. I further believe that retirement health care benefits earned by public school employees are a contractual right created by statute, and whether this contractual right was substantially impaired cannot be determined without further review by the lower courts. Accordingly, I respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

BAILEY v OAKWOOD HOSPITAL AND MEDICAL CENTER

Docket No. 125110. Argued December 8, 2004 (Calendar No. 3). Decided June 29, 2005.

Mary Bailey sought a hearing in the Bureau of Worker's Disability Compensation regarding the decision of her employer, Oakwood Hospital and Medical Center, to terminate payment of worker's compensation benefits for work-related injury sustained at a time when she was certified as vocationally disabled. Oakwood, which was self-insured and stopped benefits on the basis of its belief that Bailey was avoiding work, filed a claim against the Second Injury Fund for reimbursement of benefits paid beyond fifty-two weeks of the plaintiff's injury. MCL 418.921. The fund moved to dismiss Oakwood's claim on the basis of Oakwood's failure to comply with MCL 418.925, which requires an employer's insurance carrier to notify the fund of the fund's potential liability for benefit payments to a certified vocationally disabled claimant beyond the employer's fifty-two weeks of liability. A worker's compensation magistrate granted the fund's motion for dismissal. Oakwood appealed the dismissal of its claim against the fund to the Worker's Compensation Appellate Commission, which reversed the magistrate's decision and remanded the matter to the magistrate with an instruction that the fund be added as a party. On remand, the magistrate granted Bailey an open award of benefits, determining that Oakwood had not proved that Bailey avoided work, that Oakwood had not notified the fund of the fund's potential liability, and that, pursuant to *Robinson v Gen Motors Corp*, 242 Mich App 331 (2000), dismissal of Oakwood's reimbursement claim is the proper remedy for the failure to notify the fund. Oakwood appealed to the WCAC, challenging the magistrate's dismissal of the claim for reimbursement and the magistrate's finding that Bailey had not avoided work. The WCAC decided that the magistrate's decision to grant an open award of benefits must be reversed, that dismissal of the fund is required by *Robinson*, and that the work avoidance issue was moot in light of its decision. Bailey appealed, the Bureau of Worker's and Unemployment Compensation intervened as an appellant, and Oakwood cross-appealed. The Court of Appeals, JANSEN and MARKEY, JJ. (WHITBECK, C.J., concurring), reversed the decision of the WCAC, holding that pursuant to

Robinson and *Valencic v TPM, Inc,* 248 Mich App 601 (2001), Oakwood's failure to provide the fund with timely notice precluded Oakwood from taking advantage of the fifty-two-week limitation of liability contained in MCL 418.921. The Court remanded the matter to the WCAC to review Oakwood's claim that the plaintiff was avoiding work. 259 Mich App 298 (2003). The Supreme Court granted Oakwood's application for leave to appeal. 470 Mich 892 (2004).

In an opinion by Justice KELLY, joined by Chief Justice TAYLOR, and Justices WEAVER, CORRIGAN, and YOUNG, the Supreme Court *held*:

A certified vocationally disabled claimant is entitled to worker's compensation benefits in the same manner as other claimants. Although an employer's liability for benefits is limited to those that accrue during the fifty-two weeks following the injury, the employer's carrier must continue to pay benefits after fifty-two weeks.

The carrier is entitled to reimbursement from the fund for its payments made after fifty-two weeks. Also, it is required to give notice to the fund of the fund's potential liability. But a carrier's delay in notifying the fund does not increase the employer's liability or impose an independent liability on the carrier. The fund must reimburse the carrier for benefits the carrier paid after fifty-two weeks even if the fund receives late notice. However, if the employee is found ineligible for payments made before late notice was given, the fund need not reimburse the carrier for the benefits the carrier paid.

The decisions in *Valencic* and *Robinson* must be overruled to the extent that they are inconsistent with this opinion.

The part of the opinion of the Court of Appeals that held that Oakwood's failure to provide notice to the fund precluded Oakwood from seeking reimbursement for the overpayments must be reversed and the matter must be remanded to the WCAC to consider the issue regarding whether the plaintiff was avoiding work.

Affirmed in part, reversed in part, and remanded to the WCAC.

Justice MARKMAN, joined by Justice CAVANAGH, dissenting, stated that under MCL 418.925(1), the carrier must notify the fund at least ninety days before the liability limitation set forth in MCL 418.921 can become effective. Such an interpretation is the most harmonious and natural reading of the statutes, because it gives effect to both the limitation on the employer's liability in MCL 418.921 and the requirement that notice be given to the fund

under MCL 418.925(1). The decision of the Court of Appeals should be reversed on the basis that the liability of the fund in this case was not triggered until ninety days after it received statutory notice from the carrier. Before that time, Oakwood remained liable for the benefits.

WORKER'S COMPENSATION — VOCATIONALLY DISABLED CERTIFICATION — NOTICE TO THE SECOND INJURY FUND.

The liability of an employer or its insurance carrier for the payment of worker's compensation benefits to a worker certified as vocationally disabled is limited to a period of fifty-two weeks after the date the employee is injured even though the employer or carrier fails to notify the Second Injury Fund of the fund's likely need to pay benefits beyond the fifty-two-week period; the employer or carrier is entitled to reimbursement from the fund for any payments made to an eligible employee beyond fifty-two weeks after the injury, but is not entitled to reimbursement for benefits it pays an ineligible employee after fifty-two weeks but before it gives the fund notice (MCL 418.925[1]).

Jeffrey S. Weisswasser (*Daryl Royal*, of counsel) for the plaintiff.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Morrison Zack*, Assistant Attorney General, for the Second Injury Fund.

Humphrey, Hannon, Moriarity & Schoener, P.C. (by *Robert J. Humphrey* and *John L. Ruedisueli*), for Oakwood Hospital and Medical Center.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Victoria A. Keating*, Assistant Attorney General, for the Director of the Worker's Compensation Agency.

Amici Curiae:

Martin L. Critchell for Munson Hospital.

Richard R. Weiser for the Accident Fund Insurance Company of America.

KELLY, J. This case involves the allocation of liability for benefits under the vocationally disabled persons chapter of the Worker's Disability Compensation Act. MCL 418.901 *et seq*. The act makes an employer initially liable to pay disability benefits to a certified vocationally disabled employee who is injured on the job. It imposes on the employer only fifty-two weeks of liability for compensation, medical care, and last illness and burial expenses. MCL 418.921. Thereafter, the Second Injury Fund becomes liable. In the event of an employment-related injury to a certified vocationally disabled employee, the employer's worker's disability insurance carrier has an obligation to give notice to the fund.

The issue here is whether a carrier that fails to notify the fund is solely liable for a vocationally disabled person's disability benefits after fifty-two weeks. MCL 418.925(1). Related issues are whether the fund is liable after the fifty-second week if it receives late notice, and whether the employer can be liable after fifty-two weeks under any circumstances.

We hold that the employer has no liability for benefits after the fifty-second week, even if the fund receives late notice. Also, the carrier must continue to pay benefits after fifty-two weeks. Finally, the fund is not released from liability to reimburse the carrier for its payments made after fifty-two weeks even if it receives late notice. An exception exists if the employee loses eligibility before late notice is given. If the employee is found ineligible for payments made before late notice was given, the fund need not reimburse the carrier for the benefits paid. We overrule the Court of Appeals decisions in *Valencic v TPM, Inc*[1] and *Robinson v Gen*

[1] 248 Mich App 601; 639 NW2d 846 (2001).

Motors Corp[2] to the extent that they are inconsistent with today's opinion. We reverse in part the Court of Appeals decision in this case and remand the case to the Worker's Compensation Appellate Commission (WCAC).

THE PROVISIONS FOR VOCATIONALLY DISABLED EMPLOYEES

A vocationally disabled employee is an employee who suffers from one of several statutorily enumerated medical conditions and whose impairment is a substantial obstacle to employment. MCL 418.901(a). The liability to pay benefits for such an employee, when injured on the job, is allocated among the employer, the employer's carrier, and the Second Injury Fund. The disability act restricts the employer's liability to the first fifty-two weeks. MCL 418.921.

After that, the employer's carrier must continue to pay benefits to the employee. But the fund must reimburse the carrier for the amount the carrier pays after the fifty-second week following the injury. MCL 418.925(2). By allocating liability in this fashion, the act reduces an employer's normal worker's compensation liability, encouraging employment of the vocationally disabled.

The act provides that a vocationally disabled employee will receive benefits in the same manner and to the same extent as other employees. MCL 418.921. To qualify under this chapter, the employee must apply to the Division of Vocational Rehabilitation of the Department of Education for certification as vocationally disabled. MCL 418.901(b), 418.905.

The employer and the disability insurance carrier must also fulfill certain obligations. When hiring a

[2] 242 Mich App 331; 619 NW2d 411 (2000).

disabled employee, the employer must submit required information to the Division of Vocational Rehabilitation. MCL 418.911. If a certified vocationally disabled employee is injured on the job, the carrier must notify the fund within a certain time after the injury. MCL 418.925(1).

In this case, defendant Oakwood Hospital was both the employer and the carrier.[3] Plaintiff was its vocationally disabled employee. After plaintiff was injured at work, defendant Oakwood failed to timely notify the defendant fund under the act's notice provision. In controversy is which defendant, if either, is liable for benefits to plaintiff after the fifty-second week.

FACTUAL BACKGROUND

The basic facts are not in dispute. Plaintiff, an employee of Oakwood, was certified as vocationally disabled from a previous injury. She became afflicted with debilitating bilateral cumulative trauma disorder in her hands, known as carpal tunnel syndrome, as a consequence of her work as a medical transcriptionist. Her condition rendered her unable to work after September 21, 1994. Over the next several months, she received noninvasive treatment then underwent carpal tunnel release surgery.

Oakwood voluntarily paid disability benefits to plaintiff until March 20, 1998. At that time, Oakwood asserted that plaintiff was able to return to work. Plaintiff applied for a hearing before a worker's compensation magistrate pursuant to MCL 418.931, seeking the reinstatement of her benefits.

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[3] See MCL 418.601(c). Oakwood is self-insured. We distinguish between "carrier" and "employer" here, just as the act does, although in this case, they are the same party.

PROCEEDINGS IN THE WCAC AND THE COURT OF APPEALS

Oakwood failed to notify the Second Injury Fund within the period established in MCL 418.925(1) that the fund might be liable to pay plaintiff's compensation and medical care benefits. On November 12, 1998, Oakwood filed a petition with the worker's compensation bureau seeking reimbursement from the fund for its overpayment to plaintiff pursuant to MCL 418.931(1). Oakwood included a copy of plaintiff's vocationally handicapped certificate with its petition. It argued that it should be liable for payment of no more than fifty-two weeks of benefits under MCL 418.921 and that the fund owed the rest.

The fund sought to dismiss Oakwood's petition on the basis that Oakwood had failed to give it timely notice under MCL 418.925(1). A magistrate granted the motion and dismissed the petition. On appeal to the WCAC, the commission granted Oakwood's interlocutory appeal, reversed, and remanded the case to the magistrate. *Bailey v Oakwood Hosp & Med Ctr,* 2000 Mich ACO 292.

Soon after that action, the Court of Appeals decided *Robinson*, *supra.* It held that the failure of a carrier to timely notify the fund under MCL 418.925(1) resulted in dismissal of the fund's liability and continued the liability of the carrier. *Robinson, supra* at 334–335.

On remand, the magistrate again dismissed Oakwood's claim against the fund. He relied on *Robinson*. In addition, he found that plaintiff was not avoiding work as Oakwood claimed and granted plaintiff an open award of benefits to be paid by Oakwood.

Again on appeal to the WCAC, the commission concluded that neither Oakwood nor the fund was liable for additional benefits. It found that the *Robinson* decision

shielded the fund from liability, and that the act protected Oakwood from payments beyond fifty-two weeks. MCL 418.921. It ruled that, under the act, a carrier's liability must be limited to benefits accruing during the first fifty-two weeks after the injury. MCL 418.921. On the basis of the *Robinson* decision and the mandatory language of the statute, the WCAC terminated plaintiff's benefits. *Bailey v Oakwood Hosp & Med Ctr*, 2002 Mich ACO 185.

Plaintiff sought leave to appeal in the Court of Appeals. The director of the worker's compensation bureau intervened on plaintiff's behalf as provided for in MCL 418.841(1). The Court of Appeals reversed the WCAC decision, citing both *Robinson* and *Valencic*.[4] 259 Mich App 298; 674 NW2d 160 (2003). The Court held that Oakwood's failure to provide the fund with timely notice precluded it from taking advantage of the fifty-two-week limitation of liability contained in MCL 418.921. Absent timely notice, Oakwood would remain liable for the duration of plaintiff's work-related disability. 259 Mich App at 305-306.

The Court remanded the case to the WCAC to review Oakwood's claim that plaintiff was avoiding work. See MCL 418.861a(3). Oakwood sought, and we granted, leave to appeal. 470 Mich 892 (2004).

THE STANDARD ON APPELLATE REVIEW

Because this case presents an issue of statutory construction, we review it de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n,* 437 Mich 75, 80; 467 NW2d 21 (1991). If possible, we

[4] In *Valencic,* the Court of Appeals held that compliance with the notice provision of MCL 418.925(1) is mandatory. It ruled that a worker's compensation insurance carrier that fails to timely notify the fund may not shift liability to the fund. *Valencic, supra* at 608.

give effect to the Legislature's purpose and intent according to the common and ordinary meaning of the language it used. When ascertaining intent, we read differing statutory provisions to produce an harmonious whole. MCL 8.3a; *Farrington v Total Petroleum, Inc,* 442 Mich 201, 208-209, 212; 501 NW2d 76 (1993).

THE STATUTORY LANGUAGE

The following are the relevant statutory provisions:

> *A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act*, or in case of his death resulting from such injury, the compensation shall be paid to his dependents. *The liability of the employer* for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act *shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund.*The fund shall be liable, from the date of injury, for those vocational rehabilitation benefits provided in section 319. [MCL 418.921 (emphasis added).]

The notification provision, § 925(1), reads:

> When a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. *Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury. The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the*

> *nature and extent of the injury and disability.* [MCL 418.925(1) (emphasis added).]

PREVIOUS INTERPRETATIONS OF THE STATUTORY LANGUAGE AT ISSUE

Robinson was the first reported case to consider the consequences of a carrier's failure to notify the fund.[5] There, the Court of Appeals noted that the word "shall" in § 925(1) created a mandatory duty to notify. It reasoned that the Legislature must have intended that there be an adverse consequence for failing to give notice, or carriers could violate the provision with impunity. *Robinson, supra* at 335. The appropriate sanction, it reasoned, was complete dismissal of the fund's liability. This not only effectuated the Legislature's intent, *Robinson* observed, it protected the fund from prejudice. *Id.*

In *Valencic*, the Court of Appeals followed the reasoning of *Robinson*, as it was required to do. MCR 7.215(J)(1). It concluded that

> compliance with the notice provisions of [MCL] 418.925(1) is "mandatory," and in the case at bar, it is undisputed that notice was not given within the period set forth in that subsection. In light of *Robinson* . . ., we conclude that the WCAC's decision [not to dismiss the fund] amounted to an error of law. [*Valencic, supra* at 608.]

As in *Robinson*, the Court dismissed the fund from the lawsuit and imposed full liability on the carrier for payments beyond the first fifty-two weeks.

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[5] The careful reader will note that *Robinson* "concern[ed] . . . an *employer's* failure to give notice . . . ." *Robinson, supra* at 334 (emphasis added). The employer in *Robinson* was self-insured and thus was a carrier under the act. Hence, *Robinson* concerned the failure of the employer as carrier to give notice, just as this case does.

THE INVALIDITY OF *ROBINSON* AND *VALENCIC*

The flaws in *Robinson* and *Valencic* become painfully apparent when their holdings are applied to this case. The Legislature enacted the Worker's Disability Compensation Act to provide a reliable source of benefits to employees injured on the job regardless of tort liability. *McAvoy v H B Sherman Co*, 401 Mich 419, 437; 258 NW2d 414 (1977).

In applying *Robinson, Valencic,* and MCL 418.925(1) to this case, the Court of Appeals and the WCAC were trapped in a Catch-22. They had to release the employer-carrier and the fund from liability, leaving no one to pay plaintiff's benefits. This directly contradicted the express language of MCL 418.921 that "an employee . . . shall be entitled to compensation" for a disability caused by employment[6] and that a certified vocationally disabled employee "shall be . . . compensat[ed] in the manner and to the extent provided in this act . . . ."

We interpret the Legislature's use of the word "shall" to mandate the payment of benefits to an employee who qualifies for them. *Scarsella v Pollak,* 461 Mich 547, 549; 607 NW2d 711 (2000); *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 (1997). The question becomes who is liable for the benefits.

It is apparent from the language of § 921 that an employer's liability must end after the employee receives the benefits that accrued during the fifty-two weeks following the injury.[7] Also, the fund must assume

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[6] MCL 418.415.

[7] The dissent's conclusion to the contrary has a superficial appeal. At first blush, it seems equitable to relieve the fund of all liability if the carrier fails to provide the notice required by § 925. But the equity of the dissent's solution is questionable upon closer examination.

liability for benefits, if any are due and paid by the carrier beyond that date.

Section 925 describes the procedure for transferring liability from the carrier to the fund. It also provides that, after notification, the fund "may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability." MCL 418.925(1). The notice provision and accompanying deadlines afford the fund an opportunity to review claims to verify their validity. This avoids unwarranted costs to the fund.

Although the statute shifts liability, it does not alleviate the disability insurance carrier's responsibility to pay benefits to the employee. "Liability" means "the state or quality of being liable," and "liable" means "legally responsible." *Random House Webster's College Dictionary* (2001 ed), p 765. It is different than the responsibility to pay, although the two often overlap.

The act requires that the employee be compensated "*in the manner* . . . provided in this act . . . ." MCL 418.921 (emphasis added). It requires carriers to pay benefits directly to injured employees. MCL 418.801. Thus § 921 requires carriers to continue to make payments to certified vocationally disabled employees after fifty-two weeks just as they would to other disabled employees who are not certified as vocationally disabled. These provisions ensure that the injured em-

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In this case, the carrier (who must provide notice under § 925) and the employer (who is liable for benefits for the first fifty-two weeks under § 921) are the same entity: Oakwood Hospital and Medical Center. Extending Oakwood's liability beyond the statutory fifty-two-week period, as the dissent suggests, imposes a penalty on the same party that failed to comply with § 925. However, if the carrier and the employer are separate entities, the dissent would extend the *employer's* liability because of the *carrier's* failure to comply with its statutory duty. In this light, the dissent's solution is neither a reasonable construction of the statutes at issue nor an equitable one.

ployee is not left uncompensated during a dispute between a carrier and the fund over who is liable for payments after week fifty-two.

The act also requires that the fund reimburse the carrier for all compensation rightfully paid on its behalf. MCL 418.925(2). In effect, the act requires the carrier to advance benefits on behalf of the fund. By shifting the liability but not the obligation to pay, and by providing for parallel responsibility for payment, the Legislature ensured that an injured employee would not be left without benefits. The provision in § 925(3)[8] allowing the fund to pay the employee directly is consistent with the above provisions. The fund may pay an employee directly if a carrier fails to meet its obligation to the employee for any reason, such as insolvency. This furnishes additional assurance that the employee will receive the benefits envisioned in the act. MCL 418.921.

THE CONSEQUENCES CONTEMPLATED BY THE ACT FOR FAILURE OF NOTICE

When the act is read in context to give effect to all its provisions, it becomes apparent that the Legislature intended several consequences for failure to give notice under § 925(1). Carriers have a built-in incentive to give timely notice. If a carrier fails to notify the fund, one

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[8] MCL 418.925(3) reads:

> The obligation imposed by this section on a carrier to make payments on behalf of the fund does not impose an independent liability on the carrier. After a carrier has established the right to reimbursement, payment shall be made promptly on a proper showing every 6 months. If a carrier does not make the payments on behalf of the fund, the fund may make the payments directly to the persons entitled to such payments.

consequence is that it loses the temporary use of the money that the fund would have reimbursed to it.[9] MCL 418.925(3).

Once the fund has notice, it may review any information the carrier has about the claim. MCL 418.925(1). It may dispute an employee's eligibility for payment under MCL 418.925(2):

> [A]t any time subsequent to 52 weeks after the date of injury, the fund may notify the carrier of a dispute as to the payment of compensation. The liability of the fund to reimburse the carrier shall be suspended 30 days thereafter until such controversy is determined.

These provisions allow the fund, once it has notice, to ensure that it is required to reimburse only legitimate claims.

Another consequence would occur if the employee became ineligible for benefits after fifty-two weeks. If the employee is not eligible, there is no liability to pay benefits under MCL 418.921.[10]

The fund argues that the Court should create an additional consequence: it should relieve it from all obligations to reimburse the carrier after fifty-two

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[9] This consequence is inherent in the statute as written; the Legislature did not have to write it in to make it so, as Justice MARKMAN implies. Also, the record does not support Justice MARKMAN's assertion that this consequence is ineffectual. *Post* at 711 n 7.

[10] We agree with Justice MARKMAN that the statute bestows on the fund the right to dispute an employee's eligibility at any time. *Post* at 712 n 7. But the fund can scarcely be expected to dispute payments of which it has no knowledge. Hence, the relevant inquiry is this: what consequence does the act contemplate for the time that the carrier fails to give notice to the fund? For any period during which the fund has no notice and the employee was ineligible for benefits, the fund has no liability. The consequence to the carrier that fails to give notice and pays benefits to an ineligible employee after the fifty-second week is that it will not receive reimbursement from the fund.

weeks if notice is not timely even if the employee is eligible for benefits. It argues that its assets derive from contributions or assessments of self-insured employers and worker's compensation insurance carriers. Therefore, it says, it must be able to rely on the notification process to determine its budget.

However, notification is merely a prediction of a future event: that benefits may become payable. In order for the fund to use notifications that are only predictions to forecast its budget, it must build in a component to allow for changes in the condition of injured employees. Hence, the fund cannot budget for the future on the basis of predictions alone.

Moreover, compliance with the notice requirement may be impossible under some circumstances. Section 925(1) could directly conflict with the act's general statute of limitations in MCL 418.381.[11] For example, a certified vocationally disabled employee could suffer what appears to be a minor injury at work. Because the injury does not initially appear serious, the employee might continue to work.

Although the employee might work every day, the symptoms attributable to the injury might worsen. At

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[11] MCL 418.381 provides in pertinent part:

> A proceeding for compensation for an injury under this act shall not be maintained unless a claim for compensation for the injury, which claim may be either oral or in writing, has been made to the employer or a written claim has been made to the bureau on forms prescribed by the director, within 2 years after the occurrence of the injury. In case of the death of the employee, the claim shall be made within 2 years after death. The employee shall provide a notice of injury to the employer within 90 days after the happening of the injury, or within 90 days after the employee knew, or should have known, of the injury. Failure to give such notice to the employer shall be excused unless the employer can prove that he or she was prejudiced by the failure to provide such notice.

the conclusion of fifty-two weeks, the symptoms could be so severe that the employee must stop working. If the employee filed a claim for worker's compensation at the beginning of week fifty-three, it would be well within the two-year limitation on claims found in § 381. It is possible that only when the claim is filed would the employer and its carrier become aware of a potentially compensable claim. However, because fifty-two weeks would have already elapsed since the date of injury, the carrier would have lost its ability to comply with the notice provision of § 925(1).

Should this situation occur, the carrier would be unable to satisfy the notice provision because of no fault of its own. Under *Robinson*, despite the language of § 921 that limits carrier liability "to those benefits accruing during the period of 52 weeks after the date of injury," the carrier would remain liable. This would occur because the carrier had been unaware of the possible compensable claim until after the fifty-two-week period.

THE LEGISLATURE COULD HAVE INSERTED THE PENALTY CLAUSE SOUGHT BY THE FUND

The Legislature knows how to create a penalty when it intends one. As we have pointed out, consequences for noncompliance with notification provisions are inherent in the act. This suggests that the Legislature did not intend to impose the penalty for noncompliance with the notification provision of § 925(1) that the fund seeks.

The act requires the employer to timely notify the Division of Vocational Rehabilitation at the Michigan Department of Education[12] when it hires a certified vocationally disabled employee:

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[12] MCL 418.901(b).

> Upon commencement of employment of a certified vocationally disabled person the employer shall submit to the certifying agency, on forms furnished by the agency, all pertinent information requested by the agency. The certifying agency shall acknowledge receipt of the information. *Failure to file the required information with the certifying agency within 60 days after the first day of the vocationally disabled person's employment precludes the employer from the protection and benefits of this chapter unless such information is filed before an injury for which benefits are payable under this act.* [MCL 418.911 (emphasis added).]

Under this section, failure to notify the agency within the specified time or before an injury for which benefits are payable bars the employer from shifting liability to the fund.

The Legislature enacted this provision simultaneously with §§ 921 and 925. It furnishes a model for penalties in the event of noncompliance. However, the Legislature did not follow it when creating the notification requirement of § 925(1). It seems unlikely that the Legislature intended a penalty that it did not build into the act, especially given that it did specify penalties elsewhere in the act. *Farrington, supra* at 210.

Justice MARKMAN's construction would impose on a carrier a penalty that is not in the act. He proposes an alternative version of the act, one that limits the employer's liability

> provided that the carrier complies with the notice requirement of § 925(1). Where the carrier fails to notify the fund of the possibility that benefits will remain payable under this chapter, the employer's liability continues until such time as ninety days have passed from when the fund receives notification. [*Post* at 709.]

The Legislature did not write this limitation into the act. The limitation conflicts with the text of the statute that requires notice be provided 90 to 150 days before a date fifty-two weeks "after the date of injury." MCL 418.925(1).

THE ACT DOES NOT PENALIZE THE INJURED EMPLOYEE FOR A CARRIER'S MISFEASANCE

The act allows an employee to enforce his or her award in circuit court. MCL 418.863. The employee's claim may be brought directly against the directors and officers of a self-insured employer or carrier as well as against the corporate entity. MCL 418.647(2). These provisions establish recourse for an employee if a carrier does not meet its obligations and ceases making payments in violation of an award.

Also, the self-insured status of an employer, like Oakwood, that repeatedly or unreasonably fails to meet its obligations may be revoked. If this occurs, the employer will be required to obtain liability insurance. MCL 418.631(2).[13] Thus, the act penalizes a self-insured employer or carrier that fails to pay its obligations to disabled employees.

Valencic and *Robinson* failed to give effect to the Legislature's intent. They precluded the magistrate from awarding benefits to a certified vocationally disabled employee to the same extent and in the same manner as other employees. They created a penalty for the carrier's failure to notify the fund of its liability where none was written into the act. Accordingly, *Valencic* and *Robinson* are overruled to the extent that they are inconsistent with this opinion.

THE CARRIER IS ENTITLED TO REIMBURSEMENT FROM THE FUND

The act explicitly states that the obligation of the carrier to continue to pay benefits after fifty-two weeks

[13] Similarly, a carrier that repeatedly or unreasonably fails to meet its obligations may have its state license to provide insurance revoked. MCL 418.631(1).

"does not impose an independent liability on the carrier." MCL 418.925(3). The act provides for reimbursement to the carrier once the carrier has established having made an overpayment of accrued benefits. *Id*.

The fund must make prompt reimbursement to the carrier. *Id*. The act does not include a provision releasing the fund from this obligation if the carrier delays in reporting to it a payment to an employee. It would contravene the intent of the Legislature for the Court to read into the act words extinguishing the carrier's right to reimbursement. Hence, in this case, the fund must reimburse Oakwood for any eligible benefits it paid on the fund's behalf after the fifty-two-week period following the date of injury.

The fund argues that its assets are in the nature of a trust and that it is the trustee. It claims that it is precluded from disbursing the trust's assets unless the terms of the trust are followed.

We find unconvincing the argument that it is a violation of the terms of the fund's trust to disburse benefits when the mandatory notice provision has not been satisfied. To the contrary, the trust by its terms is required to reimburse carriers for benefits paid to disabled employees after fifty-two weeks following an injury. MCL 418.925(3). Notification by a carrier is not a condition precedent to the fund's obligation. The trustee is not absolved of its responsibility by a settlor's failure to notify the trustee of a possible obligation.

The record contains no showing that the fund's payment of claims for which it received delayed notice from carriers has caused it an actuarial crisis. We believe that the fund is not prejudiced by untimely delays and, in fact, that it enjoys the time value of the money it holds until receiving delayed notification of a

claim. Any monies that the fund pays out are recouped through assessments on employers and carriers pursuant to MCL 418.551(1) and passed along to consumers. *McAvoy, supra* at 436, quoting 1 Larson, Workmen's Compensation Law, § 2.20.

CONCLUSION

An employer is liable for payment of compensation, for furnishing medical care, and for payment of the last illness expenses of a certified vocationally disabled employee. This liability exists for fifty-two weeks after the employee suffers a second disabling injury or is killed at work. After that, the employer has no further liability.

The Second Injury Fund is liable after the fifty-second week and must reimburse a carrier for eligible benefits it pays the employee on the fund's behalf. MCL 418.921 and 418.925(3). The Worker's Disability Compensation Act provides inherent consequences for a carrier that fails to timely notify the fund of the fund's potential obligation. For instance, the carrier loses the temporary use of the money that the fund would have reimbursed to it. It risks that the fund will dispute the employee's eligibility, precluding the carrier from being reimbursed if the employee is found ineligible.

In this case, Oakwood's liability as an employer ended at the conclusion of fifty-two weeks after the date of plaintiff's injury. However, as the carrier, it remained obligated to pay her benefits thereafter and could rely on reimbursement from the fund unless plaintiff was shown to be avoiding work. The Court of Appeals holding to the contrary is overruled.

The fund will be liable for plaintiff's continuing benefits retroactive to fifty-two weeks after her injury provided that it is determined on remand that plaintiff

was not avoiding work. We remand the case to the Worker's Compensation Appellate Commission for consideration of this issue. *Valencic* and *Robinson* are overruled to the extent that they are inconsistent with this opinion. We do not retain jurisdiction.

TAYLOR, C.J., and WEAVER, CORRIGAN, and YOUNG, JJ., concurred with KELLY, J.

MARKMAN, J. (*dissenting*). The majority concludes that the Second Injury Fund (the fund) is automatically liable for a certified vocationally disabled employee's disability benefits after fifty-two weeks, notwithstanding the fact that the employer's carrier has failed to comply with the notice provisions of MCL 418.925(1). I respectfully disagree. Because § 925(1) provides that a carrier "shall notify" the fund at least ninety days before the normal expiration of the carrier's liability, I do not agree with the majority that the fund's liability is automatic at the expiration of fifty-two weeks from the date of the injury, without regard to the compliance of the carrier with its statutory obligation. Instead, I conclude that the better reading of the vocational disability chapter of the Worker's Disability Compensation Act requires that the carrier must notify the fund at least ninety days before the liability limitation set forth in MCL 418.921 can become effective. Accordingly, I would reverse the decision of the Court of Appeals and hold that the fund's liability was not triggered in this case until ninety days after it received statutory notice from the carrier.

When plaintiff began working for defendant Oakwood Hospital and Medical Center (Oakwood) in 1989, she was certified as vocationally disabled because of a prior back injury.[1] She developed bilateral carpal tunnel

[1] " 'Vocationally disabled' means a person who has a medically certifiable impairment of the back or heart, or who is subject to epilepsy, or who has diabetes, and whose impairment is a substantial obstacle to employ-

syndrome in 1993; after surgery failed to provide relief from the pain, she left her employment on September 21, 1994. Oakwood paid worker's compensation benefits until March 1998, when it stopped payment on the basis of plaintiff's alleged work avoidance. Plaintiff applied for a hearing in May 1998. Shortly thereafter, Oakwood found plaintiff's vocationally handicapped worker's certificate and filed a claim against defendant fund for reimbursement of the benefits it paid plaintiff beyond the fifty-two-week period set by § 921. The magistrate granted the fund's motion to dismiss on the basis of Oakwood's failure to provide timely notice under § 925. The Worker's Compensation Appellate Commission (WCAC) reversed, remanding with an instruction to make the fund a party. On remand, the magistrate again dismissed the fund, citing *Robinson v Gen Motors Corp*, 242 Mich App 331; 619 NW2d 411 (2000), which had been released in the interim. The magistrate then rejected Oakwood's work avoidance claim, granting plaintiff an open award of benefits. The WCAC reversed, concluding that neither Oakwood nor the fund was liable for additional benefits. The Court of Appeals then reversed the WCAC, holding that Oakwood's failure to timely provide notice meant that it remained liable as long as plaintiff had a work-related disability. 259 Mich App 298; 674 NW2d 160 (2003).

We review issues of statutory construction de novo. *Burton v Reed City Hosp Corp*, 471 Mich 745, 757; 691 NW2d 424 (2005). We recently noted "the fundamental rule" of statutory construction that "every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Pittsfield Charter Twp v Washtenaw Co*, 468

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ment, considering such factors as the person's age, education, training, experience, and employment rejection." MCL 418.901(a).

Mich 702, 714; 664 NW2d 193 (2003). The word "shall" is "unambiguous and denote[s] a mandatory, rather than discretionary action." *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). The provisions of a statute must be read in the context of the entire statute in the interest of producing an harmonious whole. *Burton*, *supra* at 757.

As a result of her certification as a vocationally disabled person, plaintiff's subsequent work-related injury triggered § 921 of the Worker's Disability Compensation Act (WDCA). That section (MCL 418.921) provides:

> A person certified as vocationally disabled who receives a personal injury arising out of and in the course of his employment and resulting in death or disability, shall be paid compensation in the manner and to the extent provided in this act, or in case of his death resulting from such injury, the compensation shall be paid to his dependents. The liability of the employer for payment of compensation, for furnishing medical care or for payment of expenses of the employee's last illness and burial as provided in this act shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation and the cost of all medical care and expenses of the employee's last sickness and burial shall be the liability of the fund. The fund shall be liable, from the date of injury, for those vocational rehabilitation benefits provided in section 319.

However, § 921 does not exist in a vacuum. Section 925(1) of the WDCA (MCL 418.925[1]) further provides:

> When a vocationally disabled person receives a personal injury, the procedure and practice provided in this act applies to all proceedings under this chapter, except where specifically otherwise provided herein. Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a

> period of 52 weeks after the date of injury. The fund, thereafter, may review, at reasonable times, such information as the carrier has regarding the accident, and the nature and extent of the injury and disability.

While these statutes normally coexist harmoniously, a conflict arises where, as here, the carrier[2] has failed to timely notify the fund of a situation where "it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury." In such a case, the carrier has violated the mandate of § 925(1) that it "shall notify" the fund, yet the consequences of such violation are not readily apparent because § 921 mandates that the employer's liability "shall be limited to . . . 52 weeks."

The majority correctly concludes that the interpretation of the Court of Appeals, based upon *Robinson* and *Valencic v TPM*, *Inc,* 248 Mich App 601; 639 NW2d 846 (2001), cannot stand. In concluding that the carrier's failure to timely notify the fund served as a permanent and complete bar to the fund's liability, *Robinson* and its progeny ignored the instruction in § 921 that "liability of the employer . . . shall be limited to those benefits accruing during the period of 52 weeks after the date of injury." *Robinson's* sanction of complete dismissal of the fund creates a clear conflict with the text of § 921.[3]

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[2] Under MCL 418.601, the definition of "carrier" includes both an insurer and a self-insured employer, such as Oakwood in the present case. Thus, as noted by the majority, the distinction between "employer" and "carrier" has no bearing on this case. *Ante* at 690 n 3.

[3] As an example of the impact of *Robinson's* sanction of dismissal upon an employer or a carrier, one need only look at *Valencic*. In that case, because of confusion regarding which insurer was the "carrier" at the time of the plaintiff's injury, the carrier ultimately found liable was not alerted to the existence of the injury until four years after it occurred. *Valencic*, *supra* at 604, 608. Notwithstanding that the carrier had no knowledge of the injury until long after the notice provision of § 925(1) had expired, the fund was dismissed from the suit because the carrier had

However, despite recognizing that the *Robinson* line of cases completely ignores one statutory mandate at the expense of another, the rule the majority adopts today has exactly the same effect. Section 925(1) provides:

> Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier *shall notify* the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury. [MCL 418.925(1) (emphasis added).]

Applying basic principles of statutory construction, the Legislature's use of the words "shall notify" makes clear that notification to the fund is mandatory. However, far from giving meaning to every word of the statute, the majority effectively reads this mandatory notification language out of the statute. I do not believe that the Legislature intended to make such notice requirement "mandatory," yet intended no remedy or means of enforcement for such requirement.

In my judgment, the most harmonious and natural reading of the vocational disability chapter as a whole would limit the employer's liability to a period of fifty-two weeks under § 921, *provided that* the carrier complies with the notice requirement of § 925(1). Where the carrier fails to notify the fund of the possibility that benefits will remain payable under this chapter, the employer's liability continues until such time as ninety days have passed from when the fund receives notification. See § 925(1). This approach is sounder, I believe, than that of the majority by giving meaning to *both* the limitation on the employer's liability in § 921 and the requirement that notice be given to

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not provided timely notice. This left the full liability to fall on the shoulders of the employer or carrier.

the fund in § 925(1), thereby giving effect to *all* the relevant language of the law. At the same time, as long as the carrier supplied notice to the fund at some point, this approach would avoid permanently placing responsibility for the payment of benefits upon the employer, as would be effected by *Robinson* and *Valencic*.[4]

Moreover, because an injury to any other, non-"vocationally disabled," employee would result in indefinite liability to the employer, the limited penalty suffered by the employer who fails to comply with the notice requirement does not seem unreasonable.[5] Because the employer essentially derives a benefit under the WDCA by hiring the vocationally disabled employee, in that its liability ordinarily ceases after fifty-two weeks in the face of a second injury, it does not seem

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[4] Contrary to the majority's assertion, this dissent does not "relieve the fund of *all* liability if the carrier fails to provide the notice required by § 925." *Ante* at 695 n 7 (emphasis added). Rather, as has been made clear, the employer's liability would continue beyond fifty-two weeks only until such time as the carrier has complied with the notice requirements of § 925. The fund would then become liable ninety days after the carrier has provided the notice required by the statute.

[5] The majority asserts that this interpretation would be neither "reasonable" nor "equitable" in situations in which the carrier and the employer were not the same party, because in such situations the failure of the carrier to provide timely notice would result in liability to the employer. *Ante* at 696 n 7. By this observation, the majority treats the employers of this state as essentially passive participants in the marketplace, incapable of protecting their own economic interests without the strained interpretations of this Court. Employers are perfectly capable of contracting with their own carriers, as well as utilizing the legal process where necessary, to ensure that the risks of liability in cases such as this one fall upon the party whose failure to comply with its statutory duty caused liability. Further, unlike what occurred in this case, there is nothing to prevent an employer from simply monitoring its carrier with regard to the typically few injured, vocationally disabled employees employed by an employer to ensure that the carrier carries out the required notification.

unreasonable to require the employer to comply with the act in order to receive such benefit.[6]

I am not oblivious to the argument that the interpretation in this dissent accords inadequate consideration to the "shall be limited to those benefits accruing during the period of 52 weeks after the date of injury" language in § 921. There is simply no perfect interpretation of this confusing statute, merely a less imperfect and a more imperfect interpretation. I believe that the interpretation here accords at least some meaning to the "shall" language in *both* § 921 and § 925(1), while the majority's interpretation effectively ignores the "shall" language in § 925(1).[7]

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[6] The majority implies that the fund will not be prejudiced by a delay in notification, because under MCL 418.925(2), the fund "may dispute an employee's eligibility for payment" at any time. *Ante* at 698. However, the majority fails to consider that one of the purposes of the notice requirement is to allow the fund to timely investigate the validity of such claims. While it may be true that the fund may dispute an employee's eligibility for payments at any time, evidentiary concerns too obvious to state suggest that the fund is in a better position to dispute such eligibility if the investigation comes sooner rather than later.

[7] The majority struggles to accord some modicum of meaning to § 925(1). It suggests that the "Legislature intended several consequences for failure to give notice under § 925(1)." *Ante* at 697. First, it suggests that the loss of the temporary use of the carrier's money serves as an adequate sanction. *Ante* at 697-698. If the majority is correct that the Legislature intended as a sanction the loss of interest on certain benefits paid out, then the majority has discerned a sanction that is most noticeable by its absence from the language of the statute, and which sanction is a notably ineffectual one to boot.

Second, the majority suggests that another sanction exists in cases in which an employee becomes ineligible for benefits after fifty-two weeks, because "[i]f the employee is not eligible, there is no liability to pay benefits under MCL 418.921." *Ante* at 698. However, in characterizing the Legislature's unremarkable decision that fraudulent claims should not be reimbursed as a "consequence" of untimely notification, the majority misapprehends the statutory scheme. The fund's ability to contest an employee's eligibility is not a "consequence" of the carrier's

Accordingly, I would reverse the decision of the Court of Appeals affirming the dismissal of the fund from the suit, and hold that the fund became liable for plaintiff's benefits ninety days after Oakwood provided the notice required under § 925(1). Before that time, Oakwood remained liable for these benefits.

CAVANAGH, J., concurred with MARKMAN, J.

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failure to comply with the notice requirement of § 925(1), but rather a "consequence" of the plain language of § 925(2), which provides that the fund may dispute the employee's eligibility "at any time." Because the fund has this power at any time regardless of *when* it received notice, it can hardly be said that such power is a "consequence" of untimely notice.

AYAR v FOODLAND DISTRIBUTORS

Docket No. 126870. Decided July 6, 2005. On application by the plaintiffs for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals, reinstated the order of the circuit court, and remanded the case to the circuit court for further proceedings. Rehearing denied 474 Mich 1201.

Raad Ayar and others brought an action in the Wayne Circuit Court alleging contract and tort claims against Foodland Distributors and others. The court, Robert J. Colombo, Jr., J., entered judgment on a jury verdict and award of damages for the plaintiffs. The judgment included prejudgment interest. The court subsequently entered orders granting the plaintiffs' motion for costs and mediation sanctions and awarding prejudgment interest on such costs and mediation sanctions from the filing date of the complaint. MCL 600.6013. Defendant Kroger Company appealed by delayed leave granted. The Court of Appeals, GAGE, P.J., and METER and FORT HOOD, JJ., reversed the trial court order regarding interest on the award of costs and mediation sanctions, and remanded for entry of an amended judgment that provides for accrued statutory interest from the date costs and mediation sanctions were awarded. 263 Mich App 105 (2004). The plaintiffs sought leave to appeal in the Supreme Court.

In an opinion per curiam, signed by Chief Justice TAYLOR, and Justices WEAVER, CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

The clear and unambiguous language of MCL 600.6013(8) requires interest to be calculated from the date that the complaint is filed. The statute makes no exception for attorney fees and costs ordered as mediation sanctions under MCR 2.403(O). The judgment of the Court of Appeals must be reversed, the order of the circuit court must be reinstated, and the matter must be remanded to the circuit court for further proceedings consistent with this opinion.

Justice CAVANAGH, joined by Justice KELLY, concurring, wrote separately to note that because MCL 600.6013(8) is clear and unambiguous, it must be applied as written. The statute clearly provides that interest on mediation sanctions is to be calculated

from the time the complaint is filed. The majority should not attempt to distinguish the majority opinion in *Rittenhouse v Erhart*, 424 Mich 166 (1985), from this case because the majority in *Rittenhouse* undertook to interpret and rewrite this plain statutory provision to reach its determination that the statute contained an exception relevant in that case. The majority should also not engage in a patent imploration to the Legislature to change the law to comport with the policy views of the majority.

Reversed, circuit court order reinstated, and case remanded to the circuit court.

INTEREST — MONEY JUDGMENTS — MEDIATION SANCTIONS.

Prejudgment interest on an award of attorney fees and costs as mediation sanctions accrues from the date the complaint is filed (MCR 2.403[O]; MCL 600.6013[8]).

Morganroth & Morganroth, PLLC (by *Mayer Morganroth* and *Jeffrey B. Morganroth*), for the plaintiffs.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Carl H. von Ende, Larry J. Saylor*, and *Todd A. Holleman*), for Kroger Company.

PER CURIAM. At issue in this case is when interest begins to accrue, pursuant to MCL 600.6013(8), on costs and attorney fees imposed for rejecting a mediation evaluation, MCR 2.403(O)(1), (6).[1] The clear language of this statute indicates that it accrues from the date of the filing of the complaint. The Court of Appeals, in reversing the order of the trial court, incorrectly concluded that accrual did not begin on that date. This was error, and accordingly, pursuant to MCR 7.302(G)(1), we reverse the judgment of the Court of Appeals[2] and reinstate the order of the circuit court.

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[1] By an amendment in 2000, the rule was amended to refer to "case evaluation" rather than "mediation." The mediation in this case occurred in 1995. Consequently, we will refer to "mediation" in this opinion.

[2] *Ayar v Foodland Distributors*, 263 Mich App 105; 687 NW2d 365 (2004).

I

In October 1993 plaintiffs filed a complaint against defendants for damages arising from aspects of the parties' commercial relationships. Mediation was conducted in 1995. The case then proceeded to trial, and plaintiffs eventually were awarded a substantial verdict in a final judgment dated June 21, 2002. This judgment included prejudgment interest and "costs and attorney fees to be assessed, if any." In an order dated June 24, 2002, the circuit court granted plaintiffs' motion for assessment of costs and mediation sanctions, MCR 2.403(O), and determined the specific amounts applicable to the various defendants.[3] An issue then arose concerning interest on these amounts. In an order dated November 14, 2002, the trial court ordered that interest on the costs and mediation sanctions awarded in its June 24 order was to be calculated from the date the complaint was filed.

The Court of Appeals reversed that order and remanded the matter for a redetermination of the amount of interest. It recognized that judgment interest is allowed on an award of mediation sanctions,[4] but determined that interest should be calculated from the date of the judgment awarding mediation sanctions, June 24, 2002. The Court of Appeals reasoned that, before that date, no mediation award existed upon which interest could be calculated.

II

Questions of statutory interpretation are reviewed de novo. *Burton v Reed City Hosp Corp*, 471 Mich 745, 751;

[3] Defendant-appellant Kroger Company was ordered to pay $381,752.

[4] Defendant Kroger's argument pertains to the date interest commences, not to whether interest can be awarded on mediation sanctions.

691 NW2d 424 (2005); *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). Clear and unambiguous statutory language is given its plain meaning, and is enforced as written. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

III

At issue here is MCL 600.6013(8), which provides, in pertinent part:

> [F]or complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is *calculated* at 6-month intervals *from the date of filing the complaint* at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. *Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs.* The amount of interest attributable to that part of the money judgment from which attorney fees are paid is retained by the plaintiff, and not paid to the plaintiff's attorney. [Emphasis added.][5]

The statute plainly states that interest on a money judgment is calculated from the date of filing the complaint. We find this language to be clear and unambiguous, as we did in *Morales*, *supra*. In *Morales*, we concluded that the statute makes no exception for periods of prejudgment appellate delay, and that interest on a judgment following such a delay is calculated, without interruption, from the date the complaint is

[5] This is the wording of the statute as amended by 2002 PA 77, effective March 21, 2002, that applies to the June 24, 2002, judgment in this case.

filed. Similarly, the statute makes no exception for attorney fees and costs ordered as mediation sanctions under MCR 2.403(O).

The Court of Appeals was correct in applying the judgment interest statute to mediation sanctions. Defendant Kroger does not dispute this point, and the statute expressly applies to "attorney fees and other costs."

The Court of Appeals was mistaken, however, in considering mediation sanctions to be in the nature of an additional claim for damages that did not arise until long after the complaint was filed. The mediation process is an integral part of the proceeding commenced when plaintiffs filed their complaint. The realization of mediation sanctions is tied directly to the amount of the verdict rendered with regard to that complaint. MCR 2.403(O)(1). Indeed, the award of prejudgment interest on mediation sanctions is part of the final judgment against defendants. At all times during which interest was assessed, plaintiffs' claim against defendants was in dispute. Therefore, the Court of Appeals was incorrect to suggest that *Rittenhouse v Erhart*, 424 Mich 166, 217-218; 380 NW2d 440 (1985) (RILEY, J.), dictated a different result in this case.[6]

IV

We conclude that, under MCL 600.6013(8), judgment interest is applied to attorney fees and costs ordered as

[6] In *Rittenhouse*, we held that prejudgment interest owed by a party accrued from the date of the complaint adding that party. The case at bar does not involve an added party, but, consistent with *Rittenhouse*, the circuit court ordered interest from the filing of the complaint against the defendant liable for the judgment.

Because this case does not involve an added party, Justice CAVANAGH's continuing disagreement with the *Rittenhouse* decision is irrelevant to the disposition of this case.

mediation sanctions under MCR 2.403(O) from the filing of the complaint against the liable defendant. This results from a plain reading of the statute. The statute provides no special treatment for judgment interest on mediation sanctions. Therefore, we reverse the judgment of the Court of Appeals, reinstate the order of the circuit court, and remand to the circuit court for further proceedings consistent with this opinion.

We acknowledge that there are meaningful policy reasons for a statute that would provide for interest on mediation sanctions from a date later than when the complaint is filed. Costs imposed under MCR 2.403(O) are in the nature of sanctions, and a successful plaintiff will otherwise receive interest on the judgment itself, in addition to costs and attorney fees that can be ordered under MCR 2.403(O). We invite our Legislature to reconsider whether interest should be imposed on mediation sanctions from the date a complaint is filed. As this case shows, the amount of mediation sanctions might not be determined until several years after the filing date. It would not be unreasonable to amend the statute to provide a result similar to that reached by the Court of Appeals. However, that result does not follow from the statute as it is currently written.

TAYLOR, C.J., and WEAVER, CORRIGAN, YOUNG, and MARKMAN, JJ., concurred.

CAVANAGH, J. (*concurring*). I concur with the majority's holding that interest on an award of mediation sanctions should be calculated from the date the complaint was filed. However, I write separately for two reasons.

First, I disagree with the majority's discussion of *Rittenhouse v Erhart*, 424 Mich 166; 380 NW2d 440 (1985). See *ante* at 717 n 6. In the present case, the

majority correctly concludes that MCL 600.6013(8)[1] is an unambiguous statute that must be applied as written. As such, it accurately determines that because the statute contains no exception pertaining to mediation sanctions, interest on mediation sanctions is calculated from the time the complaint was filed. What the majority fails to acknowledge, however, is that under these same rules of construction, no exception that allows for changing the time of calculation when a party has been added after the initial complaint was filed can be found either, contrary to the majority position in *Rittenhouse*, *supra* at 217-218 (RILEY, J.).

In *Rittenhouse*, the majority undertook to interpret and rewrite this plain statutory provision to hold that when a party is added to a lawsuit that is already in progress, interest on the money judgment accrues not from "the date of filing the complaint," as instructed by MCL 600.6013(8), but from "the date of the filing of the complaint *upon the defendant against whom the judgment has been entered*." *Rittenhouse*, *supra* at 218 (RILEY, J.) (emphasis added). But, just like the statute contains no exceptions for periods of prejudgment appellate delay, *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490-492; 672 NW2d 849 (2003), interest on claims added in amended complaints, *Phinney v Perlmutter*, 222 Mich App 513, 539-543; 564 NW2d 532 (1997), or interest on mediation sanctions, *ante* at 717, it likewise contains no exception

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[1] In pertinent part, the statute in force at the relevant time instructed:

> [F]or complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint . . . . Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs.

for interest on a judgment against a *particular* defendant. See *Rittenhouse*, *supra* at 190-191 (BRICKLEY, J.).

These four conclusions are consistent, and all are reached by recognizing that MCL 600.6013 is clear and unambiguous and must be applied as written. Thus, I find the majority's attempt to distinguish this Court's holding in *Rittenhouse*, which was reached by rewriting the statute, disingenuous in light of the majority's recognition in this case that the statute is "plain[]," "clear[,] and unambiguous." *Ante* at 716.

Second, I disagree that the majority should engage in a patent imploration to the Legislature, see *ante* at 718, to change a law to comport with the majority's policy views. The majority's entreaty is not only inappropriate, but it contravenes the central purpose of the statute it seeks to change. MCL 600.6013 is a remedial statute designed to "compensate the claimant for delays in recovering money damages," *Yaldo v North Pointe Ins Co*, 457 Mich 341, 350; 578 NW2d 274 (1998), offset costs incurred in bringing the action, encourage prompt settlement, and discourage defendants from unnecessarily delaying litigation. *Old Orchard by The Bay Assoc v Hamilton Mut Ins Co*, 434 Mich 244, 252-253; 454 NW2d 73 (1990), disavowed in part on other grounds *Holloway Constr Co v Oakland Co Bd of Co Rd Comm'rs*, 450 Mich 608 (1996). The majority should not, on the basis of what it considers "meaningful policy reasons," *ante* at 718, engage in the business of "inviting" the Legislature to revisit a policy that the Legislature has clearly already deemed meaningful by virtue of enacting the statute that furthers it.

KELLY, J., concurred with CAVANAGH, J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal January 27, 2005:

TATE v BOTSFORD GENERAL HOSPITAL, No. 126603. Pursuant to MCR 7.302(G)(l), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 245081.

Summary Disposition January 27, 2005:

HADDIX v MAJCHRZYCKI, No. 126496. In lieu of granting leave to appeal, the Court of Appeals judgment is vacated, and the case is remanded to that Court for reconsideration of both (1) the procedural deficiency issue, which was raised sua sponte in the Court of Appeals, and (2) the substantive issue—whether plaintiff has a "serious impairment of body function"—in light of this Court's decision in *Kreiner v Fischer* and *Straub v Collette*, 471 Mich 109 (2004). MCR 7.302(G)(1). The Court of Appeals is to consider further briefing on either or both issues, if it is requested by either party. Jurisdiction is not retained. Court of Appeals No. 244983.

KELLY, J. I would deny leave to appeal.

Leave to Appeal Denied January 27, 2005:

PEOPLE v PATRICK HENRY, No. 125326. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 240081.

PEOPLE v BATES, No. 126072. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251123.

CAVANAGH and KELLY, JJ. We would remand this case to the Wayne Circuit Court for an evidentiary hearing.

PEOPLE v RANDLE GRIFFIN, No. 126133. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252589.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

FINNILA v ARKIN, Nos. 126297, 126298; Court of Appeals Nos. 243371, 244155.

PEOPLE v PIETRO TERRELL, No. 126397; Court of Appeals No. 243097.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

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PEOPLE v TEPATTI, No. 126399; Court of Appeals No. 247009.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v CHARLES BROWN, No. 126423; Court of Appeals No. 254612.

CAVANAGH and KELLY, JJ. We would remand this case to the Jackson Circuit Court for resentencing.

PEOPLE v JACOBS, No. 126430. Whatever the propriety of departing from the guideline range on the basis of defendant's inability to pay restitution, the trial court articulated other substantial and compelling reasons on the basis of which the Supreme Court believes the trial court would have departed from the guideline range to the same extent. The Court is not persuaded that the other questions presented should be reviewed by this Court. Court of Appeals No. 254499.

WEAVER, J. I would deny leave to appeal without the further statement found in the majority's order.

PEOPLE v FOWLER, No. 126436; Court of Appeals No. 253103.

THE LOCAL AREA WATCH v CITY OF GRAND RAPIDS, No. 126438; reported below: 262 Mich App 136.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PARCELL v AUTO-OWNERS INSURANCE COMPANY, No. 126453; Court of Appeals No. 246134.

KELLY, J. I would grant leave to appeal.

PEACOCK v ONAWAY COMMUNITY FEDERAL CREDIT UNION, No. 126490; Court of Appeals No. 243460.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v VOSTRIRANCKY, No. 126508; Court of Appeals No. 245897.

KELLY, J. I would remand this case for resentencing.

PEOPLE v GEORGE MYERS, No. 126516; Court of Appeals No. 249626.

PEOPLE v CURTIS KELLY, No. 126527; Court of Appeals No. 246228.

KELLY, J. I would grant leave to appeal.

PEOPLE v JOSEPH ROBINSON, No. 126529; Court of Appeals No. 246708.

KELLY, J. I would grant leave to appeal.

PEOPLE v BARAWSKAS, No. 126532; Court of Appeals No. 254960.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ROSSBACH, No. 126559; Court of Appeals No. 245262.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v HANAS, No. 126595; Court of Appeals No. 254434.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

PEOPLE v CATO, No. 126666; Court of Appeals No. 246619.

KELLY, J. I would grant leave to appeal to consider the applicability of *Blakely v Washington*, 542 US 296 (2004).

BLYE v ALLIED SYSTEMS, LTD, No. 126713; Court of Appeals No. 253500.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v WESTCOMB, No. 126763. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254031.

KELLY, J. I would remand this case to the Newaygo Circuit Court for resentencing.

PEOPLE v SHANEBERGER, No. 126876. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256500.

Reconsideration Denied January 27, 2005:

SCHMITZ v CITIZENS INSURANCE COMPANY OF AMERICA, No. 127034. Leave to appeal denied at 471 Mich 913. Court of Appeals No. 256599.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal January 28, 2005:

DEAN v CHILDS, No. 126393. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall address only the question whether Childs's actions or omissions were "the" proximate cause of the deaths under *Robinson v Detroit,* 462 Mich 439 (2000). They may file supplemental briefs within 28 days of the date of this order. The motions to file briefs amicus curiae are granted. Reported below: 262 Mich App 48.

PHOENIX INVESTMENT HOLDING COMPANY, INC v NOSAN & SILVERMAN HOMES, LLC, No. 126561. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed whether the Court of Appeals erred in its finding that the liquidated damages provision did not cover a nonmonetary default such as the failure to enter into excavation contracts. The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 246398.

HUBBARD v NATIONAL RAILROAD PASSENGER CORPORATION, No. 127240. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed whether the Wayne Circuit Court properly dismissed plaintiff's claim under the Federal Employers' Liability Act, 45 USC 51 *et*

seq., because plaintiff failed to present the opinion of an expert that the locomotive cab seat was dangerous or defective. They may file supplemental briefs within 28 days of the date of this order. The motion for stay is denied as unnecessary. MCR 7.302(C)(5)(a). Court of Appeals No. 246165.

Leave to Appeal Denied January 28, 2005:

WOLF v GENERAL MOTORS CORPORATION, No. 126249. Leave to file a brief amicus curiae is granted. Reported below: 262 Mich App 1.

UAW-FORD NATIONAL EDUCATION DEVELOPMENT AND TRAINING CENTER v CITY OF DETROIT, No. 126352; Court of Appeals No. 242809.

MANISTEE COUNTY ROAD COMMISSION v NORTHWOODS DEVELOPMENT, LLC, No. 126471; Court of Appeals No. 243971.

PEOPLE v ROBERT HOLLAND, Nos. 126731, 126732; Court of Appeals Nos. 254725, 254728.

PEOPLE v KEVIN HARRINGTON, No. 126946; Court of Appeals No. 253918.

WEAVER, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

CORRIGAN, J. I respectfully dissent from the order denying the prosecutor's application for leave to appeal in this first-degree murder case. I would remand this case to the Court of Appeals for consideration as on leave granted. While Judge Michael Hathaway may arguably be correct that defendant is entitled to a new trial, I believe that his decision should be fully evaluated and tested by a three-judge panel before the trial court is required to conduct a second trial at considerable taxpayer expense.

The majority does not explain its refusal to allow a full review of this troubling case in the Court of Appeals. I have two fundamental concerns about the majority's action. First, the codefendant received a contradictory ruling denying him relief on the very same Confrontation Clause issue for which defendant received a new trial. This glaring inconsistency warrants, at a minimum, a full review by the Court of Appeals.

Second, I am concerned that the majority, by refusing to accord full appellate review, has left intact a decision that essentially rewards conduct that no legal system should ever tolerate. Specifically, it appears that retained defense counsel's inappropriate and abusive behavior at trial, including intimidating comments directed at the trial judge and the prosecutor, may well have been designed to invite error. If the defense did employ such a deliberate strategy at trial, it may preclude the grant of a new trial on the basis of that misconduct.

At the very least, these issues deserve a thorough and considered appellate review. The majority's refusal to allow any such review—by denying leave rather than remanding to the Court of Appeals for consideration as on leave granted—is troubling.

I. INCONSISTENT CONFRONTATION CLAUSE RULINGS

I conclude that submission to a three-judge panel is warranted because defendant and the codefendant received contradictory rulings on the identical Confrontation Clause issue. They were tried jointly before a single jury in the courtroom of Judge Diane Hathaway. Judge Hathaway declared one of the witnesses for the prosecution unavailable after the witness proved uncooperative on the stand. The prosecutor was then allowed to use the witness's preliminary examination testimony as substantive evidence against both defendants. Both defendant and codefendant Clark had fully cross-examined this witness at the preliminary examination.

It should be noted that both defendants apparently engaged in witness intimidation tactics that likely caused the witness to freeze on the stand. After murdering the victim, the defendants threatened to harm the witness and her children if she informed the police about what she saw. Further, during the codefendant's preliminary examination, his girlfriend threatened this witness by making a hand motion simulating a slit throat. In addition, defendant overtly glared at the witness while she attempted to testify at trial.[1]

After the jury convicted both defendants of first-degree murder, defendant retained another attorney and moved for a new trial. When Judge Diane Hathaway recused herself, the case was transferred by blind draw to Judge Michael Hathaway. The basis for defendant's motion for a new trial was his inability to cross-examine the witness who was declared unavailable. Judge Michael Hathaway initially ruled that any error was harmless and denied defendant's motion. Likewise, Judge Diane Hathaway denied the codefendant's motion for a new trial, which motion was based on the identical confrontation argument.

Like defendant, the codefendant claimed that his confrontation rights were violated when the prosecution's witness was ruled unavailable at trial and her preliminary examination testimony was thereafter read into the record. Judge Diane Hathaway ruled that the codefendant was not denied his right to confrontation because his misbehavior rendered the witness unavailable. Judge Michael Hathaway, however, ultimately reached a directly contrary conclusion, and ruled that defendant's confrontation rights were violated. The Court of Appeals should review the matter and resolve the apparent contradiction.

In *Crawford v Washington,* 541 US 36, 62 (2004), the United States Supreme Court stated that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds . . . ." The prosecutor's claim that defendant (and the codefendant) forfeited their Sixth Amendment rights to confront their accuser by continually intimidating the witness warrants plenary consideration, especially

[1] Judge Michael Hathaway acknowledged in his first ruling denying defendant's motion for a new trial that, "one can sort of pick that up in the trial transcript. I mean it's obvious that she was spooked by something."

where it resulted in contradictory rulings between the codefendants who had alleged precisely the same claim of confrontation violation.[2]

II. DEFENSE COUNSEL'S MISCONDUCT

The other apparent basis for the grant of a new trial was a claim of ineffective assistance of counsel arising from retained defense counsel's misconduct. Throughout the trial, defense counsel behaved in a disrespectful and inappropriate manner toward the judge and the prosecutor. While much of counsel's behavior occurred outside the presence of the jury, the jury was present on three occasions in which counsel was fined by the trial court. In addition, it was later revealed that the jury overheard defense counsel shout a disparaging comment to the prosecutor while the jurors were in the jury room.

Judge Michael Hathaway took testimony regarding defense counsel's misconduct to use in referring counsel to the Attorney Grievance Commission. During this hearing, Judge Hathaway learned that the jurors overheard one of defense counsel's disparaging comments directed at the prosecutor. Following this revelation, defendant's new counsel moved again for a new trial, on the new basis of ineffective assistance of counsel. Judge Michael Hathaway granted the motion, stating:

> This trial was even worse than I thought it was in the first place. I now know from [the prosecutor's] testimony . . . [t]hat [defense counsel's] abuse of her took an extremely personal turn,

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[2] Interestingly, in his first ruling denying defendant's motion for a new trial, Judge Michael Hathaway stated:

> But as flawed and as awkward as that methodology, which ultimately was abandoned fortunately, but as flawed and as awkward [as] it was, the defense attorney asked it to be done that way.
>
> It was [defense counsel] Mr. Evans who insisted on the People proceeding on a question-by-question basis to determine whether or not the witness had a recollection sufficient to answer any of the questions she was asked.
>
> And unless I'm missing something, virtually every question that she did answer on direct examination in the trial was also asked in the Preliminary Examination transcript in one way or another, and the witness was very thoroughly cross-examined in the Exam.
>
> In fact, the cross-examination of that witness was three or four times the length of the direct.

> and under the circumstances where the jury, whether they were in the box or not. [sic] Apparently overheard the remarks that he made to her, and that the jury commiserated with her about his treatment of her, in discussing the case with her after the verdict, in very sympathetic and supportive ways.
>
> And when you combine [defense counsel's] outrageous behavior during the [course] of this trial, with the fact that the jury knew about much of it, and commiserated with the prosecutor over it, as any human being would, under these circumstances. [sic] And then you also look back on the conduct of the trial itself, the way in which this reluctant witness was, her testimony was managed by the trial Court, and parts of her prior testimony read in on a question-by-question basis.
>
> The trial [court's] ruling about the admission of that testimony . . . [t]here is no question in my mind that this trial was a complete wreck, in extremely basic and fundamental ways. . . .
>
> * * *
>
> It's not in any way the kind of strategy or behavior that we could attribute to the defendant, or say that the defendant is somehow benefiting from it.

Judge Michael Hathaway thus reconsidered his earlier denial of defendant's motion for a new trial, because of defense counsel's "outrageous behavior." What has not been tested through plenary appellate review, however, is retained defense counsel's ploy of creating an appellate parachute.

The apparent defense strategy of intimidating all those who stood in the way of an acquittal, and of being as disruptive as possible, became evident throughout these proceedings, beginning as early as the preliminary examination. An example of these tactics includes defense counsel's calling the assistant prosecuting attorney, who was a woman, a "tramp" whom he wanted to "shut up." Counsel's obstructionist behavior forced the court to hold him in contempt of court, to fine him three times during the trial, and to send him to jail. Counsel even went so far as to accuse the court of treating him like a "Negro slave," and then dared the court to hold him in contempt yet again. While these actions largely took place outside the presence of the jury, they nonetheless appear to be actions designed to goad the court with the hopes of establishing error requiring reversal.

Indeed, defense counsel's own comments at trial suggest that his outrageous behavior was designed to invite error and create an appellate parachute. During trial, defense counsel made the apparently self-fulfilling prophecy that "this is going to come back on appeal." During his closing argument, defense counsel told the jury:

> . . . please, please don't hold anything that I've done or my confrontations with the Judge or the prosecution and my willingness to be fined because you know what? My father, he used to work for a judge. . . .
>
> * * *
>
> . . . I'm a lawyer, not a doormat. And I'm going to do my job whether I have to go broke in the process.
>
> * * *
>
> Don't think about that. Don't think about me being held in contempt. That has nothing to do with it because I'm representing my client.

Thus, defense counsel created an appellate parachute for a claim of ineffective assistance of counsel while at the same time arguing to the jury that the same ineffective assistance was simply part of doing his "job."

Because defense counsel's misconduct was central to Judge Michael Hathaway's decision to grant a new trial, I believe we should remand this case to the Court of Appeals so that a three-judge panel may fully review this troubling case for invited error. This Court should not deny plenary review of a decision that rewards such offensive and inappropriate behavior. For these reasons, I respectfully dissent from this Court's order denying the prosecutor's application for leave to appeal.

MOGASSABI v CHOJNACKI, No. 127732; Court of Appeals No. 259025.

Interlocutory Appeals

Leave to Appeal Denied January 28, 2005:

GARON v ACIA, No. 127774; Court of Appeals No. 258732.

COOPER v AUTO CLUB INSURANCE ASSOCIATION, No. 127848; Court of Appeals No. 259729.

Reconsideration Denied January 28, 2005:

In re FOONDLE (FAMILY INDEPENDENCE AGENCY v FOONDLE), Nos. 127455, 127456. Leave to appeal denied at 471 Mich 937. Court of Appeals Nos. 255548, 255795.

In re MORRIS (FAMILY INDEPENDENCE AGENCY v MORRIS), No. 127486. Leave to appeal denied at 471 Mich 937. Court of Appeals No. 255222.

Summary Dispositions January 31, 2005:

PEOPLE v MICHAEL GREEN, No. 126632. In lieu of granting leave to appeal, the case is remanded to the Genesee Circuit Court for entry of an amended Judgment of Sentence. MCR 7.302(G)(1). Defendant pleaded guilty to two counts of criminal sexual conduct in the third degree. Although the Judgment of Sentence reflects a minimum sentence of 178 months for one count of criminal sexual conduct and 175 months for the other, the trial judge expressed her intent to sentence defendant to minimum terms of 175 months for both counts. The Judgment of Sentence is to be amended accordingly. In all other respects, leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 255039.

In re BANKS (FAMILY INDEPENDENCE AGENCY v BANKS), No. 127292. On January 13, 2005, the Court heard oral argument on the application for leave to appeal the September 30, 2004, judgment of the Court of Appeals. On order of the Court, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, the case is remanded to the St. Clair Circuit Court, Family Division, to determine, for each of the two children, whether "there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in [respondent]'s home." MCL 712A.19b(3)(b)(i). The St. Clair Circuit Court, Family Division, may conduct additional proceedings or evidentiary hearings, if necessary, and shall expedite its consideration of this matter. Jurisdiction is retained. Court of Appeals No. 252617.

Justices CAVANAGH and CORRIGAN concur, Chief Justice TAYLOR joins the statement of Justice CAVANAGH, and Justice KELLY dissents, in statements set forth below:

CAVANAGH, J. (*concurring*). This is an especially difficult termination case. I would prefer to defer to the determination made by the Court of Appeals and deny leave. However, I concur with the remand inasmuch as it allows the trial court to again review this matter in accordance with the statutory criteria, take additional testimony if requested, consider the current circumstances, and clearly articulate the bases for whatever findings it makes. The "findings" and "conclusions" outlined in Justice CORRIGAN's concurrence are hers and hers alone and are not shared by me. As we are retaining jurisdiction in this matter, such determinations are better made by a review of the record following our remand.

TAYLOR, C.J. I join the statement of Justice CAVANAGH.

CORRIGAN, J. I concur with this Court's decision to remand this case so that the St. Clair Circuit Court, Family Division, can articulate a separate conclusion regarding the reasonable likelihood that respondent's two children "will suffer from injury or abuse in the foreseeable future" if returned to her. MCL 712A.19b(3)(b)(i). I write to emphasize the following points.

MCL 712A.10(1)(c) provides that a referee may "*make . . . a recommendation* for the court's findings and disposition." (Emphasis added.) A referee's recommended findings are entitled to no deference by the

circuit court. Here, the circuit court rejected the referee's recommendations and found that respondent intentionally (1) removed the window blinds, (2) pried off the seal around the screen, and (3) threw her seven-month-old baby out a second-story window. On this basis, the circuit court held that respondent's children were "likely to suffer from injury or abuse in the foreseeable future" if returned to respondent. MCL 712A.19b(3)(b)(i). A reviewing court is required to affirm the circuit court's decision to terminate parental rights unless it is clearly erroneous. *In re Miller*, 433 Mich 331, 338 (1989); MCR 3.977(J).

While I do not believe the circuit court clearly erred in this case, I believe its legal conclusions are incomplete. The court properly rejected the referee's conclusion that the baby's two-story "fall" was directly related to the respondent mother's mental illness because respondent's attorney *specifically argued the contrary* during closing argument:

> I'm really not thinking, from my view of the testimony, *that there was any connection* between her illness and what I would firmly believe is the accident with respect to the child. [Emphasis added.]

Ample record evidence supported the circuit court's conclusion that respondent intentionally threw her child out the second-story window. Specifically, the child landed approximately twenty-two inches away from the home. This supports the theory that the child was thrown from the window and not dropped, as respondent insisted. Moreover, respondent stated that when she used the sink to wash her hands before the "accident," nothing impeded her access. When it was pointed out to her that a set of blinds lay across the sink, she opined that the wind must have blown the blinds down and to the left, depositing them directly across the sink. Respondent's "wind" theory is patently ridiculous.

While the circuit court properly concluded that respondent acted intentionally when she threw her child out the second-story window, the court's opinion did not grapple with how respondent's intentional actions created "a reasonable likelihood that the child[ren] will suffer from injury or abuse in the foreseeable future if placed in [respondent]'s home." MCL 712A.19b(3)(b)(i). In my view, respondent's lack of candor under oath, as well as her refusal or inability to take responsibility for her intentional acts indicates that she is still in denial about the seriousness of her actions. Given her denial and her refusal to take responsibility, I believe respondent's children do face a reasonable likelihood of further harm if they are returned to her.

KELLY, J. I dissent from the majority's decision to remand this case to the circuit court for further proceedings. Because that court never articulated that a reasonable likelihood exists that the children will suffer from injury if returned to respondent, it failed in its effort to terminate under MCL 712A.19b(3)(b)(i). Therefore, the Court of Appeals correctly reversed the decision. I would deny leave to appeal.

If leave were denied and if respondent could not comply with her treatment plan, she would not regain her children, and the Family Independence Agency could again seek termination.

Because the case is being remanded for further action by the judge, I add that I do not share the "findings" and "conclusions" in Justice CORRIGAN's concurrence. I urge the judge on remand to make an independent and updated review of the merits of the question of future injury.

Leave to Appeal Denied January 31, 2005:

VASQUEZ v VASQUEZ, No. 126472; Court of Appeals No. 244222.

PEOPLE v CLOY, No. 126505; Court of Appeals No. 246073.

PEOPLE v ANDREWS, No. 126520; Court of Appeals No. 244054.

PEOPLE v MUEHLENBEIN, No. 126521; Court of Appeals No. 244712.

JOACHIM v LSM FAMILY TRUST, No. 126523; Court of Appeals No. 245586.

PEOPLE v MCCREARY, No. 126570; Court of Appeals No. 240822.

PEOPLE v SHARMA, No. 126573; Court of Appeals No. 252105.

BYNUM v GROSSE ILE TOWNSHIP, Nos. 126618, 126619; Court of Appeals Nos. 245842, 248087.

PEOPLE v TROY MANNING, No. 126622; Court of Appeals No. 246535.

PEOPLE v HEINLE, No. 126630; Court of Appeals No. 241570.

YPSILANTI CHARTER TOWNSHIP v MILLER, No. 126642; Court of Appeals No. 243879.

MCFARLAND v TRAVELERS INSURANCE COMPANY, No. 126685; Court of Appeals No. 245771.

PEOPLE v WOODRUFF, No. 126690; Court of Appeals No. 247897.

PEOPLE v GAILAN SMITH, No. 126692; Court of Appeals No. 247946.

PEOPLE v ARTHUR SMITH, No. 126697; Court of Appeals No. 247826.

GESING v CITY OF WARREN, No. 126710; Court of Appeals No. 244501.

PEOPLE v ANTHONY HENRY, No. 126730; Court of Appeals No. 244240.

PEOPLE v EDMUNDS, No. 126734; Court of Appeals No. 245498.

PEOPLE v TATUM, No. 126735; Court of Appeals No. 248037.

PEOPLE v DERRICK GARNER, No. 126741; Court of Appeals No. 255297.

PEOPLE v OVERTON, No. 126742; Court of Appeals No. 246929.

LITTLE v HIRSCHMAN, No. 126750; Court of Appeals No. 227751 (on remand).

PEOPLE v ALLEN, No. 126754; Court of Appeals No. 246416.

PEOPLE v MARVIN LEE, No. 126761; Court of Appeals No. 244703.

PEOPLE v LAROME SMITH, No. 126762; Court of Appeals No. 246632.

PEOPLE v WOOD, No. 126774; Court of Appeals No. 245195.

PEOPLE v GORENC, No. 126781; Court of Appeals No. 253465.

PEOPLE v MADYUN, No. 126783; Court of Appeals No. 246016.

PEOPLE v DAUGHERTY, No. 126788; Court of Appeals No. 252665.

PEOPLE v POTTS, No. 126790; Court of Appeals No. 245588.

PEOPLE v BOOKER HUDSON, No. 126791; Court of Appeals No. 246403.

CAVANAGH, J. I would grant leave to appeal to reconsider *People v Stevens (After Remand)*, 460 Mich 626 (1999).

PEOPLE v DABNEY, No. 126807; Court of Appeals No. 246618.

PEOPLE v CHRISTOPHER MULLINS, No. 126809; Court of Appeals No. 246892.

PEOPLE v FREDERICK WILLIAMS, No. 126812; Court of Appeals No. 245176.

PEOPLE v HERBERT LEE, No. 126819; Court of Appeals No. 246418.

PEOPLE v LEACH, No. 126820; Court of Appeals No. 254397.

PEOPLE v TINCHER, No. 126829; Court of Appeals No. 246891.

PEOPLE v FERGUSON, No. 126830; Court of Appeals No. 255474.

PEOPLE v HARRISON, No. 126838; Court of Appeals No. 255502.

MURRAY v DEPARTMENT OF CORRECTIONS, No. 126855; Court of Appeals No. 255383.

PEOPLE v STEVENSON, No. 127297; Court of Appeals No. 254856.

PEOPLE v CAMBURN, No. 127496; Court of Appeals No. 246786.

OAKES v MESSINGER, No. 127565; Court of Appeals No. 254778.

PEOPLE v ADELSON, No. 127638; Court of Appeals No. 255859.

WINALIS v KHATTAR, No. 127683; Court of Appeals No. 259053.

Reconsideration Denied January 31, 2005:

PEOPLE v MONTAGUE, No. 123851. Leave to appeal denied at 471 Mich 911. Court of Appeals No. 232314.

SMITH v COMMUNITY EMERGENCY MEDICAL SERVICE, No. 123883. Leave to appeal denied at 471 Mich 894. Court of Appeals No. 247770.

BOWERS v CITY OF FLINT, No. 125105. Leave to appeal denied at 471 Mich 892. Court of Appeals No. 251062.

PEOPLE v MOFFIT, No. 125322. Leave to appeal denied at 471 Mich 894. Court of Appeals No. 252109.

ELSWORTH ENTERPRISES, INC v GENESYS REGIONAL MEDICAL CENTER, No. 125423. Leave to appeal denied at 471 Mich 888. Court of Appeals No. 248446.

MARKMAN, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v EDDIE THOMPSON, No. 125452. Leave to appeal denied at 471 Mich 895. Court of Appeals No. 252236.

PEOPLE v NEFF, No. 125937. Leave to appeal denied at 471 Mich 872. Court of Appeals No. 253194.

In re BENJAMIN JOHN AZZAR LIVING TRUST (ELLIS v AZZAR), Nos. 125951-125953. Leave to appeal denied at 471 Mich 872. Court of Appeals Nos. 238476, 241119, 243766.

PEOPLE v LEON DAVIS, No. 125962. Leave to appeal denied at 471 Mich 906. Court of Appeals No. 243809.

WINDSOR CHARTER TOWNSHIP v AZZAWI, No. 126003. Leave to appeal denied at 471 Mich 873. Court of Appeals No. 249876.

SHR LIMITED PARTNERSHIP v SHELL OIL COMPANY, No. 126114. Leave to appeal denied at 471 Mich 885. Court of Appeals No. 251927.

In re TUCKER (FAMILY INDEPENDENCE AGENCY v TUCKER), No. 127321. Leave to appeal denied at 471 Mich 919. Court of Appeals No. 252651.

Leave to Appeal Denied February 3, 2005:

CRIGLER v BRYAN, No. 126310; Court of Appeals No. 246174.

PEOPLE v JEFFREY RICHARDS, No. 126708; Court of Appeals No. 245264.

PEOPLE v DASHKOVITZ, No. 126712; Court of Appeals No. 245847.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v COHEN, No. 127205; Court of Appeals No. 256919.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal February 25, 2005:

PEOPLE v MCKAY, No. 126930. The clerk is to schedule oral argument on whether to grant the application or take other peremptory action

permitted by MCR 7.302(G)(l). The oral argument is limited to the following issue: whether Offense Variable 13 of the sentencing guidelines, MCL 777.43, was properly scored. The parties may file supplemental briefs within 28 days of the date of this order.

CAVANAGH and KELLY, JJ. We would grant oral argument on both issues.

Leave to Appeal Denied February 25, 2005:

PEOPLE v WATTS, No. 126512; Court of Appeals No. 246881.

KELLY, J. (*dissenting*). Defendant is a police officer who committed perjury in a drug case. He was charged and tried for the offense. At trial, the prosecution made civic duty arguments to the jury in its closing argument.

The prosecutor told the jury that the police community and legal community would watch the case to see "what we're going to say about this conduct . . . ."

During rebuttal, the prosecutor continued, "And if we can't get [a guilty verdict] from you . . . we may as well pack up our tent and go home because we can't go on and present cases and fight crime and try and solve it if we don't have that from you in a case like this where we have to have a statement through a verdict of guilty . . . ."

Defense counsel did not object. Nonetheless, I agree with Judge METER's Court of Appeals dissent that these improper arguments constituted plain, prejudicial error that seriously affected the fairness and integrity of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764 (1999).

The prosecutor was asking the jury to convict defendant because any other verdict would signal to the police that our society condones perjury by law enforcement officers. This was obviously a civic duty argument, one that our courts have long held is legally improper.

These exhortations seriously affect the fairness and integrity of the judicial proceedings. They beg the jury to send a message to others by its verdict. The message in this case was that society will not tolerate dishonesty from law enforcement officers on the witness stand.

While all can agree that we must not tolerate such dishonesty, the trial of an accused is not the forum from which to send that message. The reason is, of course, that jurors in criminal trials are not empaneled to send a message to law enforcement, or to any other civic body. Their job is not to fight crime. Rather, their sworn mission is to determine the guilt or innocence of the accused who appears before them. Civic duty arguments cannot be tolerated lest we imprison people, not for their alleged illegal acts, but to right the wrongs of our institutions and of society in general.

The improper urgings on the prosecutor's part in this case denied defendant a fair trial. They rendered suspect the fairness and impartiality of the proceedings. For that reason, defendant's conviction should be reversed and the case remanded for a new trial.

CAVANAGH, J. I join the statement of Justice KELLY.

In re KRANZ (FAMILY INDEPENDENCE AGENCY v KRANZ) and *In re* LUST (FAMILY INDEPENDENCE AGENCY v KRANZ), Nos. 128009-128011; Court of Appeals Nos. 254029, 254030, 254425.

Interlocutory Appeal

Leave to Appeal Denied February 25, 2005:

PEOPLE v CHARLIE JONES, No. 127932; Court of Appeals No. 259972.

Summary Disposition February 28, 2005:

PEOPLE v CARL SMITH, No. 126920. In lieu of granting leave to appeal, the case is remanded to the Genesee Circuit Court pursuant to MCR 6.425(D)(3) to correct or delete the challenged information in the presentence report that was not taken into account in sentencing and, if necessary, to amend the restitutionary amount prescribed by the judgment of sentence, which appears to exceed the total of the amounts defendant fraudulently obtained or embezzled reflected in the presentence report's victim loss summary. MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 255799.

Leave to Appeal Denied February 28, 2005:

PEOPLE v MIMS, No. 125866; Court of Appeals No. 244065.

MABINS v BUSTOS, No. 125974; Court of Appeals No. 239099.

MANZO v PETRELLA, No. 126256; reported below: 261 Mich App 705.

PEOPLE v ANTHONY JONES, No. 126258; Court of Appeals No. 245890.

PEOPLE v PAUL SMITH, No. 126285; Court of Appeals No. 242738.

PEOPLE v RANDY PATTERSON, No. 126359; Court of Appeals No. 254272.

PEOPLE v PICKETT, No. 126442; Court of Appeals No. 246138.

PEOPLE v SCOTT OWENS, No. 126480; Court of Appeals No. 244917.

PEOPLE v LONNIE WILLIAMS, No. 126486; Court of Appeals No. 246011.

ALTEGRA CREDIT COMPANY v DAAJA-RA, No. 126535; Court of Appeals No. 253432.

RORKE v SAVOY ENERGY, LP, No. 126560; Court of Appeals No. 245317.

PEOPLE v BRIAN PAIGE, No. 126593; Court of Appeals No. 254555.

PEOPLE v THOMAS BROOKS, No. 126635; Court of Appeals No. 245252.

LOUIS J EYDE LIMITED FAMILY PARTNERSHIP v MERIDIAN CHARTER TOWNSHIP, No. 126674; Court of Appeals No. 248312.

KOOPMANS v WASTE MANAGEMENT OF MICHIGAN, INC, No. 126678; Court of Appeals No. 246852.

THE MABLE CLEARY TRUST v THE EDWARD-MARLAH MUZYL TRUST, No. 126679; reported below: 262 Mich App 485.

FLINT PROFESSIONAL FIREFIGHTERS UNION LOCAL 352 v CITY OF FLINT, AFSCME COUNCIL, LOCALS 1600 AND 1799 v CITY OF FLINT, and FLINT POLICE OFFICERS ASSOCIATION v CITY OF FLINT, Nos. 126681-126683. Application for leave to cross-appeal is also denied. Court of Appeals Nos. 244953, 244961, 244985.

PEOPLE v ENGLISH, No. 126698; Court of Appeals No. 247354.

PEOPLE v MACK, No. 126700; Court of Appeals No. 245057.

PEOPLE v DARYL PARKER NO 1, No. 126702; Court of Appeals No. 244118.

PEOPLE v TRACY ROBINSON, No. 126719; Court of Appeals No. 253319.

PEOPLE v GRAHAM, No. 126738; Court of Appeals No. 246726.

SMITH v COLEMAN, No. 126745; Court of Appeals No. 243768.

HIGHLAND PARK POLICEMEN AND FIREMEN RETIREMENT SYSTEM v CITY OF HIGHLAND PARK, No. 126749; Court of Appeals No. 252424.

PEOPLE v BARNES, No. 126764; Court of Appeals No. 247037.

PEOPLE v MARSHAWN PORTER, No. 126765; Court of Appeals No. 254417.

SOTO v DEPARTMENT OF CORRECTIONS, No. 126767; Court of Appeals No. 255937.

SANILAC COUNTY PARKS COMMISSION v LEXINGTON TOWNSHIP, Nos. 126772, 126773; Court of Appeals Nos. 244858, 244960.

PEOPLE v MOBLEY, No. 126776; Court of Appeals No. 246020.

PEOPLE v COWANS, No. 126777; Court of Appeals No. 248976.

PEOPLE v COLEN, No. 126784; Court of Appeals No. 255673.

PEOPLE v PHAN, No. 126786; Court of Appeals No. 249703.

PEOPLE v KALA WHITE, Nos. 126792, 126793; Court of Appeals Nos. 221694, 232606.

PEOPLE v COLEMAN, No. 126794; Court of Appeals No. 254208.

PEOPLE v DARRETT KING, No. 126797; Court of Appeals No. 245766.

PEOPLE v MALACHI WASHINGTON, No. 126799; Court of Appeals No. 247713.

PEOPLE v RAY, No. 126806; Court of Appeals No. 247510.

PEOPLE v MCKECHNIE, No. 126813; Court of Appeals No. 255602.

PEOPLE v DOUGLAS, No. 126814; Court of Appeals No. 254900.

PEOPLE v BULLS, No. 126817; reported below: 262 Mich App 618.

KORN v SOUTHFIELD CITY CLERK, No. 126818. Application for leave to cross-appeal is denied as moot. Court of Appeals No. 251827.

PEOPLE v JOSEPH PATTERSON, No. 126823; Court of Appeals No. 254441.

ST JOSEPH MERCY HOSPITAL v THOMAS, No. 126826; Court of Appeals No. 253567.

PEOPLE v SEAN ROGERS, No. 126827; Court of Appeals No. 247616.

PEOPLE v DARYL PARKER NO 2, No. 126828; Court of Appeals No. 243485.

LANDON v GENESEE FAMILY COURT JUDGE, No. 126831; Court of Appeals No. 255299.

SAGINAW SCHOOL DISTRICT v GAERTNER, No. 126832; Court of Appeals No. 253581.

PEOPLE v DRAIN, No. 126840; Court of Appeals No. 246014.

PEOPLE v BUTLER, No. 126843; Court of Appeals No. 247043.

PEOPLE v DAVID A CAMPBELL, No. 126844; Court of Appeals No. 246271.

DUNLAP v WAYNE CIRCUIT JUDGE, No. 126850; Court of Appeals No. 255334.

PEOPLE v MILLS, No. 126856; Court of Appeals No. 247948.

PEOPLE v TANSIL, No. 126857; Court of Appeals No. 255553.

PEOPLE v ANTHONY ROGERS, No. 126862; Court of Appeals No. 255417.

PEOPLE v JESSE KELLY, No. 126863; Court of Appeals No. 255585.

PEOPLE v LAHTI-PETERSON, No. 126865; Court of Appeals No. 254925.

PEOPLE v THURSAM, No. 126869; Court of Appeals No. 255209.

PEOPLE v WALLACE, No. 126873; Court of Appeals No. 255684.

PEOPLE v AUSSICKER, No. 126877; Court of Appeals No. 245058.

10 AND SCOTIA EXPRESS, LLC v TARGET CONSTRUCTION, INC, No. 126878; Court of Appeals No. 244827.

PEOPLE v SCHUIL, No. 126885; Court of Appeals No. 254558.

PEOPLE v PIBULDHANAPATANA, No. 126887; Court of Appeals No. 254886.

PEOPLE v MULLEN, No. 126890; Court of Appeals No. 244700.

PEOPLE v NEVELS, No. 126898; Court of Appeals No. 255422.

PEOPLE v MADDOX, No. 126907; Court of Appeals No. 247601.

PEOPLE v GARCIA, No. 126912; Court of Appeals No. 246154.

PEOPLE v BARTHOLOMEW, No. 126915; Court of Appeals No. 255677.

PEOPLE v BRIDINGER, No. 126919; Court of Appeals No. 255552.

PEOPLE v BYARS, No. 126923; Court of Appeals No. 254666.

PEOPLE v CHARLIE WASHINGTON, No. 126960; Court of Appeals No. 247127.

PEOPLE v KIMBROUGH, No. 126987; Court of Appeals No. 246812.

PEOPLE v BUSWA, No. 127001; Court of Appeals No. 255654.

PEOPLE v TRUDEAU, No. 127030; Court of Appeals No. 246938.

PEOPLE v AUSTIN, No. 127038; Court of Appeals No. 256379.

PEOPLE v JACOB MARTIN, No. 127116; Court of Appeals No. 247429.

PEOPLE v BOLDUC, No. 127243; reported below: 263 Mich App 430.

PEOPLE v KEITH, No. 127495; Court of Appeals No. 256010.

PEOPLE v DEQUAN MAHAN, No. 127497; Court of Appeals No. 255247.

EYDE v STATE OF MICHIGAN, No. 127508; Court of Appeals No. 257690.

PEOPLE v QURESHI, No. 127726; Court of Appeals No. 258472.

In re ROGERS (FAMILY INDEPENDENCE AGENCY v AGUIRRE), No. 127821; Court of Appeals No. 255479.

In re HICKS (FAMILY INDEPENDENCE AGENCY v HICKS), No. 127885; Court of Appeals No. 255540.

Interlocutory Appeals

Leave to Appeal Denied February 28, 2005:

PEOPLE v LONSBY, No. 126879; Court of Appeals No. 250559.

SUNDELL v NATIONWIDE INSURANCE COMPANY, No. 126981; Court of Appeals No. 255218.

BIORESOURCE, INC v CITY OF DETROIT, Nos. 127680, 127681; Court of Appeals Nos. 241137, 241168 (on reconsideration).

Reconsideration Denied February 28, 2005:

KNECHT v QUICK-SAV FOOD STORES, LTD, No. 121622. Leave to appeal denied at 471 Mich 870. Court of Appeals No. 239672.

BROWN v BRECON COMMONS, LLC, No. 123600. Leave to appeal denied at 471 Mich 894. Court of Appeals No. 233188.

KELLY, J. I would grant reconsideration.

NELSON v GRAY, No. 124795. Leave to appeal denied at 471 Mich 883. Court of Appeals No. 236369.

PEOPLE v RODNEY HICKS, No. 125461. Leave to appeal denied at 471 Mich 927. Reported below: 259 Mich App 518.

PEOPLE v ANTON MARSHALL, No. 125608. Leave to appeal denied at 471 Mich 893. Court of Appeals No. 242774.

PEOPLE v EDDINGTON, No. 125670. Leave to appeal denied at 471 Mich 927. Court of Appeals No. 248852.

KELLY, J. I would grant reconsideration. On reconsideration, I would vacate the Wayne Circuit Court's orders of February 6, 2003, and April 7, 2003, denying the defendant's motion for resentencing pursuant to MCR 6.508(D)(2) and defendant's motion for reconsideration, and remand the case to the Wayne Circuit Court for reconsideration of the defendant's motion as one seeking relief from judgment in the form of resentencing. The trial judge's opinion denying the motion mistakenly identified as the issues raised those that the defendant had raised in his appeal of right. Thus, the court did not deal with the issues which were in fact presented in the motion seeking relief from judgment in the form of resentencing.

PEOPLE v DWIGHT WILLIAMS, No. 125732. Leave to appeal denied at 471 Mich 896. Court of Appeals No. 251660.

PEOPLE v DALY, No. 125788. Leave to appeal denied at 471 Mich 906. Court of Appeals No. 243958.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would remand this case to the Court of Appeals for reconsideration in light of *Crawford v Washington,* 541 US 36 (2004).

PEOPLE v DERICO THOMPSON, No. 125799. Leave to appeal denied at 471 Mich 919. Court of Appeals No. 237602.

DEITERING v GRAND BLANC CHARTER TOWNSHIP, No. 125824. Leave to appeal denied at 471 Mich 906. Court of Appeals No. 244158.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

WEAVER, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal because this Court should review the issue presented.

LOCKWOOD BUILDING COMPANY, INC v DEMPSEY, No. 125865. Leave to appeal denied at 471 Mich 919. Court of Appeals No. 241508.

WANG v SPORLEDER, No. 125869. Leave to appeal denied at 471 Mich 906. Court of Appeals No. 244611.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v DELL, No. 125882. Leave to appeal denied at 471 Mich 897. Court of Appeals No. 250754.

PEOPLE v MARIO EVANS NO 1, No. 125969. Leave to appeal denied at 471 Mich 906. Court of Appeals No. 238184.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v RUELAS, No. 126002. Leave to appeal denied at 471 Mich 927. Court of Appeals No. 253463.

GILLETTE v COMSTOCK TOWNSHIP and GILLETTE v STUCKI, Nos. 126020, 126021. Leave to appeal denied at 471 Mich 898, 899. Court of Appeals Nos. 240198, 240199.

PEOPLE v CONIC, No. 126034. Leave to appeal denied at 471 Mich 899. Court of Appeals No. 250373.

PEOPLE v STEPHAN, No. 126153. Leave to appeal denied at 471 Mich 886. Court of Appeals No. 241051.

PEOPLE v MARIO EVANS NO 2, No. 126167. Leave to appeal denied at 471 Mich 907. Court of Appeals No. 240357.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v MARY LITTLE, No. 126194. Leave to appeal denied at 471 Mich 900. Court of Appeals No. 253935.

PEOPLE v DAVID M CAMPBELL, No. 126224. Leave to appeal denied at 471 Mich 946. Court of Appeals No. 246967.

PEOPLE v CONWAY, No. 126235. Leave to appeal denied at 471 Mich 900. Court of Appeals No. 246026.

PEOPLE v ARQUETTE, No. 126245. Leave to appeal denied at 471 Mich 933. Court of Appeals No. 244940.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand for resentencing.

SMITH v AKERLIND, No. 126257. Leave to appeal denied at 471 Mich 920. Court of Appeals No. 244661.

LASALLE NATIONAL BANK v MASTER GUARD HOME SECURITY, INC, No. 126263. Leave to appeal denied at 471 Mich 901. Court of Appeals No. 252571.

PEOPLE v MCCAIN, No. 126411. Leave to appeal denied at 471 Mich 921. Court of Appeals No. 243336.

BECKER v RICHARDS, No. 126985. Leave to appeal denied at 471 Mich 922. Court of Appeals No. 245423.

In re BROWN (FAMILY INDEPENDENCE AGENCY v JIM BROWN) and *In re* THACKER (FAMILY INDEPENDENCE AGENCY v TAMMY BROWN), Nos. 127557, 127558. Leave to appeal denied at 471 Mich 943. Court of Appeals Nos. 254733, 254750.

Leave to Appeal Denied March 4, 2005:

In re UNGER (FAMILY INDEPENDENCE AGENCY v UNGER), No. 127617; reported below: 264 Mich App 270.

In re COX (FAMILY INDEPENDENCE AGENCY v COX), No. 127824; Court of Appeals No. 255179.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal March 10, 2005:

STOKAN v HURON COUNTY, Nos. 126706, 126707. The clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties may file supplemental briefs, addressing the interpretation of Resolution 23.83, within 28 days of the date of this order. Court of Appeals Nos. 242645, 243489.

Summary Dispositions March 10, 2005:

REID v CAVATAIO, No. 126617. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of the Supreme Court's decision in *Kreiner v Fischer* and *Straub v Collette*, 471 Mich 109 (2004). MCR 7.302(G)(1). Court of Appeals No. 244615.

MCDONNELL v AMERICAN NATIONAL RED CROSS, Nos. 126769, 126770. In lieu of granting leave to appeal, the June 29, 2004, judgment of the Court of Appeals is vacated in part, and the case is remanded to that Court for reconsideration of the issue whether plaintiff stated a cause of action in ordinary negligence in light of *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411 (2004). Court of Appeals Nos. 243320, 245043.

Leave to Appeal Denied March 10, 2005:

PEOPLE v DEJON JOHNSON, No. 126726; Court of Appeals No. 246340. KELLY, J. I would remand this case for resentencing.

PEOPLE v MCCRAY, No. 126729; Court of Appeals No. 252233.

CAVANAGH and KELLY, JJ. We would hold this case in abeyance for *Halbert v Michigan*, cert gtd 545 US ___; 125 S Ct 823; 160 L Ed 2d 609 (2005).

OIS, INC v INDUSTRIAL QUALITY CONTROL INC, No. 126740; reported below: 262 Mich App 592.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal March 11, 2005:

KORRI v NORWAY VULCAN AREA SCHOOLS, No. 125691. The clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties shall include among the issues to be addressed: (1) whether respondent failed to provide an annual year-end performance evaluation within the meaning of MCL 38.83a(1), and (2) whether the fact that petitioner was notified that her employment was terminated, pursuant to MCL 38.83, affected respondent's obligation to issue a year-end evaluation under MCL 38.83a(1). The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 238811.

GRAND TRUNK WESTERN RAILROAD, INC v AUTO WAREHOUSING COMPANY, No. 126609. The clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties are directed to file supplemental briefs within 28 days of the date of this order addressing whether, as contended by the dissenting judge in the Court of Appeals, defendant was entitled to have the trier of fact determine the reasonableness of the settlement amount allocated to each claim of injury. Reported below: 262 Mich App 345.

PEOPLE v CLEVELAND WILLIAMS, No. 126956. The clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed whether *People v Chavies*, 234 Mich App 274 (1999), correctly held that MCL 780.131 does not apply to a defendant who was on parole at the time of the offense with which the defendant is charged. The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 239662.

Summary Dispositions March 11, 2005:

CURTIS v CITY OF DETROIT, No. 125652. The defendant filed an application for leave to appeal and the Supreme Court directed that oral argument be held on whether to grant the application or take other peremptory action. The briefs and oral argument of the parties having been considered by the Court, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the Wayne Circuit Court for entry of a judgment in favor of defendant. Defendant fully complied with the notice requirements of the Michigan housing law, MCL 125.540, and the

Detroit City Code, § 12-11-28. Whether lis pendens or other statutory notice obligations should be in place is not an issue for this Court. Court of Appeals No. 241632.

WEAVER, J. (*dissenting*). I would deny leave to appeal because the Court of Appeals properly affirmed the trial court on the issues before us.

CAVANAGH and KELLY, JJ. We concur in the statement of Justice WEAVER.

PEOPLE v TERRY WILLIS, No. 125862. In lieu of granting leave to appeal, the order of the Court of Appeals is vacated, and the case is remanded to that Court for consideration of defendant's application for leave to appeal to that Court. MCR 7.302(G)(1). In the unique circumstances of this case, the application should not have been dismissed as untimely under MCR 7.205(F)(3). Jurisdiction is not retained. Court of Appeals No. 251839.

TAYLOR, C.J. I concur with the Court's remand order and write separately to indicate that if the Court of Appeals finds the trial court violated MCR 6.505(A) by hearing oral argument on defendant's motion without appointing counsel to represent defendant at the hearing, then it should vacate the trial court's order denying relief from judgment and require the trial court to issue a new order granting or denying relief from judgment after complying with MCR 6.505(A).

In re BANKS (FAMILY INDEPENDENCE AGENCY v BANKS), No. 127292. On January 13, 2005, the Court heard oral argument on the application for leave to appeal the September 30, 2004, judgment of the Court of Appeals. By order of January 31, 2005, 472 Mich 859, the case was remanded to the St. Clair Circuit Court, Family Division, for its determination, with regard to each of the two children, whether "there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in [respondent]'s home." MCL 712A.19b(3)(b)(i). The St. Clair Circuit Court, Family Division, rendered its decision on February 11, 2005. On order of the Court, in lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed and the St. Clair Circuit Court, Family Division, order terminating respondent's parental rights to the minor children is reinstated because the Supreme Court is satisfied with that court's findings on remand. MCR 7.302(G)(1). Court of Appeals No. 252617.

TAYLOR, C.J., and CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied March 11, 2005:

In re BREAULT (FAMILY INDEPENDENCE AGENCY v HUTCHINSON), No. 128052; Court of Appeals No. 255568.

SKONIECZNY v SKONIECZNY, No. 128107; Court of Appeals No. 260682.

Appeal Dismissed March 18, 2005:

CLOUGH v BALLIET, No. 126122. On order of the Court, on the Court's own motion, it appearing that the parties have settled this case, the order

of November 4, 2004, 471 Mich 913, granting leave to appeal, is vacated and the appeal is dismissed as moot. Court of Appeals No. 243090.

Leave to Appeal Denied March 18, 2005:

In re HENDERSON (FAMILY INDEPENDENCE AGENCY v HENDERSON), No. 128112; Court of Appeals No. 254682.

PEOPLE v MALIK, No. 127402; Court of Appeals No. 247222.

WEAVER, J. I would grant leave to appeal.

CORRIGAN, J. (*dissenting*). I would reverse the decision of the Court of Appeals, which incorrectly concluded that a limited search warrant impeded the authority of the police to effectuate a lawful arrest or to detain the occupant of a residence that was subject to a search. Rather, the proper question was whether the police officer had probable cause to detain or arrest the defendant's brother at the time the officer saw the additional illegal steroids in plain view. I believe that he did.

Defendant was the addressee of a package containing illegal steroids. When the police effected a controlled delivery to defendant's address, defendant's brother signed for the package, claiming to be defendant. Before the delivery, the police obtained a search warrant that provided that officers could enter the home and retrieve the package if it remained unopened after a reasonable period elapsed.

Two hours later, the police executed the search warrant and located the package. At that point, the police intended to arrest defendant. Upon inquiry, the police were told that defendant was located in a back bedroom. When the police walked toward the back bedroom as directed, an officer observed the man who had earlier signed for the package, and claimed to be defendant, walking quickly into a bedroom. Assuming that the man was defendant, the officer followed the individual into the bedroom, at which time the officer saw additional contraband in plain view.

The Court of Appeals affirmed the circuit court order granting defendant's motion to suppress the seizure of the additional steroids and quash the charges against him. The panel held that the police exceeded the scope of the search warrant that allowed for the search and seizure of the delivered package only.

The touchstone of Fourth Amendment analysis is reasonableness. *Ohio v Robinette,* 519 US 33 (1996). "Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Dunaway v New York,* 442 US 200, 213 (1979). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra v Illinois,* 444 US 85, 91 (1979). Consistent with this understanding, MCL 764.15(1)(c) provides that an officer may make an arrest without a warrant if a felony has been committed "and the peace officer has reasonable cause to believe the person committed it."

Here, the arresting officer had particularized reasonable cause to effectuate an arrest without a warrant against defendant's brother.

Defendant's brother signed for a package known to contain illegal drugs, claiming to be the addressee/defendant. Because it is a felony to possess controlled substances,[1] the officer was statutorily authorized to question and arrest defendant's brother with respect to those controlled substances contained in the delivered package. When executing a valid arrest, an officer need not shut his eyes to evidence in plain view. See, e.g., *Arizona v Hicks,* 480 US 321, 326 (1987); *Maryland v Buie,* 494 US 325 (1990).

Moreover, the police officers were justified in detaining the man they believed to be defendant while the package was retrieved under the terms of the limited search warrant. As the United States Supreme Court noted in *Michigan v Summers,* 452 US 692, 702-703 (1981):

> In assessing the justification for the detention of an occupant of premises being searched for contraband pursuant to a valid warrant, both the law enforcement interest and the nature of the "articulable facts" supporting the detention are relevant. Most obvious is the legitimate law enforcement interest in preventing flight in the event that incriminating evidence is found. Less obvious, *but sometimes of greater importance, is the interest in minimizing the risk of harm to the officers.... The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation*. [Emphasis supplied.]

In this situation, I believe the officer appropriately detained the person believed to be defendant—the person who identified himself as the addressee of the package of illegal drugs and who signed for possession of that package. The detention was further warranted to ensure the safety of the officers retrieving the package under the terms of the search warrant.

Under either of these bases, the officer was lawfully in a position from which to view the drugs in the bedroom. The Court of Appeals erred in affirming the lower court's order suppressing the seized drugs and quashing defendant's indictment. I would reverse.

Interlocutory Appeal

Leave to Appeal Denied March 18, 2005:

PEOPLE v CRAIG BROWN NO. 1, No. 128143; Court of Appeals No. 259696.

Summary Dispositions March 25, 2005:

PEOPLE v HINDMAN, No. 125763. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed in part, and the case is

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[1] MCL 333.7401.

remanded to the Saginaw Circuit Court for resentencing on defendant's second-degree murder conviction under properly scored sentencing guidelines. MCR 7.302(G)(1). Offense variable 10 is to be scored at 10 points if the "offender exploited a *victim's* physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b) (emphasis added). However, defendant here was assessed points not on the basis of having exploited the second-degree murder victim, but on the basis of having exploited her own children who were merely passengers in her car and not the victims of the criminal offense being scored. Therefore, the circuit court erred in scoring offense variable 10, and because defendant raised this issue at sentencing, she is entitled to resentencing. *People v Kimble*, 470 Mich 305, 310-311 (2004); MCL 769.34(10). Offense variable 18, at the time relevant to this action, was to be scored "if an element of the offense or attempted offense involves the operation of a vehicle . . . ." MCL 777.22(1). The operation of a vehicle is not an element of second-degree murder. Therefore, the circuit court erred in scoring offense variable 18. *Kimble, supra* at 312; MCL 769.34(10). In addition, in rescoring the guidelines, the circuit court should consider whether it was appropriate to score 35 points under offense variable 3, in light of the applicable language of former MCL 777.33(2)(c). In all other respects, leave to appeal is denied. Court of Appeals No. 244904.

WEAVER, J. I dissent from the order remanding for resentencing. I continue to believe that the plain language of MCL 769.34(10) requires a defendant to preserve a scoring error by "rais[ing] the issue at sentencing in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." See, e.g., *People v Kimble,* 470 Mich 305 (2004) (WEAVER J., dissenting). Defendant did not preserve her objection to the scoring of either offense variable 3 or 18 and, thus, cannot now challenge the scoring of those variables. Moreover, although defendant did object to the scoring of offense variable 10, even if the objection had been sustained, the sentence imposed was within the appropriate guidelines range, making review unnecessary.

To hold that the plain error doctrine may be applied, as a majority did in *People v Kimble, supra* at 312, and does implicitly in this case, undermines the plain language of MCL 769.34(10) that forbids a party to raise unpreserved scoring errors on appeal.

PEOPLE V HIRMUZ, No. 128167. In lieu of granting leave to appeal, only that portion of the order that directed assignment of this case to a different judge upon remand is vacated. MCR 7.302(G)(1). In all other respects, leave to appeal is denied. The motion for stay is denied. Court of Appeals No. 259154.

Leave to Appeal Denied March 25, 2005:

In re DILLEY (FAMILY INDEPENDENCE AGENCY V WARTHAN), No. 128188; Court of Appeals No. 256647.

In re MITCHELL (FAMILY INDEPENDENCE AGENCY v STREETS), No. 128197; Court of Appeals No. 256816.

Summary Disposition March 29, 2005:

HOME OWNERS INSURANCE COMPANY v REED, No. 126821. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. Farmers Insurance Exchange's motion to allow response brief is denied. MCR 7.302(G)(1). Jurisdiction is not retained. Court of Appeals No. 252979.

Leave to Appeal Denied March 29, 2005:

PEOPLE v POSTELL, No. 126406; Court of Appeals No. 245728.

SLATER v DEWITT CHARTER TOWNSHIP, No. 126455; Court of Appeals No. 244791.

PEOPLE v TYRONE MAHAN, No. 126484; Court of Appeals No. 246234.

BANKSTON CONSTRUCTION, INC v CITY OF DETROIT, No. 126592; Court of Appeals No. 241988.

PEOPLE v MUHAMMAD, No. 126627; Court of Appeals No. 244688.

MORGAN v DEPARTMENT OF CORRECTIONS, No. 126766; Court of Appeals No. 246732.

PEOPLE v CRIDER, No. 126778; Court of Appeals No. 245900.

PEOPLE v SEEVER, No. 126779; Court of Appeals No. 245615.

PEOPLE v ANDREW OWENS, No. 126780; Court of Appeals No. 244413.

HLIFKA v HIGGINS, No. 126798; Court of Appeals No. 244355.

PEOPLE v CUMMINGS, No. 126808; Court of Appeals No. 244907 (on reconsideration).

PEOPLE v GOLDY, No. 126822; Court of Appeals No. 246501.

PEOPLE v BLAYNE FIELDS, No. 126833; Court of Appeals No. 254502.

PEOPLE v MASHELI, No. 126861; Court of Appeals No. 247345.

PEOPLE v GLENN GREEN, No. 126866; Court of Appeals No. 247395.

PEOPLE v BREEDING, No. 126871; Court of Appeals No. 255472.

PEOPLE v ANTONIO MANNING, No. 126875; Court of Appeals No. 255598.

PEOPLE v BELVIN, No. 126889; Court of Appeals No. 248651.

In re HOGAN TRUST NO 1 (HOGAN v HOGAN), No. 126891; Court of Appeals No. 247989.

PEOPLE v MICHAEL PARNELL, No. 126892; Court of Appeals No. 248236.

In re HOGAN TRUST NO 2 (SAWYER v HOGAN), No. 126893; Court of Appeals No. 242530.

ECKLER v HOWARD TOWNSHIP BOARD OF TRUSTEES, No. 126902; Court of Appeals No. 247284.

QUEST FINANCIAL SERVICES, INC v KITTS, No. 126921; Court of Appeals No. 254809.

HESSE v CHIPPEWA VALLEY SCHOOLS, No. 126925; Court of Appeals No. 244153.

PEOPLE v GOSSARD, No. 126935; Court of Appeals No. 245180.

PEOPLE v REGINALD MARTIN, No. 126938; Court of Appeals No. 247712.

GERESY v DOMMERT, No. 126942; Court of Appeals No. 243468.

PEOPLE v DOXEY, No. 126947; reported below: 263 Mich App 115.

PEOPLE v ALEJANDRO GARDNER, No. 126961. Defendant's motion to add issues is granted. Court of Appeals No. 246707.

PEOPLE v THOMAS ROBERTS, No. 126962; Court of Appeals No. 246232.

MCA FINANCIAL CORPORATION v GRANT THORNTON, LLP, No. 126972; reported below: 263 Mich App 152.

PEOPLE v ALEXANDER, No. 126976; Court of Appeals No. 248201.

PEOPLE v CARPENTER, No. 126988; Court of Appeals No. 247543.

PEOPLE v DUNNE, No. 126989; Court of Appeals No. 256278.

PEOPLE v WARLICK, No. 126992; Court of Appeals No. 247213.

PEOPLE v TAVAR CURRY, No. 126994; Court of Appeals No. 247134.

PEOPLE v TROY JACKSON, No. 127000; Court of Appeals No. 249622.

EGBERT v EGBERT, No. 127005; Court of Appeals No. 254578.

PEOPLE v STRAYHORN, No. 127009; Court of Appeals No. 246999.

SPIEGEL v FORD MOTOR COMPANY, No. 127010; Court of Appeals No. 255250.

PEOPLE v JOHNNY WILLIAMS, No. 127019; Court of Appeals No. 245267.

MCA FINANCIAL CORPORATION v DYKEMA GOSSETT, PLLC, No. 127020; Court of Appeals No. 250810.

PEOPLE v GARCIA-MARCOS, No. 127028; Court of Appeals No. 255707.

PEOPLE v WHITLEY, No. 127029; Court of Appeals No. 246218.

PEOPLE v MATHIS, No. 127036; Court of Appeals No. 247848.

PEOPLE v SCHRAM, No. 127039; Court of Appeals No. 248103.

PEOPLE v BLUE, No. 127041; Court of Appeals No. 246782.

PEOPLE v ARMSTRONG, No. 127046; Court of Appeals No. 256714.

GRANT v METALLOY CORPORATION, No. 127052; Court of Appeals No. 255092.

PEOPLE v WHITESIDE, No. 127053; Court of Appeals No. 255751.

STANFORD v CITY OF DEARBORN, No. 127055; Court of Appeals No. 254901.

PEOPLE v BONNER, No. 127058; Court of Appeals No. 246783.

PEOPLE v BENAVIDEZ, No. 127067; Court of Appeals No. 249415.

PEOPLE v SANTIAGO PEREZ, No. 127071; Court of Appeals No. 247309.

SUTTON v FIRST FEDERAL OF MICHIGAN, No. 127074; Court of Appeals No. 255770.

PEOPLE v VINCENT TERRELL, No. 127077; Court of Appeals No. 255327.

PEOPLE v WILLIE JONES, No. 127078; Court of Appeals No. 253720.

PEOPLE v HENRY SIMPSON, No. 127085; Court of Appeals No. 256640.

PEOPLE v TYSON, No. 127087; Court of Appeals No. 255939.

PEOPLE v BRENDON WALKER, No. 127096; Court of Appeals No. 246634.

PEOPLE v PHIPPS, No. 127098; Court of Appeals No. 256433.

WERTH v DEPARTMENT OF CORRECTIONS, No. 127105; Court of Appeals No. 256246.

PEOPLE v JAJUAN DAVIS, No. 127108; Court of Appeals No. 248546.

PEOPLE v VIRGIL, No. 127120; Court of Appeals No. 247850.

PEOPLE v CHAMBERS, Nos. 127121-127125; Court of Appeals Nos. 255266, 255305-255308.

PEOPLE v ZSIROS, No. 127126; Court of Appeals No. 256158.

PEOPLE v TALLEY, No. 127140; Court of Appeals No. 253655.

PEOPLE v WOODROW GARNER, No. 127172; Court of Appeals No. 256375.

PEOPLE v PEOPLES, No. 127181; Court of Appeals No. 248155.

PEOPLE v GRAVES, No. 127234; Court of Appeals No. 247651.

PEOPLE v FEW, No. 127262; Court of Appeals No. 247650.

PEOPLE v HEMP, No. 127433; Court of Appeals No. 247716.

ROCCA v CHILDREN'S HOSPITAL OF MICHIGAN, No. 127618; Court of Appeals No. 258500.

PEOPLE v MAYBERRY, No. 127954. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257136.

PEOPLE v LEDUC, No. 127955; Court of Appeals No. 256968.

Interlocutory Appeal

Leave to Appeal Denied March 29, 2005:

HATTERY v GRUCA, No. 126900; Court of Appeals No. 246755.

Reconsideration Denied March 29, 2005:

HASTINGS MUTUAL INSURANCE CO v RUNDELL, No. 124284. Leave to appeal denied at 471 Mich 938. Court of Appeals No. 238549.

PEOPLE v KENNETH WALKER, No. 126035. Leave to appeal denied at 471 Mich 935. Court of Appeals No. 253636.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the Court of Appeals to consider whether defendant was entitled to resentencing.

PEOPLE v KINDRED, No. 126086. Leave to appeal denied at 471 Mich 945. Court of Appeals No. 249730.

NIELSEN v PALLISCO, No. 126159. Leave to appeal denied at 471 Mich 920. Court of Appeals No. 250535.

PEOPLE v RITCHIE, No. 126243. Leave to appeal denied at 471 Mich 946. Court of Appeals No. 247490.

OIL CAPITAL RACE VENTURE, INC v HUNTER, No. 126287. Leave to appeal denied at 471 Mich 936. Court of Appeals No. 244132.

PEOPLE v WILBURN STEWART, No. 126324. Leave to appeal denied at 471 Mich 947. Court of Appeals No. 253810.

PEOPLE v MCCANN NO 1, No. 126345. Leave to appeal denied at 471 Mich 947. Court of Appeals No. 253937.

AMERICAN BUMPER & MANUFACTURING COMPANY v NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Nos. 126364, 126365. Leave to appeal denied at 471 Mich 948. Reported below: 261 Mich App 367.

MARKMAN, J., not participating.

PEOPLE v KENNETH CURRY, No. 126376. Leave to appeal denied at 471 Mich 948. Court of Appeals No. 252884.

PEOPLE v SAMUEL NEAL, No. 126396. Leave to appeal denied at 471 Mich 948. Court of Appeals No. 254580.

PEOPLE v BARHITE, No. 126398. Leave to appeal denied at 471 Mich 921. Court of Appeals No. 237890.

SARR v SCOTT A SMITH, PC, No. 126426. Leave to appeal denied at 471 Mich 949. Court of Appeals No. 242395.

PEOPLE v KARL LITTLE, No. 126715. Leave to appeal denied at 471 Mich 954. Court of Appeals No. 253818.

OPTION ONE MORTGAGE CORPORATION v URSERY, No. 127318. Leave to appeal denied at 471 Mich 958. Court of Appeals No. 257844.

KELLY, J. I would grant reconsideration and, on reconsideration, would remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Granted March 31, 2005:

PRUCHNO v PRUCHNO, No. 126858. The case is to be argued and submitted to the Court with *Sweebe v Sweebe Estate*, No. 126913. The Elder Law, Family Law, and Probate & Estate Planning sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 245583.

SWEEBE v SWEEBE ESTATE, No. 126913. The case is to be argued and submitted to the Court with *Pruchno v Pruchno*, No. 126858. The Elder Law, Family Law, and Probate & Estate Planning sections of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 253520.

PEOPLE v DROHAN, No. 127489. The issue is limited to whether *Blakely v Washington*, 542 US 296 (2004), and *United States v Booker*, 543 US ___; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme. See *People v Claypool*, 470 Mich 715, 730 n 14 (2004). The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the question presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 264 Mich App 77.

Summary Dispositions March 31, 2005:

PEOPLE v LABELLE, No. 127687. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(G)(1). The parties are also directed to address the

issue whether defendant, a passenger, had standing to object to the traffic stop or the subsequent search of the vehicle after the driver consented. Court of Appeals No. 258986.

MACINTYRE v MACINTYRE, No. 127963. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed in part. MCL 600.5080(2) requires a "review" of the child custody decision. MCR 7.302(G)(1). The parties' agreements may not waive the availability of an evidentiary hearing if the circuit court determines that a hearing is necessary to exercise its independent duty under the Child Custody Act, MCL 722.25. But as long as the circuit court is able to "determine independently what custodial placement is in the best interests of the children[,]" *Harvey v Harvey*, 470 Mich 186, 187 (2004), an evidentiary hearing is not required in all cases. In this case, the Oakland Circuit Court was able to make such an independent determination without a hearing. The case is remanded to the Court of Appeals for consideration of the remaining issues on appeal. Reported below: 264 Mich App 690.

Leave to Appeal Denied March 31, 2005:

PEOPLE v CRIPPEN, No. 126440; Court of Appeals No. 246724.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v SULLIVAN BROWN, No. 126647; Court of Appeals No. 237027 (on remand).
KELLY, J. I would grant leave to appeal.

PEOPLE v KAHIL GREEN, No. 126717; Court of Appeals No. 246802.

PEOPLE v ORICK, No. 126718; Court of Appeals No. 246801.
CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

PEOPLE v AL-TIMIMI, No. 126725; Court of Appeals No. 245211.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

DUVERNEY v BIG CREEK MENTOR UTILITY AUTHORITY, No. 126757; Court of Appeals No. 243866.
WEAVER, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 126800; reported below: 262 Mich App 649.
CAVANAGH, J. I would grant leave to appeal.

PEOPLE v MCPHERSON, No. 126804; reported below: 263 Mich App 124.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MCGEE, No. 126851; Court of Appeals No. 248710.

PEOPLE v STIFF, No. 127063; Court of Appeals No. 247827.

PEOPLE v JENSEN, No. 127689; Court of Appeals No. 235372 (on reconsideration).

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 1, 2005:

MICK v LAKE ORION COMMUNITY SCHOOLS and MICK v BASS, Nos. 126547, 126548. Pursuant to MCR 7.302(G)(l), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties shall be prepared to address whether the plaintiff has shown a materially adverse employment action to sustain his retaliation claim. They may file supplemental briefs within 28 days of the date of this order. The application for leave to appeal remains pending. Court of Appeals Nos. 241121, 241122.

DEYO v DEYO, No. 126795. Pursuant to MCR 7.302(G)(l), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties shall include among the issues to be addressed whether the Court of Appeals erred in its finding that the defendant "contributed to the acquisition, improvement, or accumulation of the property." MCL 552.401. See *Dart v Dart*, 460 Mich 573 (1999), and *Reeves v Reeves*, 226 Mich App 490 (1997). The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 245210.

Summary Disposition April 1, 2005:

DEVAULT ESTATE v PORNPICHIT, No. 126714. In lieu of granting leave to appeal, the Wayne Circuit Court's June 17, 2004, oral opinion and the June 18, 2004, order are vacated, and the case is remanded to that court for further consideration. MCR 7.302(G)(1). The court is to issue findings of fact and conclusions of law on the admissibility of the testimony of Michael Brazil, D.O., consistent with the requirements of MRE 702 and MCL 600.2955. *Craig v Oakwood Hosp,* 471 Mich 67 (2004); *Gilbert v DaimlerChrysler Corp,* 470 Mich 749 (2004). The court shall provide a copy of its decision to this Court within 45 days of this order. Jurisdiction is retained. Court of Appeals No. 256163.

Leave to Appeal Denied April 1, 2005:

BARNES v VETTRAINO, No. 123661, 5/December 2004. On order of the Court, leave to appeal having been granted and the Court having considered the briefs and oral arguments of the parties, the order of July 15, 2004, 470 Mich 894, that granted leave to appeal, is vacated and leave to appeal is denied, because the Court is no longer persuaded the questions presented should be reviewed by this Court. If plaintiffs do prevail, they should be allowed to recover those damages that are common to medical malpractice actions, but not those damages that are a function of the destruction of the fetus, because an award of the latter type of damages would be violative of Michigan's clear public policy against abortions. *People v Bricker*, 389 Mich 524, 529 (1973), constru-

ing *Roe v Wade*, 410 US 113 (1973). Plaintiffs' motion to allow an amended statement of facts is denied as moot. Court of Appeals No. 235357.

CAVANAGH, J. (*concurring*). Because I do not find it contrary to public policy that we should allow enforcement of liability against negligent health care professionals in cases such as this, I concur that leave was improvidently granted and should be denied.

KELLY, J. I join the statement of Justice CAVANAGH.

Reconsideration Denied April 1, 2005:

In re ROGERS (FAMILY INDEPENDENCE AGENCY v AGUIRRE), No. 127821. Leave to appeal denied at 472 Mich 868. Court of Appeals No. 255479.

Leave to Appeal Granted April 7, 2005:

PEOPLE v NICHOLAS JACKSON, 125250. The parties are to include among the issues addressed: (1) whether the admission of the oral and written statements made by Anthony Leroy Hines to the police was error in light of *Crawford v Washington*, 541 US 36 (2004), and, if so, whether *Crawford* should be applied retroactively; (2) whether the trial court erred when it applied the rape-shield statute, MCL 750.520j, and denied defendant an opportunity to present testimony regarding his allegations that the complainant had made a prior false allegation of sexual abuse against a different individual (see *People v Hackett*, 421 Mich 338 [1984]); (3) whether alleged prior false allegations constitute "specific instances of the victim's sexual conduct" as contemplated by the rape-shield statute; (4) what procedural and evidentiary requirements must be met to prove that the allegations are false and for their admission as evidence at trial; and (5) if the trial court did err in excluding or admitting evidence, whether any evidentiary or constitutional errors were harmless. See *People v Carines*, 460 Mich 750 (1999). The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 242050.

Summary Dispositions April 7, 2005:

PEOPLE v CAGLE, No. 126207. In lieu of granting leave to appeal, the case is remanded to the Oakland Circuit Court for a hearing to determine whether defendant received ineffective assistance of counsel. *People v Ginther,* 390 Mich 436 (1973). MCR 7.302(G)(1). Defendant was charged with and pleaded no contest in 1992 to six counts of first-degree criminal sexual conduct based on alleged acts committed between June 1979 and November 1981. At the time defendant entered his plea, the charges against him were barred by the six-year period of limitations of MCL 767.24 in effect at the time the crimes were allegedly committed. The

circuit court shall determine whether defendant was informed by his counsel of the expiration of the period of limitations on the charges brought against him and whether defendant indicated that he wished to waive this defense. If the circuit court determines that defendant was not so informed and did not knowingly waive the defense, the court shall vacate defendant's convictions. Defendant's other pending motions are denied as moot. Court of Appeals No. 252838.

LENTINI v URBANCIC, No. 126489. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration in light of *Waltz v Wyse*, 469 Mich 642 (2004). MCR 7.302(G)(1). Court of Appeals No. 246323.

NGUYEN v PROFESSIONAL CODE INSPECTIONS OF MICHIGAN, INC, No. 126901. In lieu of granting leave to appeal, that portion of the Court of Appeals opinion remanding this matter for trial with regard to defendant Dan Johnson is reversed. MCR 7.302(G)(1). No reasonable juror could conclude that defendant's conduct amounted to reckless conduct showing a substantial lack of concern whether damage or injury would result. *Stanton v Battle Creek*, 466 Mich 611, 620-621 (2002); *Jackson v Saginaw Co*, 458 Mich 141, 146 (1998). Thus, plaintiff has failed to demonstrate that defendant's conduct constitutes gross negligence under MCL 691.1407(2)(c). Defendant's actions in issuing a stop work order were based on his duty as an assistant city manager to enforce a presumptively valid city ordinance and an approved variance to that ordinance. That it was later determined that the language of the approved minutes of the zoning board of appeals meeting at which the variance was approved was erroneous does not strip defendant of immunity. Moreover, defendant's conduct does not meet the test of being the proximate cause of plaintiff's alleged damages. See *Robinson v Detroit*, 462 Mich 439 (2000). In all other respects, leave to appeal is denied. Court of Appeals No. 247584.

Leave to Appeal Denied April 7, 2005:

WOLFE v DEPARTMENT OF TRANSPORTATION, MILES v DEPARTMENT OF TRANSPORTATION, LAMBERT v DEPARTMENT OF TRANSPORTATION, and MCCREARY v DEPARTMENT OF TRANSPORTATION, Nos. 126612-126615; Court of Appeals Nos. 245546-245549.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CLAY TOWNSHIP v MONTVILLE, No. 126658; Court of Appeals No. 248293.

MILLER v LORD, No. 126768; Court of Appeals No. 246448.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v WARE, No. 126782; Court of Appeals No. 247142.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v NATHANIEL MITCHELL, No. 126825; Court of Appeals No. 248654.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

SINACOLA v LELAND TOWNSHIP, No. 127636; Court of Appeals No. 252107.

Interlocutory Appeal

Leave to Appeal Denied April 7, 2005:

PEOPLE v CHAHINE, No. 128332; Court of Appeals No. 260932.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 8, 2005:

In re VANCONETT ESTATE (RAU v LEIDLEIN), NO. 126758. Pursuant to MCR 7.302(G)(l), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The parties shall include among the issues to be addressed whether: (1) Herbert VanConett's mutual will was revocable, and (2) if his mutual will was revocable, the contract to make a will between Herbert and Ila VanConett became specifically enforceable upon Ila's death as to jointly held property passing to Herbert VanConett by operation of law upon Ila VanConett's death. They may file supplemental briefs within 28 days of the date of this order. The application for leave to appeal remains pending. Court of Appeals No. 247516.

Leave to Appeal Denied April 8, 2005:

BEN DREW COMPANY, LLC v ONTWA TOWNSHIP, No. 124431; Court of Appeals No. 248286.

WEAVER, J. I dissent from the denial of leave in this case. I would vacate the Court of Appeals June 9, 2003, order, which dismissed the complaint as "wholly insufficient," and remand the case to the Court of Appeals for further proceedings. Plaintiff's claim was not "wholly insufficient." Rather, plaintiff has already established that a colorable claim exists by pleading specific facts in support of its claim that defendant violated Const 1963, art 9, § 31, and offering supporting documentation. Therefore, I would vacate the Court of Appeals order and remand the case to that Court for further proceedings on plaintiff's complaint.

KELLY, J. I join the statement of Justice WEAVER.

VERIZON NORTH, INC v PUBLIC SERVICE COMMISSION, No. 125728; Court of Appeals No. 241340.

MARKMAN, J. I respectfully dissent and would grant appellants' application for leave to appeal. This case addresses the question of how much deference is due an administrative agency in its interpretation of a statute within its purview. The Public Service Commission here determined that MCL 484.2310(2), which states that a carrier cannot charge a rate for intrastate services that is greater than it is authorized to charge

for interstate services, should take precedence over MCL 484.2102(y), which defines an inadequate rate as one "less than the total service long run incremental cost of providing the service." I would grant leave in order to better understand how a rate can be adjudged "reasonable" where a carrier has been denied the ability to recoup the costs of its services.

I would consolidate this case with *Ameritech v Pub Service Comm*, Docket No. 126676.

PEOPLE v GATSKI, No. 125740; reported below: 260 Mich App 360.

WEAVER and MARKMAN, JJ., concur; YOUNG, J., concurs in a separate statement; CORRIGAN, J., joins the statement of YOUNG, J.; TAYLOR, C.J., dissents; and CAVANAGH and KELLY, JJ., concur in the result only of TAYLOR, C.J.

YOUNG, J. I concur in the majority's decision to deny the application for leave to appeal because I believe that defendant was properly prosecuted under MCL 324.73102(1). However, like Chief Justice TAYLOR, I believe that the Court of Appeals method of construing § 73102—most notably, its invocation of the "absurd results" doctrine—was erroneous. See *People v McIntire*, 461 Mich 147 (1999).

CORRIGAN, J. I join the statement of Justice YOUNG.

TAYLOR, C.J. I dissent from this Court's order denying defendant's application for leave to appeal. I would reverse the published opinion of the Court of Appeals because it deviated from well-established rules of statutory construction and misconstrued the recreational trespass statute. MCL 324.73102(1).

Defendant was fishing within the clearly defined banks of the Grand River near the Webber Dam in Lyons Township in Ionia County when he was given a citation for violating MCL 324.73102(1). The dam is owned and operated by Consumers Energy, and the dam grating was surrounded by "no trespassing" signs strung on a guide cable across the river.

At issue is whether defendant came within an exception to the recreational trespass statute found in § 73102(3). This subsection provides:

> On fenced or posted property or farm property, a fisherman wading or floating a navigable public stream may, without written or oral consent, enter upon property within the clearly defined banks of the stream or, without damaging farm products, walk a route as closely proximate to the clearly defined bank as possible when necessary to avoid a natural or artificial hazard or obstruction, including, but not limited to, a dam, deep hole, or a fence or other exercise of ownership by the riparian owner.

The question involving statutory interpretation is whether the "when necessary to avoid a natural or artificial hazard or obstruction" language applies only to walking along adjacent land or also to entering on

property within the banks. The grating for the dam was within the banks, but there was no indication that defendant needed to go on it to avoid an obstruction.

The Court of Appeals stated:

> The focal point in the language of subsection 73102(3) is the use of the disjunctive "or" after the word "stream" in the first part of the provision. It is well-established that the word "or" is often misused in statutes and it gives rise to an ambiguity in the statute because it can be read as meaning either "and" or "or." Generally, "or" is a disjunctive term, but the popular use of the word is frequently inaccurate and this misuse has infected statutory enactments. Their literal meanings should be followed if they do not render the statute dubious, but one will be read in place of the other if necessary to put the meaning in proper context.
>
> We conclude that subsection 73102(3) is not well drafted, and the particular use of the word "or" and placement of commas in the text could lead reasonable minds to differ with respect to whether the provision creates the different types of exceptions that the parties assert. . . .
>
> * * *
>
> . . . Defendant's proposed construction would expand this subsection to absurdly create an unlimited right to enter property located within the banks of a river for any reason. Such a proposed construction would not accurately represent the legislative intent behind the statute and would render the latter portion of the subsection nugatory. Thus, we conclude that subsection 73102(3) provides an exception to the general trespass rule to allow a fisherman engaged in recreational activity to enter upon posted property only to avoid a natural or artificial hazard or an obstruction in the water.
>
> Therefore, unless defendant can prove that it was necessary for him to enter onto the grating to avoid a natural or artificial hazard or obstruction, he would not be excused from otherwise violating subsection 1 of MCL 324.73102. [260 Mich App 360, 365-368 (2004) (citations omitted).]

The Court of Appeals analysis is flawed in several respects. First, the Court of Appeals read "or" as if it said "and" because it believed the statute was inartfully drafted. The Court of Appeals stated: "Generally, 'or' is a disjunctive term, but the popular use of the word is frequently inaccurate and this misuse has infected statutory enactments." *Id*. at 365.

Given that the statute makes sense when "or" is read in the disjunctive, the Court of Appeals had no ground to read "or" as if it said

"and." In reviewing a statute, if its language is clear, we must conclude that the Legislature intended the meaning expressed, and the statute is enforced as written. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27 (1995). The Court of Appeals also rejected defendant's construction of the statute because it would *absurdly* create an unlimited right to enter property located within the banks of a river for any reason. Our judiciary is not free to engage in judicial legislation or to otherwise save the citizenry from the actions of its duly elected legislators. See, e.g., *People v Borchard-Ruhland,* 460 Mich 278 (1999); *Perez v Keeler Brass Co*, 461 Mich 602 (2000). This Court has repudiated nontextual modes of interpretation such as the so-called "absurd result" doctrine of avoiding the text of a statute when judges view the result as absurd or unjust. *People v McIntire*, 461 Mich 147, 153 (1999). In *McIntire* we said that such attempts to divine unexpressed and nontextual legislative intent is " 'nothing but an invitation to judicial lawmaking.' " *Id.* at 155 n 2 (citation omitted).

I believe § 73102(3) is correctly read as follows:

> On fenced or posted property or farm property, *a fisherman* wading or floating a navigable public stream *may*, without written or oral consent, *[1]* enter upon property within the clearly defined banks of the stream *or, [2]* without damaging farm products, walk a route as closely proximate to the clearly defined bank as possible when necessary to avoid a natural or artificial hazard or obstruction, including, but not limited to, a dam, deep hole, or a fence or other exercise of ownership by the riparian owner.

When the word "or" in § 73102(3) is read in the disjunctive, as it should be, it is apparent that § 73102(3) has two exceptions. The first exception is when a fisherman is between the clearly defined banks of the river below the high-water line, and the second allows a fisherman to go outside the banks of the river to get around an obstacle. Given that defendant was standing within the clearly defined banks of the river, he came within the first exception. Accordingly, he was not in violation of the criminal trespass statute.

Both of the exceptions recognized in § 73102(3) are consistent with the rights of fishermen under Michigan law as supported by *Collins v Gerhardt*, 237 Mich 38, 48-49 (1926). The exceptions recognized in § 73102(3) do not afford Michigan fishermen an unlimited right as the Court of Appeals speculated; rather the exceptions allow fishermen to fish the navigable waters of Michigan. Riparian rights are generally subordinate to the rights of the public to take fish. *Attorney General ex rel Director of Conservation v Taggart*, 306 Mich 432 (1943).

The Court of Appeals was concerned that the construction of the statute I have set forth would allow fishermen too many rights because it would create an unlimited right to enter property located within the banks of a river for any reason. This is at best an argument that the Legislature should amend the statute to restrict the rights of fishermen. It is well established that we will not inquire into the wisdom of its

legislation. *Council of Orgs & Others for Ed About Parochiaid v Governor*, 455 Mich 557, 564 n 7 (1997); *Nummer v Dep't of Treasury*, 448 Mich 534, 553 n 22 (1995). Moreover, arguments that a statute is "unwise or results in bad policy should be addressed to the Legislature." *People v Kirby*, 440 Mich 485, 493-494 (1992).

Thus, I would reverse the judgment of the Court of Appeals because it failed to follow the plain words of the statute and improperly considered absurd results in interpreting the statute.

CAVANAGH and KELLY, JJ. We concur in the result only of the statement of Chief Justice TAYLOR.

PEOPLE v BURRIS, No. 126655; Court of Appeals No. 255158.

Interlocutory Appeal

Leave to Appeal Denied April 8, 2005:

AMERITECH MICHIGAN v PUBLIC SERVICE COMMISSION, No. 126676; Court of Appeals No. 244742.

TAYLOR, C.J. I would grant leave to appeal.

MARKMAN, J. I respectfully dissent and would grant appellant's application for leave to appeal. This case addresses the question of how much deference is due an administrative agency in its interpretation of a statute within its purview. The Public Service Commission here determined that appellant's mistaken diagnosis that a customer's phone was not working was attributable to wiring inside the customer's home, rather than to wiring outside the home, constituted a "false, misleading or deceptive" statement within the meaning of MCL 484.2502(1)(a), and imposed fines upon petitioner in excess of $30,000. Because there is little in this provision that implicates the expertise of the PSC, and because I believe the PSC may have abused its discretion by its interpretation, I would grant leave to further assess the point at which judicial deference to the determination of an administrative agency must give way to ensuring that the laws of this state are correctly construed.

I would consolidate this case with *Verizon v Pub Service Comm*, Docket No. 125728.

Leave to Appeal Denied April 14, 2005:

PEOPLE v COOPER, No. 126621; Court of Appeals No. 246330.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v ALVERNO EVANS, No. 126789; Court of Appeals No. 246944.

KELLY, J. I would grant leave to appeal.

PEOPLE v HULCE, No. 126815; Court of Appeals No. 255303.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

In re TARLEA ESTATE (TARLEA v CRABTREE), No. 126854; reported below: 263 Mich App 80.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v BOSTICK, No. 126918; Court of Appeals No. 254581.

PEOPLE v TRUAX, No. 126941; Court of Appeals No. 255679.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 15, 2005:

BARRETT v MT BRIGHTON, INC, No. 126544. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) In the facts of this case, was the snowboard rail a danger that inheres in the sport of skiing that was "obvious and necessary" within the meaning of MCL 408.342(2)? (2) In considering whether there are obvious and necessary dangers, is it appropriate to consider the various types of skiing (e.g., traditional downhill skiing, snowboarding, and so forth)? (3) Did MCL 408.326a(d) obligate defendant to mark the top or entrance of the subject ski slope as being closed to all but those who were snowboarders? (4) Did MCL 408.326a(c) obligate defendant to mark the top or entrance of the subject ski slope as being "most difficult"? (5) Did MCL 408.326a(e) obligate defendant to maintain a trail board in the ski area labeling the subject ski slope as "most difficult"? (6) Are items (4) and (5) properly preserved for this Court's review? The parties may file supplemental briefs within 28 days of the date of this order. The application for leave to appeal remains pending. Court of Appeals No. 222777.

FAMILIES AGAINST INCINERATOR RISK v WASHTENAW COUNTY CLERK, No. 126867. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be briefed: (1) whether, in light of the provision in MCL 168.954 that "[e]ach signer of the petition shall affix his signature, address, and the date of signing," the Court of Appeals erred in concluding that if a "signature matches the voter registration card, the clerk may not invalidate an otherwise valid signature on the basis that the handwriting in the address and date column was determined not to be that of the signer"; and (2) by what authority and to what extent may a court preclude a clerk from engaging in handwriting analysis to prevent fraud. The parties shall file supplemental briefs within 28 days of the date of this order. The Elections Division of the Michigan Department of State, the Michigan Republican Party, and the Michigan Democratic Party are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 245319.

HARRIS v RAHMAN, No. 126922. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument: (1) Can plaintiff prevail if she did not present documentary evidence that defendant knew the quantity of mercury involved when he first spoke with plaintiff on the telephone, or that defendant's statements directly contradicted the advice of the Poison Control Center? (2) Could a reasonable juror conclude that defendant's conduct amounted to reckless conduct showing a substantial lack of concern regarding whether injury would result? (3) If so, do defendant's actions constitute "the" proximate cause of the injuries in this case as required by MCL 691.1407(2)(c)? See *Robinson v Detroit*, 462 Mich 439 (2000). The parties may file supplemental briefs within 28 days of the date of this order. The application for leave to appeal remains pending. Court of Appeals No. 247253.

Summary Disposition April 15, 2005:

BISCAYNE CORNER DELI & BAKERY EAST, LLC v MC OFFICE INVESTMENTS, LLC, No. 126716. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to the Wayne Circuit Court for further proceedings. MCR 7.302(G)(1). Plaintiff's deposition testimony created a genuine issue of material fact on the question whether the heating or cooling was inadequate for 48 continuous hours or more. Court of Appeals No. 246743.

Leave to Appeal Denied April 15, 2005:

AYAR v FOODLAND DISTRIBUTORS, No. 126654; Court of Appeals No. 242603.

Interlocutory Appeal

Leave to Appeal Denied April 20, 2005:

LAPORTE v WILLIAM BEAUMONT HOSPITAL, No. 128434; Court of Appeals No. 260461.

KELLY, J. (*concurring*). I agree with the order. I am confident that the trial judge, an experienced and respected jurist, will strive to rule in this case fairly and without bias, just as this Court should do.

YOUNG, J. (*concurring*). Because this matter is interlocutory, I concur in the denial. In *Craig v Oakwood Hosp*, 471 Mich 67 (2004), and *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004), this Court clearly set forth the role of the trial judge under MRE 702 and MCL 600.2955 to act as a gatekeeper to ensure that each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from that data—is

reliable. If, after the trial in this case, there is an application for leave to appeal establishing that the Oakland Circuit Court failed to adequately perform its role as a gatekeeper, these gatekeeping principles will be enforced.

Leave to Appeal Denied April 22, 2005:

HALEY v CALHOUN COUNTY CLERK, Nos. 128353, 128354; Court of Appeals Nos. 261365, 261398.

KELLY, J. I would grant leave to appeal.

Leave to Appeal Denied April 26, 2005:

PEOPLE v SWIATKOWSKI, No. 126580; Court of Appeals No. 241754.

PEOPLE v JOSEPH HILL, No. 126625; Court of Appeals No. 246074.

VERCNOCKE v STUBBS, No. 126653; Court of Appeals No. 245422.

KUZMA v GREAT LAKES BEVERAGE COMPANY, No. 126836; Court of Appeals No. 245734.

WILLIAM BEAUMONT HOSPITAL v GARDEN CITY OSTEOPATHIC HOSPITAL, No. 126860; Court of Appeals No. 245584.

PEOPLE v KEITH FINLEY, No. 126881; Court of Appeals No. 246159.

PEOPLE v BANDY, No. 126883; Court of Appeals No. 247511.

PEOPLE v PORCH, No. 126895; Court of Appeals No. 244390.

JABERO v HARAJLI, Nos. 126903, 126904; Court of Appeals Nos. 243494, 246737.

PEOPLE v FREEZEL JONES, No. 126926; Court of Appeals No. 248547.

PEOPLE v BILLY PAIGE, No. 126949; Court of Appeals No. 255497.

HERSCHFUS v HERSCHFUS, No. 126950; Court of Appeals No. 252217.

SULIMAN v PONTIAC CEILING AND PARTITION COMPANY, LLC, No. 126963; Court of Appeals No. 248121.

CARPENTER v SIMONIAN, No. 126966; Court of Appeals No. 247258.

STANLEY BUILDING COMPANY v CITY OF ST CLAIR SHORES, No. 126967; Court of Appeals No. 245168.

PEOPLE v JENKINS, No. 126975; Court of Appeals No. 248952.

PEOPLE v PLINE, No. 126990; Court of Appeals No. 247644.

PEOPLE v CLARKSTON, No. 126999; Court of Appeals No. 255676.

RVP DEVELOPMENT CORP v FURNESS GOLF CONSTRUCTION INC and FURNESS GOLF CONSTRUCTION INC v RVP DEVELOPMENT CORP, Nos. 127013, 127014; Court of Appeals Nos. 241125, 241126.

DEUTSCH v BERLINER, No. 127015; Court of Appeals No. 246991.

NORMAN CORPORATION v CITY OF EAST TAWAS, No. 127021; reported below: 263 Mich App 194.

PEOPLE v HEARINGTON, No. 127024; Court of Appeals No. 245015.

LEWIS v FIRST ALLIANCE MORTGAGE COMPANY, No. 127033; Court of Appeals No. 230089.

DEPARTMENT OF TRANSPORTATION v LANDSTAR LIGON, INC, No. 127044. Leave to file a brief amicus curiae is granted. Court of Appeals No. 250744.

HAWKINS v EASON, No. 127047; Court of Appeals No. 246168.

ROSE v DURLING, No. 127048; Court of Appeals No. 253778.

PEOPLE v BRIAN JONES, No. 127054; Court of Appeals No. 256128.

PEOPLE v LANCASTER, No. 127062; Court of Appeals No. 248686.

PEOPLE v PAYNE, No. 127069; Court of Appeals No. 255972.

PEOPLE v TONY LAWSON, No. 127073; Court of Appeals No. 247855.

CLAYBONE v DETROIT DIESEL CORPORATION, No. 127076; Court of Appeals No. 255117.

PEOPLE v STEPHEN JOHNSON, No. 127083; Court of Appeals No. 246925.

PEOPLE v PETHOUD, No. 127093; Court of Appeals No. 244115.

PEOPLE v PULLIAM, No. 127103; Court of Appeals No. 247550.

PEOPLE v GAIL WILSON, No. 127107; Court of Appeals No. 247131.

PEOPLE v ATKINS, No. 127110; Court of Appeals No. 237788.

HOJEIJE v DEPARTMENT OF TREASURY and HOJEIJE v BROCKMAN, Nos. 127111, 127112; reported below: 263 Mich App 295.

PEOPLE v BARRY WILLIS, No. 127113; Court of Appeals No. 255350.

CHURCH'S BUILDER WHOLESALE v HOMEOWNER CONSTRUCTION LIEN RECOVERY FUND (CHURCH'S BUILDER WHOLESALE v LOESSER), No. 127114; Court of Appeals No. 255116.

PEOPLE v ANTONIO CASEY, No. 127128; Court of Appeals No. 255094.

PEOPLE v FRANK PARKER, No. 127133; Court of Appeals No. 245093.

PEOPLE v DEANDRE WILSON, Nos. 127134, 127155; Court of Appeals Nos. 246893, 247211.

PEOPLE v MCCRACKEN, No. 127138; Court of Appeals No. 246817.

PEOPLE v CORY THOMPSON, No. 127141; Court of Appeals No. 240849.

PEOPLE v COLLIER, No. 127147; Court of Appeals No. 245502.

PEOPLE v JOHN LAWSON, No. 127148; Court of Appeals No. 246716.

PEOPLE v SHANNON, No. 127159; Court of Appeals No. 250164.

PEOPLE v CHONTOS, Nos. 127160, 127161; Court of Appeals Nos. 246799, 246884.

SWILLEY v GENERAL MOTORS CORPORATION, No. 127164; Court of Appeals No. 255194.

MOSIMANN v MSAS CARGO INTERNATIONAL, No. 127165; Court of Appeals No. 253765.

PEOPLE v HAMPTON, No. 127168; Court of Appeals No. 256100.

PEOPLE v SOUTHWARD, No. 127169; Court of Appeals No. 249293.

PEOPLE v TURIC, No. 127180; Court of Appeals No. 254833.

ROBERTS v FORD MOTOR COMPANY, No. 127182; Court of Appeals No. 255439.

PEOPLE v SAMUEL THOMAS, No. 127185; reported below: 263 Mich App 70.

PEOPLE v DENNIS HICKS, No. 127187; Court of Appeals No. 256380.

PEOPLE v DENNIS, No. 127195; Court of Appeals No. 240747.

PEOPLE v JOEL CARTER, No. 127196; Court of Appeals No. 249089.

BACARELLA v CHOLAK-JONES, No. 127197; Court of Appeals No. 248425.

SOHN v US AIR, INCORPORATED, No. 127198; Court of Appeals No. 255372.

PEOPLE v BEY, No. 127202; Court of Appeals No. 246981.

PEOPLE v TITUS WILLIS, No. 127203; Court of Appeals No. 246364.

PEOPLE v JAMES H DANIELS, No. 127204; Court of Appeals No. 247033.

ZAMMIT v CITY OF NEW BALTIMORE POLICE DEPARTMENT, No. 127209; Court of Appeals No. 256687.

MOWREY v WESTFIELD INSURANCE COMPANY, No. 127213; Court of Appeals No. 246173.

PEOPLE v MCCANN NO 2, No. 127216; Court of Appeals No. 246538.

PEOPLE v SHERIDAN, No. 127219; Court of Appeals No. 256576.

PEOPLE v BOYD, No. 127220; Court of Appeals No. 246721.

BARCEWSKI v YELLOW FREIGHT SYSTEM, INC, No. 127231; Court of Appeals No. 255353.

BRONSON v MEIJER COMPANIES, LTD, No. 127232; Court of Appeals No. 255470.

PEOPLE v JEREMIAH BROOKS, No. 127233; Court of Appeals No. 256940.

PEOPLE v MORRIS ROGERS, No. 127235; Court of Appeals No. 250163.

PEOPLE v BELSER, No. 127238; Court of Appeals No. 247214.

PEOPLE v FASON, No. 127239; Court of Appeals No. 255274.

PEOPLE OF THE CITY OF SOUTHGATE v CADLE, No. 127242; Court of Appeals No. 255087.

PEOPLE v KENDRICKS, No. 127244; Court of Appeals No. 240331.

PEOPLE v CHRISTINE WILLIAMS, No. 127246; Court of Appeals No. 244205.

PEOPLE OF THE CITY OF SOUTHGATE v EGGERS, No. 127247; Court of Appeals No. 255088.

PEOPLE v LAWRENCE HENDERSON, No. 127258; Court of Appeals No. 248603.

GRAHAM v RIGHTSOURCE GROUP, LLC, No. 127263; Court of Appeals No. 255103.

PEOPLE v JAY BURNS, No. 127264; Court of Appeals No. 255907.

PEOPLE v BUSSEY, No. 127267; Court of Appeals No. 247350.

ADAIR HOLDINGS, LLC v KLINE, No. 127268; Court of Appeals No. 255142.

PEOPLE v OSBORNE, No. 127280; Court of Appeals No. 256876.

PEOPLE v BLAND, No. 127290; Court of Appeals No. 248568.

WINTERSMITH v MICHIGAN FEDERAL CREDIT UNION, No. 127308; Court of Appeals No. 255567.

PEOPLE v GAY, No. 127311; Court of Appeals No. 246720.

CAZA v POINTE DODGE, No. 127328; Court of Appeals No. 256152.

PEOPLE v JANOSKEY, No. 127500; Court of Appeals No. 253277.

PEOPLE v COUCH, No. 128035; Court of Appeals No. 257600.

PEOPLE v AMBROSE, No. 128160; Court of Appeals No. 259571.

Interlocutory Appeals

Leave to Appeal Denied April 26, 2005:

ELGRABLY v ROSS, No. 127989; Court of Appeals No. 259842.

PEOPLE v CROCKETT, No. 128109; Court of Appeals No. 258456.

Reconsideration Denied April 26, 2005:

PEOPLE v BATES, No. 126072. Leave to appeal denied at 472 Mich 851. Court of Appeals No. 251123.

PEOPLE v DAUGHERTY, No. 126788. Leave to appeal denied at 472 Mich 862. Court of Appeals No. 252665.

PEOPLE v SHANEBERGER, No. 126876. Leave to appeal denied at 472 Mich 853. Court of Appeals No. 256500.

WINALIS v KHATTAR, No. 127683. Leave to appeal denied at 472 Mich 862. Court of Appeals No. 259053.

Reconsideration Denied April 29, 2005:

In re BANKS (FAMILY INDEPENDENCE AGENCY v BANKS), No. 127292. See 472 Mich 873. Court of Appeals No. 252617.

TAYLOR, C.J., and CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would deny leave to appeal.

Leave to Appeal Denied May 5, 2005:

AUITO v CLARKSTON CREEK GOLF CLUB, INC, No. 126968; Court of Appeals No. 240621.

Summary Disposition May 6, 2005:

DETROIT EDISON COMPANY v PUBLIC SERVICE COMMISSION NO 1, MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION v PUBLIC SERVICE COMMISSION NO 1, and CONSUMERS ENERGY COMPANY v PUBLIC SERVICE COMMISSION NO 1, Nos. 125950, 125954, 125955. On order of the Court, leave to appeal having been granted and oral arguments of the parties having been considered by the Court, pursuant to MCR 7.302(G)(1), only part II(B) of the March 2, 2004, Court of Appeals opinion, in which the Court of Appeals erroneously concluded that a generally applicable industry code of conduct may be promulgated through a contested case proceeding is vacated. The conclusion by the Court of Appeals in part II(B) is contrary to MCL 24.203(3) and 24.207 as well as existing case law, e.g., *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services*, 431 Mich 172 (1988); *In re Pub Service Comm Guidelines for Transactions Between Affiliates*, 252 Mich App 254 (2002). Further, the issue addressed in part II(B) of the Court of Appeals opinion is now moot in light of 2004 PA 88, in which the Legislature amended MCL 460.10a(5) and ratified the code of conduct established by the Public Service Commission. In all other respects, leave to appeal is denied. Reported below: 261 Mich App 1.

CAVANAGH, J. (*concurring in part*). Because of 2004 PA 88, the issue addressed in part II(B) of the Court of Appeals opinion is now moot; therefore, I concur only with the determination that leave was improvidently granted and should be denied.

KELLY, J. I join the statement of Justice CAVANAGH.

Leave to Appeal Denied May 6, 2005:

In re ZANDARSKI (FAMILY INDEPENDENCE AGENCY v ZANDARSKI), No. 128520; Court of Appeals No. 258120.

Leave to Appeal Granted May 12, 2005:

PEOPLE v KEVIN ROBINSON, No. 126379. The parties are directed to include among the issues addressed: (1) the elements of accomplice liability under MCL 767.39; and (2) whether intent to cause great bodily harm is sufficient to support a conviction of aiding and abetting second-degree murder. See *People v Langworthy,* 416 Mich 630 (1982); *People v Kelly*, 423 Mich 261 (1985). Court of Appeals No. 237036.

SORKOWITZ v LAKRITZ, WISSBRUN & ASSOCIATES, PC, No. 126562; reported below: 261 Mich App 642.

OSTROTH v WARREN REGENCY, GP, LLC, No. 126859. The parties are directed to include among the issues briefed: (1) whether MCL 600.5839(1) precludes application of the statutes of limitations prescribed by MCL 600.5805 and, if not, (2) which statute of limitations, MCL 600.5805(6) or MCL 600.5805(10), is applicable to the claim asserted against defendant Edward Schulak, Hobbs & Black, Inc., in this case. The motions for leave to file briefs amicus curiae on appeal are also granted. Other persons or groups interested in the determination of the question presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 263 Mich App 1.

FEDERATED INSURANCE COMPANY v OAKLAND COUNTY ROAD COMMISSION, No. 126886. The parties are directed to include among the issues to be briefed: (1) whether the work initiated in 1991 was an "interim response activity" that did not trigger the statute of limitations provision set out in MCL 324.20140(1)(a) rather than a "remedial action" that must first be "approved or selected" by the Department of Environmental Quality; and (2) whether the initiation of work for one release of hazardous substances begins the running of the period of limitations for any subsequent or unrelated release of hazardous substances. The application for leave to appeal as cross-appellant is denied. Reported below: 263 Mich App 62.

HOERSTMAN GENERAL CONTRACTING, INC v HAHN, No. 126958. The issue is limited to whether there was an accord and satisfaction between the disputing parties in this case. Other persons or groups interested in the determination of the question presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 244507.

ZSIGO v HURLEY MEDICAL CENTER, No. 126984. Persons or groups interested in the determination of the question presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 240155.

CAMERON v AUTO CLUB INSURANCE ASSOCIATION, No. 127018. Leave to file a brief amicus curiae is granted. Reported below: 263 Mich App 95.

WEXFORD MEDICAL GROUP v CITY OF CADILLAC, No. 127152. The parties are directed to include among the issues to be briefed: (1) whether petitioner has demonstrated that it is entitled to the charitable institution exemptions set forth in MCL 211.7o and MCL 211.9(a); (2) whether petitioner has shown that it is entitled to the public health exemption under MCL 211.7r; and (3) whether the Tax Tribunal or the judiciary may impose a threshold level of charitable care or public health services when the Legislature has not done so. The motions to file briefs amicus curiae by the Michigan Health & Hospital Association and the Michigan Rural Health Clinics Organization in support of petitioner-appellant are also granted. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 250197.

Leave to Appeal Granted May 13, 2005:

MICHIGAN CHIROPRACTIC COUNCIL v COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES, Nos. 126530, 126531. The parties are directed to include among the issues briefed: (1) whether an optional managed care endorsement such as that offered by intervenors is permissible under the no-fault act, MCL 500.3101 *et seq*., (2) whether the Court of Appeals erred in relying on its finding that the endorsement is potentially deceptive and misleading, (3) whether petitioners have standing to bring their petition, in light of some number of their members having participated in the managed care program, or any other reason affecting standing, and whether petitioners have standing with regard to all or only some of the counts in their petition, and (4) the standard of review to be applied by the circuit court to the administrative decision denying the petition. Leave to file briefs amicus curiae are also granted. Reported below: 262 Mich App 228.

WILSON v ALPENA COUNTY ROAD COMMISSION, No. 126951. The parties are directed to include among the issues briefed whether the plaintiffs sufficiently pleaded facts and provided evidence sufficient to place their claim within the highway exception to governmental immunity, MCL 691.1402. Reported below: 263 Mich App 141.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 13, 2005:

PEOPLE v ANTHONY JOHNSON, No. 127434. Pursuant to MCR 7.302(G)(l), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(l). The

parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatement of arguments made in application papers. The application for leave to appeal remains pending. Court of Appeals No. 246937.

Summary Disposition May 13, 2005:

YOUSIF V MONA, No. 126594. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to articulate the material facts in issue on the question of whether the carpet pulls represented an unreasonable hazard, of which defendant had a duty to warn plaintiff. MCR 7.302(G)(1). Jurisdiction is retained. Court of Appeals No. 246680.

YOUNG, J. I share Justice MARKMAN's belief that a loose carpet thread is not a "hidden danger" and that plaintiff faced no "unreasonable risk of harm" from defendant's carpeting. As we have previously held, a social guest "assumes the ordinary risks that come with the premises." *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 603 (2001). A loose carpet thread is certainly an "ordinary risk" one would expect in visiting another's home.

KELLY, J. I would deny the application for leave to appeal.

MARKMAN, J. (*dissenting*). While at defendant's—her brother's—home, plaintiff tripped on a loose carpet thread loop and injured herself. The trial court granted summary disposition in favor of defendant, and the Court of Appeals reversed. Contrary to the majority, I would reverse the judgment of the Court of Appeals and reinstate the order of the trial court.

Because a loose carpet thread loop is not a "hidden danger," *James v Albert*, 464 Mich 12, 19 (2001), and because a homeowner does not owe an obligation to an invitee to scour his or her premises to ensure that there are no loose carpet thread loops in his or her home, I do not believe that any "unreasonable risk of harm" was posed to the plaintiff. *Preston v Sleziak,* 383 Mich 442, 453 (1970), overruled on other grounds by *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591 (2000). A host "has no duty to reconstruct his premises . . . for those accepting his hospitality. The guest assumes ordinary risks that come with the premises." *Stitt*, *supra* at 603. A loose carpet thread loop is an ordinary risk in a carpeted home, and a homeowner has no duty to rid his or her home of every loose carpet thread loop before inviting another for a visit. Social guests are licensees who "assume the ordinary risks associated with their visit." *James, supra* at 19.

As in *Barrett v Discount Tire & Battery* (Docket No. 127167), the Court of Appeals here loses sight of the fact that legal decisions are designed to increase the predictability and certainty of everyday life. Such decisions have practical consequences. What is the appropriate response to the Court of Appeals decision on the part of a reasonable homeowner in Michigan (at least one who happens to have a rug or carpet somewhere within his or her premises) who wishes to avoid litigation? Must he or she remove all rugs and carpets from the premises? Must he

or she inspect each rug or carpet loop by loop in order to determine whether any are loose or of an excessive diameter? Must he or she apprise visitors while they are on the front porch that there is carpeting within the home and that a guest enters at the guest's own risk? Will a sign warning of the possibility of errant carpet loops be sufficient? Will Berber, but not Persian, rugs and carpets subject homeowners to heightened liability? The Court of Appeals decision would expose homeowners to the risk of litigation for accidents arising from the most mundane, the most open and obvious, conditions of the ordinary home, conditions regarding which there has been no unreasonable conduct at all on the part of the homeowners.

What is the rule of personal conduct and obligation that the Court of Appeals would impose upon homeowners by its decision in this case?

Leave to Appeal Denied May 13, 2005:

PEOPLE v MOORER, No. 126457; reported below: 262 Mich App 64.

KELLY, J. (*dissenting*). I continue to disagree with this Court's issuance of an order directing the prosecutor to respond to defendant's application for leave to appeal.

Defendant sought leave to appeal in propria persona. He is indigent and requested appointment of appellate counsel. The prosecutor chose not to respond to his application. Although defendant is unskilled in conducting legal research and presenting legal arguments, his claim had merit on its face.

Rather than grant leave to appeal or direct the Clerk to schedule oral argument on whether to grant the application, the Court gave the prosecutor a second opportunity to respond. It did not appoint counsel for defendant. Now it denies defendant's application.

I believe that the Court should have granted defendant's request for appointment of appellate counsel and scheduled oral argument on whether to grant the application for leave to appeal. This would have given the Court the benefit of the best argument from both sides and kept the scales of justice evenly balanced.

I would appoint appellate counsel for defendant and direct the Clerk to schedule oral argument on whether to grant the application for leave to appeal.

MCDONALD v VAUGHN, No. 126771; Court of Appeals No. 244687.

MARKMAN, J. (*concurring*). While I concur in the decision to deny leave to appeal, I write separately to inquire of the dissenting justices what rule of law they would effect in the instant case—a rule of law that presumably would be equally applicable in the next thousand cases as in the instant case? (1) Would they hold that an affidavit that does not state that it is made on personal knowledge, that does not state any facts that are admissible as evidence, and that does not demonstrate that the affiant, if sworn as a witness, could testify competently, constitutes a valid affidavit? (2) Would they hold that such an affidavit, although invalid,

nonetheless constitutes harmless error? (3) Would they hold that it constitutes an abuse of discretion on the part of the trial court not to admit such an affidavit? (4) Would they hold that, where a defective affidavit has been filed, it is always an abuse of discretion on the part of the trial court not to allow the filing party an opportunity to file a second affidavit? (5) If it would not always constitute an abuse of discretion not to allow a second affidavit, under what circumstances would they hold it does constitute an abuse of discretion? Once more, what is the rule of law that the dissenting justices would bestow upon our legal system by reversing the trial court and the Court of Appeals in this case?

Although Justice CAVANAGH chooses not to accept my invitation to articulate the rule of law that he would uphold by his dissenting position in this case, I am pleased to respond to his own invitation by predicting that the overwhelming majority of the "next thousand" cases of this kind will never be introduced at all into the appellate process because the parties will understand, as a result of the instant decision and others like it, that Michigan's court rules mean what they say and that a trial court does not abuse its discretion by adhering to such rules.

CAVANAGH, J. I would remand this case to the Oakland Circuit Court for further proceedings since, under the facts of this case, the circuit court abused its discretion in failing to consider Dr. Tolia's August 8, 2002, affidavit; and would also urge Justice MARKMAN to pay close attention to the next thousand cases and determine what rule of law emerges.

KELLY, J. I would remand this case to the Oakland Circuit Court for further proceedings since, under the facts of this case, the circuit court abused its discretion in failing to consider Dr. Tolia's August 8, 2002, affidavit.

BARRETT V DISCOUNT TIRE & BATTERY, No. 127167; Court of Appeals No. 250213.

MARKMAN, J. (*dissenting*). Plaintiff tripped over a two-foot-long jack protruding from underneath a vehicle at an automotive garage and injured himself. The trial court granted summary disposition in favor of defendant, and the Court of Appeals reversed. Contrary to the majority, I would reverse the judgment of the Court of Appeals and reinstate the order of the trial court.

"[T]he general rule is that a premises possessor is not required to protect an invitee from open and obvious dangers . . . ." *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 517 (2001). "[O]nly those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine." *Id.* at 519.

In my judgment, "a reasonably prudent person," *id*. at 523, would have observed the jack sticking out from underneath the vehicle. Moreover, "a reasonably prudent person" would be aware of the possibility that a jack might be sticking out from underneath a vehicle in an

automotive garage, and be prepared to avoid it. Finally, a jack sticking out from underneath a vehicle in an automotive garage "does not involve an especially high likelihood of injury," *id*. at 520, to the extent that it must be avoided at all costs by a garage owner acting reasonably to protect those upon his or her premises.

The Court of Appeals believed that the jack was not "open and obvious" because it was gray and may have been camouflaged by the gray garage floor. However, to allow such a condition by itself to negate the fact that the "hazard" of the jack is "open and obvious" is to seriously erode the "open and obvious" defense, one that has traditionally been available to protect property owners from unreasonable liability.

As with *Yousif v Mona* (Docket No. 126594), the Court of Appeals here lost sight of the fact that legal decisions are designed to increase the predictability and certainty of everyday life. Such decisions have practical consequences. What is the appropriate response to the Court of Appeals decision on the part of a reasonable automotive garage owner in Michigan who wishes to avoid litigation? Must his or her jacks be of a different color than the garage floor? If there is the possibility of grease on the garage floor (which product often happens to be black), must the jack be some other color than black? Must the jack be of a bright color? Must the jack not be allowed to protrude from underneath a vehicle unless it contains an eye-level flag of a color that is not camouflaged by the walls of the garage? The Court of Appeals decision would expose property owners to the risk of litigation for accidents arising from the most mundane, the most open and obvious, conditions of an ordinary business premises, conditions concerning which there has been no unreasonable conduct at all on the part of the property owners.

What is the rule of personal conduct and obligation that the Court of Appeals would impose upon property owners by its decision in this case?

In re MERSINO (FAMILY INDEPENDENCE AGENCY v HEAD), No. 128393. Leave to appeal is denied because respondent's claim of appeal was filed more than sixty-three days after entry of the order terminating her parental rights. See MCR 3.993(C)(2) and MCR 7.205(F)(5). Court of Appeals No. 260392.

KELLY, J. (*concurring*). While I concur in the decision to deny leave to appeal, I do so for the reason articulated by the Court of Appeals. As the Court of Appeals noted, respondent failed to request appointment of appellate counsel within fourteen days of receiving notice of the termination of her parental rights. MCR 3.977(I)(1)(c); MCR 7.204(A)(1)(c). Because respondent failed either to timely request counsel or to file her claim of appeal within sixty-three days of the order terminating parental rights, she lost her right to appeal.

Leave to Appeal Denied May 20, 2005:

In re PETITION FOR FORECLOSURE OF CERTAIN PARCELS (JACKSON COUNTY TREASURER v CHRISTIE), No. 126380; Court of Appeals No. 246672.

MARKMAN, J. I respectfully dissent from the majority's order denying plaintiff's application for leave to appeal, and instead would grant leave

to appeal. The issue presented here is whether plaintiff failed to "satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States . . . ." MCL 211.78(2). More specifically, the issue is how much notice, if any, the government must provide to a month-to-month tenant in order to "satisfy the minimum requirements of due process." In *Dow v Michigan*, 396 Mich 192, 196 (1976), this Court held that "the Due Process Clause requires that an owner of a significant interest in property be given proper notice . . . ." Does a month-to-month tenant possess a "significant interest in property"? If so, what is the "proper notice" due to the month-to-month tenant? These are consequential constitutional questions that, in my judgment, merit further attention by this Court.

TAYLOR, C.J. I join the statement of Justice MARKMAN.

In re PATTERSON (SHUMAN v PATTERSON), No. 128653; Court of Appeals No. 257961.

Summary Dispositions May 26, 2005:

TATE v BOTSFORD GENERAL HOSPITAL, No. 126603. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the order of the Oakland Circuit Court is reinstated. MCR 7.302(G)(1). There was no question of fact regarding plaintiff's competence to refuse treatment because plaintiff failed to respond to the summary disposition motion by setting forth "specific facts" that properly refuted the doctor's testimony that she was responding to a life-threatening emergency situation and that, because of the drug reaction, plaintiff would not have been sufficiently alert or mentally competent to refuse treatment. MCR 2.116(G)(4). Plaintiff's unsworn statements were not notarized and did not affirmatively show that the witnesses, if sworn as witnesses, could testify competently to the facts stated in the statements. MCR 2.119(B)(1)(c). Further, neither of plaintiff's statements was from an expert as was needed here, given that the diagnosis of a medical emergency requires expert opinion. Court of Appeals No. 245081.

CAVANAGH, J. (*dissenting*). Plaintiff claims that defendant hospital falsely imprisoned him when its emergency department staff physically restrained him in response to his request to leave and go to another hospital. Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that the emergency room physician had a right and duty to provide medical care because an emergency situation developed as a result of plaintiff's allergic reaction to the drug Compazine. In support of its motion, defendant included the affidavit of the emergency room physician, plaintiff's medical record, which detailed what defendant alleged was a life-threatening emergency, and plaintiff's signed authorization for emergency services. Plaintiff's response to defendant's motion for summary disposition was supported by two documents.

The trial court granted defendant's motion for summary disposition, concluding that the emergency room physician had a legal right to restrain plaintiff in light of the allergic reaction. The Court of Appeals reversed, holding that a question of fact exists regarding whether plaintiff was competent to refuse treatment. Unpublished opinion per curiam of the Court of Appeals, issued April 29, 2004 (Docket No. 245081). Because I believe that the Court of Appeals reached the right result, I would simply deny leave to appeal. Accordingly, I must respectfully dissent.

The grant or denial of summary disposition is reviewed de novo. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294 (1998). Summary disposition based on a motion brought under MCR 2.116(C)(10) may be granted if the moving party is entitled to judgment as a matter of law and there is no genuine issue of material fact. *Id*. A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds may differ. *West v Gen Motors Corp*, 469 Mich 177, 183 (2003). Further, this Court must "consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party." *Radtke v Everett*, 442 Mich 368, 374 (1993). In viewing the documentary evidence in the light most favorable to plaintiff, the opposing party, I would conclude that there is a genuine issue of material fact regarding *when* plaintiff requested to leave.

Again, in support of its motion for summary disposition, defendant averred that there was a life-threatening medical emergency *caused by* the reaction to the Compazine, that the use of restraints *then* became medically necessary to preserve plaintiff's life because plaintiff became dystonic *as a result of* the Compazine, and that plaintiff's competency was compromised *because of* the allergic reaction to the Compazine. In opposition to defendant's motion for summary disposition, plaintiff submitted his own affidavit and testified as follows:

> I further contends [sic] that after I was taken into the emergency ward, I allowed my pulse to be taken and a blood sample to be drawn, but I strongly questioned the treating doctors [sic] competency and her motive when she inserted an IV tube in my arm as I had been medically treated several times in the past [for] stomach up[set] where I was successfully treated with a simple oral medication that alleviated the problem.

Plaintiff further testified:

> When I then [went] to get up off the gurney and announced that I was going over to Beaumont General Hospital, the treating [doctor] called over a security guard accompanied by two hospital orderlies that intimidated me from leaving. I then announced that I was going to call the police and the treating doctor then indicated the security guard was the police.

> As I again attempted to get off the gurney and leave, the treating doctor had my wrist tied to the gurney so that I was totally immobilized and could not move from the gurney.

It is at this point that plaintiff claims he was falsely imprisoned. Moreover, plaintiff avers that he was fully competent and was not in an emergency state at this point. Plaintiff goes on to testify:

> It was only *after* I was tied down and the IV tube reinserted *and drugs poured into me that I suffered any bad reaction* that consisted of keeping me in an extreme drowsy state the rest of my imprisonment in the defendant hospital. [Emphasis added.]

In my view, plaintiff presented sufficient evidence to withstand the motion for summary disposition because there is a genuine issue of material fact whether plaintiff was detained before the alleged emergency situation developed. Defendant claims that plaintiff became agitated *after* the administration of the Compazine and attempted to leave *after* the medical emergency unfolded. On the other hand, plaintiff claims that he requested to leave, and was subsequently restrained, *before* he was administered the Compazine—i.e., before he suffered a reaction and the alleged medical emergency occurred. Giving the benefit of reasonable doubt to plaintiff, I would conclude that the grant of summary disposition in defendant's favor was improper because a genuine issue of material fact remains. Moreover, by defendant's own account, expert testimony would not be necessary if plaintiff requested to leave, and was thereafter restrained, *before* the alleged emergency developed.

In sum, I would conclude that plaintiff set forth "specific facts" to refute defendant's allegation that the physician was entitled to physically restrain plaintiff *after* he suffered an alleged allergic reaction to Compazine. Because a genuine issue of material fact is presented and the Court of Appeals reached the right result, I would simply deny leave to appeal. Thus, I must respectfully dissent.

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

DIVELY v WILLIAM BEAUMONT HOSPITAL, No. 127218. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration. MCR 7.302(G)(1). Pursuant to MCR 7.316(A)(4), the Court of Appeals is to reconsider its decision in light of the transcript establishing that Lighthall was in fact not among the witnesses identified during voir dire, and to reconsider the admissibility of Lighthall's testimony under MRE 702 in light of our decisions in *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004), and *Craig v Oakwood Hosp*, 471 Mich 67 (2004). Jurisdiction is not retained. Court of Appeals No. 242288.

PEOPLE v SCOTT SMITH, No. 127251. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration of defendant's claim of sentencing error as on leave granted. MCR 7.302(G)(1). Jurisdiction is not retained. Court of Appeals No. 257207.

PEOPLE v SHACKELFORD, No. 127257. In lieu of granting leave to appeal, the case is remanded to the Wayne Circuit Court to determine whether the complainants' property was recovered. MCR 7.302(G)(1). If it was recovered, then the judgment of sentence should be corrected to indicate no restitution. If it was not recovered, then the presentence investigation report should be corrected to indicate that fact. Jurisdiction is not retained. Court of Appeals No. 256961.

PEOPLE v GIVHAN, No. 128122. In lieu of granting leave to appeal, only that portion of the Court of Appeals decision that ordered a new trial based on newly discovered evidence is vacated, and the case is remanded to the Wayne Circuit Court for a determination, within 28 days of the date of this order, of whether Joseph Moore's account of the shooting is newly discovered evidence that entitles defendant to a new trial. MCR 7.302(G)(1). In ruling that defendant was entitled to a new trial, the Court of Appeals decided an issue that in the first instance properly should have been decided by the trial court. In all other respects, leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 245107.

Leave to Appeal Denied May 26, 2005:

RAVENNA CASTINGS CENTER v RAVENNA TOWNSHIP, No. 126315; Court of Appeals No. 242286.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

VICK v DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES, No. 126796; Court of Appeals No. 243630.

KELLY, J. I would grant leave to appeal.

PEOPLE v JENNIFER JONES, No. 126929; Court of Appeals No. 246842.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v TUMPKIN, No. 126959; Court of Appeals No. 246778.

KELLY, J. I would grant leave to appeal.

PEOPLE v BYRD, No. 126977; Court of Appeals No. 245624.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v DEREK JOHNSON, No. 127008; Court of Appeals No. 246940.

KELLY, J. I would grant leave to appeal.

PEOPLE v MOLINA, No. 127137; Court of Appeals No. 255750.

CAVANAGH and KELLY, JJ. We would deny leave without prejudice to any claim for relief that may be available to defendant under MCL 791.234(12) after defendant has served five years of his sentence.

PEOPLE v BRYANT, No. 127166; Court of Appeals No. 256641.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v SHAUN ROBERTS, No. 127183; Court of Appeals No. 247217.

KELLY, J. I would remand this case for resentencing.

PEOPLE v FERNALD, No. 127201; Court of Appeals No. 256610.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

RILEY v HOLLAND COMMUNITY HOSPITAL, No. 127285; Court of Appeals No. 255043.

KELLY, J. I would vacate the dismissal for lack of jurisdiction and remand for reconsideration of plaintiff's application.

PEOPLE v CHRZAN, No. 128061; Court of Appeals No. 250137.

CAVANAGH and KELLY, JJ. We would reverse for the reasons set forth in the dissenting opinion in the Court of Appeals.

Leave to Appeal Granted May 27, 2005:

WOLD ARCHITECTS AND ENGINEERS, INC v STRAT, No. 126917. The parties shall include among the issues briefed: (1) whether "common-law" arbitration should be deemed preempted by the Michigan arbitration statute, MCL 600.5001 *et seq.*; (2) if common-law arbitration continues to exist, what language must be included in an agreement to make it "statutory" arbitration; (3) whether the arbitration agreement in this case became statutory arbitration due to the conduct of the parties during the arbitration process; and (4) whether common-law arbitration agreements should be unilaterally revocable. Court of Appeals No. 246874.

Order Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 27, 2005:

JOLIET v PITONIAK, No. 127175. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall submit supplemental briefs within 28 days of the date of this order addressing: (1) what actions, if any, were taken by the two defendants after October 8, 1998 that contributed to a discriminatory hostile work environment, so as to support a December 1, 1998, date of injury; (2) whether a December 1, 1998, accrual date for injury to plaintiff is sustainable for defendant Frank Bacha, where he left his employment with the city of Taylor on October 8, 1998; and (3) the impact, if any, of this Court's decision in *Magee v DaimlerChrysler Corp,* 472 Mich 108 (2005). Court of Appeals No. 247590.

Summary Disposition May 27, 2005:

WOLTERS REALTY, LTD v SAUGATUCK TOWNSHIP, No. 127022. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to

reconsider its opinion in light of the misstatement in its opinion that "it is undisputed that plaintiff never sought a variance from defendants," when in fact the record reflects that plaintiff requested a variance, but defendant zoning board of appeals deemed plaintiff's variance request moot because of its denial of plaintiff's special approval use application. MCR 7.302(G)(1). Jurisdiction is not retained. Court of Appeals No. 247228.

Summary Disposition May 31, 2005:

SAHR v WAL-MART STORES, INC, No. 127338. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(G)(1). The Court of Appeals shall provide an analysis of whether the Worker's Compensation Appellate Commission misinterpreted the magistrate's utilization of the testimony of plaintiff's treating surgeon, Dr. Gerald Schell, and improperly substituted its own interpretation of that testimony in violation of the commission's standard of review, MCL 418.861a(3). *Mudel v Great Atlantic & Pacific Tea Co,* 462 Mich 691 (2000). Court of Appeals No. 255762.

KELLY, J., not participating.

Reconsideration Granted May 31, 2005:

PEOPLE v QURESHI, No. 127726. The order of February 28, 2005, 472 Mich 868, is vacated. On reconsideration, in lieu of granting leave to appeal, the December 3, 2004, order of the Court of Appeals is vacated, and the case is remanded to that Court for reconsideration of defendant's claim of appeal in light of the fact that the trial court's judgment of sentence incorrectly indicates that defendant pleaded guilty. MCR 7.302(G)(1). The record establishes that defendant was found guilty of embezzlement after a bench trial. Jurisdiction is not retained. Court of Appeals No. 258472.

Leave to Appeal Denied May 31, 2005:

ESSELL v GEORGE W AUCH COMPANY, No. 126199; Court of Appeals No. 240940.

PEOPLE v PIERRE JOHNSON, No. 126591; Court of Appeals No. 246263.

DICKINSON v LIMP BIZKIT, No. 126775; Court of Appeals No. 244021.

PEOPLE v INDIA PORTER, No. 126880; Court of Appeals No. 247486.

PEOPLE v WATSON, No. 126888. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253873.

PEOPLE v MURRAY, No. 126897; Court of Appeals No. 254956.

PEOPLE v NGEM, No. 126911. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254405.

PEOPLE v RAMON KING, No. 126914. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250446.

PEOPLE v MAZER, No. 126931. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255232.

PEOPLE v RONALD JOHNSON, No. 126932. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253940.

PEOPLE v RANDY MYERS, No. 126936. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253370.

PEOPLE v CALICUT, No. 126939. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254650.

PEOPLE v HUGHEY, No. 126945. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253470.

PEOPLE v SPENCER, No. 126954. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254061.

PEOPLE v ROBERT WALKER, No. 126955. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253192.

PEOPLE v STEPHEN DAVIS, No. 126970. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254961.

PEOPLE v LAWRENCE WHITE, No. 126974. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253456.

KELLY, J., not participating.

PEOPLE v HAYWOOD, No. 126982. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253792.

PEOPLE v STAMPS, No. 126991. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252740.

PEOPLE v MARIO BROWN, No. 126995. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254220.

PEOPLE v JOHN JONES, No. 127002. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254784.

PEOPLE v ALEXANDER WALKER, No. 127003. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256530.

KELLY, J. I would grant leave to appeal.

PEOPLE v NELSON, No. 127004. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256758.

PEOPLE v JAMES L DANIELS, No. 127023. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256768.

PEOPLE v DERRY THOMAS, No. 127025. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253653.

KELLY, J., not participating.

PEOPLE v MALLORY, No. 127026. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254773.

PEOPLE v LEONARD TURNER, No. 127027. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254955.

PEOPLE v DOUGLAS ROGERS, No. 127035. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 257492.

PEOPLE v ROBERT MARTIN, No. 127037. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252509.

PEOPLE v COLE, No. 127040. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254439.

PEOPLE v BURT, No. 127042. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256794.

PEOPLE v LIGGINS, No. 127043. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256553.

PEOPLE v CLARDY, No. 127045. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257130.

PEOPLE v EDWARD ROBINSON, No. 127059; Court of Appeals No. 256470.

PEOPLE v JEWELL, No. 127060. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253410.

DENNIS v FORD, No. 127061; Court of Appeals No. 246485.

COMMUNITY BOWLING CENTERS v CITY OF TAYLOR, No. 127065; Court of Appeals No. 247937.

PEOPLE v MICHAEL ANDERSON, No. 127066. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254553.

PEOPLE v NETT, No. 127068. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254800.

PEOPLE v KRAUSE, No. 127070; Court of Appeals No. 246896.

PEOPLE v MAY, No. 127072. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254430.

PEOPLE v ELLIS, No. 127075; Court of Appeals No. 246709.

PEOPLE v GREGORY CARTER, No. 127081. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254482.

BAILEY v AMERITECH, INC, No. 127082; Court of Appeals No. 245837.

PEOPLE v PHILLIP MITCHELL, No. 127084; Court of Appeals No. 247129.

GRANBERRY v HARPER HOSPITAL, No. 127086; Court of Appeals No. 256075.

PEOPLE v RICHEY, No. 127091. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254016.

PEOPLE v FLOWERS, No. 127095. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254062.

PEOPLE v SHARPE, No. 127097. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255331.

PEOPLE v CHRISTOPHER ANDERSON, No. 127117; Court of Appeals No. 245708.

PEOPLE v NASSER, No. 127132. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255499.

LINDAHL v RUBRIGHT, No. 127136; Court of Appeals No. 245568.

PEOPLE v PHILIP MILLER, No. 127139; Court of Appeals No. 246607.

PEOPLE v RICHARD THOMAS, No. 127146. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253726.

KELLY, J. I would grant leave to appeal.

PEOPLE v NORMAN, No. 127149. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256344.

PEOPLE v MUNDEN, No. 127170. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254388.

PEOPLE v WICKER, No. 127173. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253368.

PEOPLE v BILL, No. 127178. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256374.

PEOPLE v CRAIN, No. 127179; Court of Appeals No. 247598.

PEOPLE v HASKELL, No. 127184; Court of Appeals No. 251929.

PEOPLE v VARNEY, No. 127189; Court of Appeals No. 247986.

HARRISON v GREAT LAKES BEVERAGE COMPANY, No. 127190; Court of Appeals No. 245801.

PEOPLE v SEGO, No. 127191. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254979.

PEOPLE v AUGUSTINE HERNANDEZ, No. 127199. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254817.

PEOPLE v JERRY SIMS, No. 127207. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 257316.

BORNSCHEIN v STRAITS CORRECTIONAL FACILITY WARDEN, No. 127208; Court of Appeals No. 256336.

CONCERNED CITIZENS OF ACME TOWNSHIP v ACME TOWNSHIP, No. 127210; Court of Appeals No. 256414.

PEOPLE v BERRY, No. 127214; Court of Appeals No. 256826.

PEOPLE v DEREK MIXON, No. 127215; Court of Appeals No. 247534.

PEOPLE v FLICK, No. 127221. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254194.

PEOPLE v OUELLETTE, No. 127222. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254068.

MICHIGAN STATE POLICE TROOPERS ASSOCIATION v STATE OF MICHIGAN, Nos. 127223-127225; Court of Appeals Nos. 242907, 243948, 245567.

PEOPLE v HUFF, No. 127227. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254132.

PEOPLE v ROBERT GRIFFIN, No. 127236. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254433.

PEOPLE v BRENT GREEN, No. 127237. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254256.

PEOPLE v WOODS, No. 127248; Court of Appeals No. 247306.

PEOPLE v MCKEE, No. 127252. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 253725.

PEOPLE v KELLEY, No. 127253. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256272.

PEOPLE v HAVENS, No. 127254; Court of Appeals No. 247670.

PEOPLE v ROUNDS, No. 127259; Court of Appeals No. 249132.

PEOPLE v SANDERS, No. 127260. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256608.

RUDD v CITY OF MUSKEGON, No. 127271; Court of Appeals No. 246958.

PEOPLE v WYATT, Nos. 127274, 127277. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 256669, 256577.

FERGUSON v CITY OF LINCOLN PARK, No. 127275; reported below: 264 Mich App 93.

PEOPLE v RONALD SIMPSON, No. 127281. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253699.

BERMAN v DEBORAH N RIBITWER & ASSOCIATES, PC, No. 127284; Court of Appeals No. 246870.

MUSTAZZA v CHEBOYGAN COUNTY ROAD COMMISSION and BOYD v CHEBOYGAN COUNTY ROAD COMMISSION, Nos. 127286, 127287; Court of Appeals Nos. 247234, 247235.

PEOPLE v TERRY JOHNSON, No. 127288. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 257007.

MERLINO v MGM GRAND DETROIT, LLC, No. 127289. Leave to file briefs amicus curiae is granted. Court of Appeals No. 247165.

PEOPLE v WILLIAM JOHNSON, No. 127293; Court of Appeals No. 247227.

PEOPLE v MICHAEL SMITH, No. 127295. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254723.

CULY v CULY, No. 127296; Court of Appeals No. 255201.

PEOPLE v O'NEAL, No. 127298; Court of Appeals No. 247133.

PEOPLE v BUFORD, No. 127300; Court of Appeals No. 246331.

PEOPLE v MCNEAL, No. 127305; Court of Appeals No. 248341.

BETTIS v KINSLEY, No. 127309; Court of Appeals No. 246567.

BERTLING v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, No. 127310; Court of Appeals No. 247887.

PEOPLE v LITTLES, No. 127312; Court of Appeals No. 255593.

PEOPLE v BOBBY MARSHALL, No. 127313; Court of Appeals No. 247795.

PEOPLE v FRANK MILLER, No. 127314. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255908.

PEOPLE v TERRY, No. 127315; Court of Appeals No. 256005.

PEOPLE v GAMMAGE, No. 127316; Court of Appeals No. 249196.

PEOPLE v OSSOWSKI, No. 127317; Court of Appeals No. 246667.

LANDETA v FORD MOTOR COMPANY and TIRADO v FORD MOTOR COMPANY, Nos. 127319, 127320; Court of Appeals Nos. 247152, 247153.

CAVANAGH, J., not participating.

DEPARTMENT OF TREASURY v ROSA BRANNON, DEPARTMENT OF TREASURY v S B & B TRANSPORTATION UNLIMITED, INC, DEPARTMENT OF TREASURY v SIBERIA BRANNON, and DEPARTMENT OF TREASURY v TROY BRANNON, Nos. 127322-127325; Court of Appeals Nos. 247449, 247630, 248689, 252085.

KELLY, J., not participating.

ROSEWOOD LIVING CENTER v BUREAU OF HEALTH SYSTEMS, No. 127326; Court of Appeals No. 253018.

PEOPLE v MICHAEL WHITE, No. 127330; Court of Appeals No. 247132.

PEOPLE v BORUCKI, No. 127337; Court of Appeals No. 257044.

PEOPLE v LUCEY, No. 127339. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253982.

KELLY, J. I would remand this case to the Court of Appeals for rehearing on defendant's application for leave to appeal before a panel that does not include the judge who sentenced defendant at the trial court level.

PEOPLE v CYNAR, No. 127342; Court of Appeals No. 249270.

AUTO-OWNERS INSURANCE COMPANY v JEFFERSON, No. 127346; Court of Appeals No. 247579.

PEOPLE v HARRIS, No 127351. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254962.

PEOPLE v FELTON, No. 127352; Court of Appeals No. 247857.

PEOPLE v BOWEN, No. 127353; Court of Appeals No. 256537.

PEOPLE v PAYETTE, No. 127354; Court of Appeals No. 247652.

PEOPLE v HAMM, No. 127358. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256877.

PEOPLE v LINK, No. 127360. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 257037.

PEOPLE v MCCREERY, No. 127361; Court of Appeals No. 247348.

PEOPLE v SHULICK, No. 127363; Court of Appeals No. 247722.

BUITENHUIS v MACDONALD'S INDUSTRIAL PRODUCTS, INC, No. 127364; Court of Appeals No. 256091.

PEOPLE v GULYBAN, No. 127365; Court of Appeals No. 249191.

PEOPLE v KRUITHOF, No. 127366; Court of Appeals No. 256809.

PEOPLE v KEANE, Nos. 127369, 127521; Court of Appeals Nos. 255683, 248541.

PEOPLE v DEMETRIUS JOHNSON, No. 127370; Court of Appeals No. 249211.

PEOPLE v CORDALL NEAL, No. 127371; Court of Appeals No. 246031.

COLONIAL SQUARE COOPERATIVE v CITY OF ANN ARBOR, No. 127373; reported below: 263 Mich App 208.

CENSKE v DEPARTMENT OF COMMUNITY HEALTH, No. 127375; Court of Appeals No. 256102.

PEOPLE v PARAMORE, No. 127378; Court of Appeals No. 247137.

PEOPLE v TRAVIS, No. 127382; Court of Appeals No. 249203.

PEOPLE v SYKES, No. 127395; Court of Appeals No. 245256.

PEOPLE v JAMEAL THOMAS, No. 127403. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255948.

PEOPLE v DAVID BURNS, No. 127408; Court of Appeals No. 247842.

GRATTAN TOWNSHIP v KENNEDY, No. 127410; Court of Appeals No. 254808.

PEOPLE v LUMSDEN, No. 127411. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255062.

PEOPLE v VILLEGAS, No. 127413; Court of Appeals No. 255551.

PEOPLE v GROSS, No. 127414; Court of Appeals No. 247858.

ALSHUBI v DAIMLERCHRYSLER CORPORATION, No. 127416; Court of Appeals No. 255494.

PEOPLE v BEAG, No. 127426; Court of Appeals No. 247642.

PEOPLE v CHARLES HOUSTON, No. 127435; Court of Appeals No. 247347.

PEOPLE v NORTHINGTON, No. 127436. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258711.

PEOPLE v DONALD MALONE, No. 127437. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255113.

PEOPLE v TRICE, No. 127447; Court of Appeals No. 247537.

PEOPLE v WORKMAN, No. 127448; Court of Appeals No. 247209.

PEOPLE v CADIEUX, No. 127449; Court of Appeals No. 256904.

PEOPLE v SANBORN, No. 127463. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255777.

PEOPLE v SOTO, No. 127466; Court of Appeals No. 257437.

PEOPLE v RANES, Nos. 127480, 127695, 127482. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 256715, 256717, 256718.

PEOPLE v QUILLER ANDERSON, No. 127492; Court of Appeals No. 258169.

PEOPLE v WELCHE, No. 127501. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256508.

PEOPLE v PAUL WHITE, No. 127502. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256643.

PEOPLE v RICHARDSON, No. 127524; Court of Appeals No. 248159.

PEOPLE v KRAMER, No. 127529. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254067.

PEOPLE v CONNER, No. 127551. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258112.

PEOPLE v RICKY GARDNER, No. 127552. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257137.

PEOPLE v HAMON, No. 127553; Court of Appeals No. 256900.

PEOPLE v CHRISTOPHER JACKSON, No. 127579. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257833.

PEOPLE v KIRK SIMS, No. 127615. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257593.

PEOPLE v SHAWN THOMAS, No. 127647; Court of Appeals No. 247888 (after remand).

PEOPLE v DAVID SMITH, No. 127657; Court of Appeals No. 249866.

PEOPLE v DWAYNE HILL, No. 127665; Court of Appeals No. 249980.

PEOPLE v MICHON HOUSTON, No. 127674; Court of Appeals No. 248742.

PEOPLE v FENWICK, No. 127684; Court of Appeals No. 249058.

PEOPLE v REGINALD TURNER, No. 127688; Court of Appeals No. 247599 (on reconsideration).

PEOPLE v TRYGG, No. 127698; Court of Appeals No. 257239.

PEOPLE v OSWALD, No. 127707. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258885.

PEOPLE v SEEGER, No. 127709. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256430.

PEOPLE v HRITZ, No. 127712; Court of Appeals No. 257655.

PEOPLE v PINES, No. 127722. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255909.

PEOPLE v MCALKICH, No. 127723; Court of Appeals No. 257953.

PEOPLE v KASKE, No. 127724. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255528.

PEOPLE v PELIKAN, No. 127738; Court of Appeals No. 258297.

PEOPLE v ARTIBEE, No. 127740; Court of Appeals No. 251115.

PEOPLE v RODNEY SMITH, No. 127741; Court of Appeals No. 249136.

PEOPLE v RANDOLPH, No. 127743; Court of Appeals No. 248957.

PEOPLE v ALFREDRICK HENDERSON, No. 127747. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257373.

PEOPLE v JAMES PARNELL, No. 127751; Court of Appeals No. 248611.

PEOPLE v GUNNETT, No. 127754. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256960.

PEOPLE v EBEL, No. 127755; Court of Appeals No. 249862.

PEOPLE v MINNER, No. 127758. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255467.

PEOPLE v HUNT, No. 127759; Court of Appeals No. 254126.

PEOPLE v JAMES WILLIAMS, No. 127760; Court of Appeals No. 250226.

PEOPLE v MCMURRY, No. 127764. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256552.

PEOPLE v GRISSOM, No. 127765; Court of Appeals No. 251427.

PEOPLE v WINSTON, No. 127766. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257374.

PEOPLE v HORTEN, No. 127768; Court of Appeals No. 257794.

PEOPLE v JAMES KING, No. 127769; Court of Appeals No. 250331.

PEOPLE v ANTUAN WALDEN, No. 127771; Court of Appeals No. 248543.

PEOPLE v HOAGLIN, No. 127772. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257408.

PEOPLE v JEFFRIES, No. 127776; Court of Appeals No. 249059.

PEOPLE v CRISTINI, No. 127777. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255040.

PEOPLE v RONE, No. 127790. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256099.

KELLY, J. I would grant leave to appeal.

PEOPLE v HARDESTY, No. 127807. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259666.

PEOPLE v SHELTON, No. 127837. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255625.

PEOPLE v ALEXIS SMITH, No. 127845. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256620.

PEOPLE v PARKS, No. 127862. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255670.

PEOPLE v JEROME KELLY, No. 127864. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255691.

PEOPLE v GREGORY, No. 127891. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256622.

PEOPLE v ESTELLE, No. 127893. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254986.

PEOPLE v KESSLER, No. 127894. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 258250.

PEOPLE v HOLLOWAY, No. 127905. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255778.

PEOPLE v HASSON, No. 127909. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259518.

PEOPLE v TAYLOR, No. 127917. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255586.

PEOPLE v MARK ANDERSON, No. 127918. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259101.

PEOPLE v ROBERT HARRINGTON, No. 127928. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255571.

PEOPLE v CASWELL, No. 127929. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256980.

PEOPLE v KEVIN DAVIS, No. 127942. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 259245.

KELLY, J. I would grant leave to appeal.

PEOPLE v JOSEPH JOHNSON, No. 127958. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 258229.

KELLY, J. I would grant leave to appeal.

PEOPLE v RHEA, No. 127959. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255456.

PEOPLE v RYAN, No. 127960. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 257182.

PEOPLE v RODERICK LEWIS, No. 127961. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254606.

PEOPLE v KOSS, No. 127962. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255019.

KELLY, J. I would grant leave to appeal.

PEOPLE v KIDDER, No. 128012. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256981.

PEOPLE v ERDMAN, No. 128070. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 260092.

PEOPLE OF WEST BLOOMFIELD TOWNSHIP v MONTGOMERY, No. 128080; Court of Appeals No. 257407.

PEOPLE v YEAGER, No. 128153; Court of Appeals No. 256104.

BERTLING v DEPARTMENT OF LABOR AND ECONOMIC GROWTH DIRECTOR, No. 128322; Court of Appeals No. 257990.

PEOPLE v ISH, No. 128483. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 260095.

PEOPLE v CRAIG BROWN No 2, No. 128572; Court of Appeals No. 254476.

Interlocutory Appeals

Leave to Appeal Denied May 31, 2005:

LITTLE v SWANSON FUNERAL HOMES, INC, No. 127051; Court of Appeals No. 254119.

PEOPLE v MONTGOMERY, Nos. 128063, 128081; Court of Appeals Nos. 260245, 260244.

Reconsideration Denied May 31, 2005:

FINNILA v ARKIN, Nos. 126297, 126298. Leave to appeal denied at 472 Mich 851. Court of Appeals Nos. 243371, 244155.

PEOPLE v PIETRO TERRELL, No. 126397. Leave to appeal denied at 472 Mich 851. Court of Appeals No. 243097.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v JACOBS, No. 126430. Leave to appeal denied at 472 Mich 852. Court of Appeals No. 254499.

VASQUEZ v VASQUEZ, No. 126472. Leave to appeal denied at 472 Mich 861. Court of Appeals No. 244222.

PEOPLE v RANDY PATTERSON, No. 126359. Leave to appeal denied at 472 Mich 865. Court of Appeals No. 254272.

PEOPLE v MALACHI WASHINGTON, No. 126799. Leave to appeal denied at 472 Mich 866. Court of Appeals No. 247713.

ST JOSEPH MERCY HOSPITAL v THOMAS, No. 126826. Leave to appeal denied at 472 Mich 867. Court of Appeals No. 253567.

DUNLAP v WAYNE CIRCUIT JUDGE, No. 126850. Leave to appeal denied at 472 Mich 867. Court of Appeals No. 255334.

Summary Dispositions June 2, 2005:

OLSON v OLSON, No. 126943. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(G)(1). Jurisdiction is not retained. Court of Appeals No. 254919.

OCWEN FEDERAL BANK, FSB v INTERNATIONAL CHRISTIAN MUSIC MINISTRY, INC, No. 127171. In lieu of granting leave to appeal, the judgment of the Court of Appeals that found that the order of the St. Clair Circuit Court quieting title violated MCR 2.613(B) is reversed, and the case is remanded to that Court to consider defendants' remaining claims. MCR 7.302(G)(1). Plaintiff was not a party to the prior action in the Wayne Circuit Court, and that proceeding did not determine plaintiff's right to the property. As a result, the St. Clair Circuit Court's order did not have the effect of setting aside or rendering "null and void" the order of the Wayne Circuit Court. Rather, under the facts of this case, the St. Clair Circuit Court had plenary authority pursuant to MCL 600.2932 to vest title in the plaintiff. Court of Appeals No. 249081.

PEOPLE v HUDGINS, No. 127193. In lieu of granting leave to appeal, the case is remanded to the Wayne Circuit Court for correction of the judgment of sentence to reflect that defendant was convicted of receiving and concealing stolen property valued at over $20,000, MCL 750.535(2)(a), consistent with the record of the proceedings at trial and the sentencing information report. See MCR 6.429(A). MCR 7.302(G)(1). In all other respects, the application for leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 246808.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Leave to Appeal Denied June 2, 2005:

MITCHELL CORPORATION OF OWOSSO v DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES, No. 126944; reported below: 263 Mich App 270.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

BERMUDEZ v LEE, Nos. 127090, 127092; Court of Appeals No. 249609.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

HAYLEY v ALLSTATE INSURANCE COMPANY, No. 127102; reported below: 262 Mich App 571.

CAVANAGH, J., not participating.

KELLY, J. I would reverse for reasons stated in the Court of Appeals dissent.

HUGHES v LAKE SUPERIOR & ISHPEMING RAILROAD COMPANY, No. 127135; reported below: 263 Mich App 417.

GROSS v LANDIN, No. 127174; Court of Appeals No. 246282.

CORRIGAN, J. I would reverse, adopting Judge KELLY's dissent.

PEOPLE v SCHAUER, No. 127186; Court of Appeals No. 247721.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v ELY, No. 127229; Court of Appeals No. 255293.

CAVANAGH and KELLY, JJ. We would hold this case in abeyance for *Halbert v Michigan*, 545 US ___; 125 S Ct 823; 160 L Ed 2d 609 (2005).

Summary Disposition June 3, 2005:

PEOPLE v DECARLOSE SMITH, No. 126837. In lieu of granting leave to appeal, the case is remanded to the Wayne Circuit Court to determine whether there was a violation of MCL 780.131, MCL 780.133, or MCR 6.004(D). MCR 7.302(G)(1). In the course of making this determination, the Wayne Circuit Court shall also determine the following underlying facts:

(1) the date on which defendant was taken into custody by the Michigan Department of Corrections in connection with the first charge of assault with intent to murder that was brought in Washtenaw County;

(2) whether and on what date the Department of Corrections received notice of the second pending charge against defendant of assault with intent to murder that was brought in Wayne County;

(3) whether and on what date the Department of Corrections delivered, by certified mail, to the Wayne County Prosecutor written notice of defendant's place of imprisonment and request for final disposition of the pending charge;

(4) whether the request was accompanied by a statement setting forth the term of commitment under which defendant was being held, the time already served, the time remaining to be served on the first sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board relating to defendant;

(5) whether, on what date, and from whom the prosecutor received the written notice and a request for final disposition of the pending warrant, indictment, information, or complaint;

(6) whether the prosecutor acted in good faith during the 180-day period to proceed promptly to trial;

(7) whether there were any adjournments of the lower court proceedings, which party requested the adjournment(s), and whether there were any objections to the adjournment(s); and

(8) any other facts the parties deem necessary in determining whether the above statutes and court rule were violated.

The parties shall provide the Wayne Circuit Court with any written documentation in their possession that establishes these underlying facts, and this documentation shall be made part of the lower court record. If the parties cannot agree with regard to these underlying facts, the Wayne Circuit Court shall conduct any additional proceedings or evidentiary hearings necessary. The Wayne Circuit Court shall issue its opinion within fifty-six days of the date of this order. Jurisdiction is retained. Court of Appeals No. 254724.

Leave to Appeal Granted June 10, 2005:

RADELJAK v DAIMLERCHRYSLER CORPORATION, No. 127679. The parties are

to include among the issues to be briefed: (1) whether the public interest factors of the forum non conveniens doctrine set forth in *Cray v Gen Motors Corp,* 389 Mich 382, 396 (1973), should be revised or modified; and (2) whether, even if another more appropriate forum exists, a Michigan court may not resist jurisdiction unless its own forum is "seriously inconvenient." See *Robey v Ford Motor Co*, 155 Mich App 643, 645 (1986). The Michigan Trial Lawyers Association, the Michigan Defense Trial Counsel, the Michigan Chamber of Commerce, and the Michigan Manufacturers Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 247781.

Leave to Appeal Denied June 10, 2005:

BELLVILLE v CONSUMERS ENERGY COMPANY, No. 127153; Court of Appeals No. 243179.

CAVANAGH, J. (*dissenting*). This case raises a number of significant issues, and I would grant leave to consider them. In 1994, plaintiffs, owners and operators of a dairy farm, were concerned about the health of their dairy herd. They requested that defendant Consumers Energy Company come to their farm and conduct testing to determine if electrical problems were negatively affecting the herd.

Defendant conducted testing in 1994 and told plaintiffs that there were no electrical problems. Defendant conducted subsequent testing in 1997 and twice in 1998, and continued to tell plaintiffs that there were no electrical problems. After plaintiffs ruled out other possible causes by consulting with numerous experts about possible nutritional deficiencies and medical problems, plaintiffs hired their own electrical experts in 1999 and 2000. These experts determined that defendant's electrical lines were the cause of the problems with the dairy herd.

Defendant argues that plaintiffs' claims are barred by the statute of limitations because if plaintiffs disagreed with defendant's assessment, plaintiffs should have hired their own experts sooner. Defendant also does not believe that the discovery rule is applicable. In essence, defendant faults plaintiffs for believing that defendant was properly conducting the testing and accurately conveying the information. But plaintiffs had no reason *not* to believe defendant—a company whose purpose is to provide utility services to the public—until other possible causes were subsequently eliminated. Defendant faults plaintiffs for not discovering that electrical problems were the source of the injuries to the herd *when defendant itself was repeatedly unable to do so.* However, I do not believe that it is inherently unreasonable for a customer to believe the repeated word of an electrical utility company. Therefore, whether the statute of limitations bars plaintiffs' claims and whether the discovery rule applies to these claims are jurisprudentially significant issues that should be addressed.

Further, I disagree that plaintiffs have not established a question of material fact about whether they reasonably relied on defendant's alleged misrepresentations. When defendant repeatedly told plaintiffs

that electrical problems were not the cause of problems with the dairy herd, *plaintiffs looked to other possible causes.* They did so on the basis of the representations made by defendant that electricity was not the source of the problems. Defendant also attempts to support its position by arguing that plaintiffs continued to operate their dairy farm for 1½ years after learning of the electrical problems. However, it is unreasonable to expect that plaintiffs would be able to stop farming, shut down their business, and pack up their dairy herd the moment they learned that defendant had misrepresented that there were no electrical problems on the farm. Accordingly, I would grant leave to appeal.

WEAVER and KELLY, JJ. We join the statement of Justice CAVANAGH.

Interlocutory Appeal

Leave to Appeal Denied June 10, 2005:

BRAGAN v SYMANZIK, No. 126993; reported below: 263 Mich App 324.

Summary Dispositions June 16, 2005:

PEOPLE v FLOYD, No. 127228. In lieu of granting leave to appeal, defendant's sentence is vacated, and the case is remanded to the Kent Circuit Court for resentencing. MCR 7.302(G)(1). Contrary to the holding of the circuit court, MCL 769.34(4)(b) was effective in April 1999, when defendant was sentenced. That statute required the circuit court to impose a sentence of life probation absent a departure. On remand, the circuit court shall either impose a sentence of life probation, or articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range in accordance with *People v Babcock*, 469 Mich 247 (2003). In all other respects, the application for leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 254898.

LAURA v DAIMLERCHRYSLER CORPORATION, No. 128155. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(G)(1). The proceedings in the Washtenaw Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Jurisdiction is not retained. Court of Appeals No. 257297.

Leave to Appeal Denied June 16, 2005:

PEOPLE v DAVID KING, No. 127016. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255064.

KELLY, J. I would grant leave to appeal.

PEOPLE v GLADYS WILSON, No. 127131. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 245875.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ERIC STEWART, No. 127143; Court of Appeals No. 246334.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v CORTEZ DAVIS, No. 127283. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 246847.

KELLY, J. I would grant leave to appeal.

PEOPLE v BRAXTON, No. 127401; Court of Appeals No. 232830.

KELLY, J. I would grant leave to appeal.

PEOPLE v SULLIVAN, No. 127532. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256829.

KELLY, J. I would grant leave to appeal.

OUSLEY v MCLAREN, No. 127692; reported below: 264 Mich App 486.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v FUSON, No. 127881; Court of Appeals No. 259349.

KELLY, J. I would grant leave to appeal.

TERRASI v HAQ and TERRASI v TEJURA, Nos. 128285, 128291; Court of Appeals No. 258561.

TERRASI v UNIVERSITY OF MICHIGAN BOARD OF REGENTS, No. 128286; Court of Appeals No. 258562.

Interlocutory Appeal

Leave to Appeal Denied June 16, 2005:

MULKEY v KUZMA, No. 128134; Court of Appeals No. 259625.

Leave to Appeal Granted June 17, 2005:

PEOPLE v MILESKI, No. 127457. The parties are to include among the issues to be briefed: (1) whether each of the victim's hearsay statements was "testimonial" in nature and thus inadmissible under the rule of *Crawford v Washington*, 541 US 36 (2004); (2) if so, whether *Crawford* should be applied retroactively; (3) if any of the statements are nontestimonial under *Crawford*, whether they were admissible as excited utterances pursuant to MRE 803(2); and (4) if any of the statements are testimonial under *Crawford*, whether their admission was harmless beyond a reasonable doubt. The case is to be argued and submitted to the

Court with *People v Walker*, No. 128515. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 248038.

HERALD COMPANY, INC v EASTERN MICHIGAN UNIVERSITY BOARD OF REGENTS, No. 128263. The parties shall include among the issues to be briefed: (1) whether the Court of Appeals correctly applied the appropriate standard of review; (2) whether the Washtenaw Circuit Court clearly erred in applying the § 13(1)(m) Freedom of Information Act exemption, MCL 15.243(1)(m), to the public record in question; and (3) whether purely factual materials, if any, contained within the public record were properly included within the scope of the exemption. The Detroit Free Press's motions for leave to file a brief amicus curiae and for immediate consideration of that motion are also granted. Reported below: 265 Mich App 185.

PEOPLE v ALVIN WALKER, No. 128515. The parties are to include among the issues to be briefed: (1) whether each of the victim's hearsay statements was "testimonial" in nature and thus inadmissible under the rule of *Crawford v Washington*, 541 US 36 (2004); (2) if so, whether *Crawford* should be applied retroactively; (3) if any of the statements are nontestimonial under *Crawford*, whether they were admissible as excited utterances pursuant to MRE 803(2); and (4) if any of the statements are testimonial under *Crawford*, whether their admission was harmless beyond a reasonable doubt. The Oakland Circuit Court, in accordance with Administrative Order No. 2003-03, is to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court. The case is to be argued and submitted to the Court with *People v Mileski*, No. 127457. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 265 Mich App 530.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal June 17, 2005:

KROCHMAL v PAUL REVERE LIFE INSURANCE COMPANY, No. 126997. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument whether *Guiles v Univ of Michigan Bd of Regents*, 193 Mich App 39 (1992), accurately states the law. The parties may file supplemental briefs within 28 days of the date

of this order, but they should avoid submitting mere restatements of arguments made in application papers. Reported below: 262 Mich App 115.

BENTFIELD v BRANDON'S LANDING BOAT BAR, No. 127515. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument the standard of review when a trial court denies a motion for reconsideration that alleges a new cause of action that was available prior to the court's original ruling. The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments made in application papers. Court of Appeals No. 248795.

Summary Dispositions June 17, 2005:

KENNY v KAATZ FUNERAL HOME, INC, No. 127472. In lieu of granting leave to appeal, the decision of the Court of Appeals is reversed for the reasons stated in the dissenting opinion. MCR 7.302(G)(1) Reported below: 264 Mich App 99.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WYATT v OAKWOOD HOSPITAL AND MEDICAL CENTERS, Nos. 128276, 128288, 128301. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the question whether the statute of limitations bars an action from proceeding where the complaint was filed more than two years *after* the original letters of authority and *before* the subsequent letters of authority were issued. MCR 7.302(G)(1). That Court is to give the holding of *Waltz v Wyse*, 469 Mich 642 (2004), full retroactive application. Jurisdiction is not retained. Court of Appeals Nos. 258235, 258237, 258241.

EVANS v HALLAL, No. 128289. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the question whether the statute of limitations bars an action from proceeding where the complaint was filed more than two years *after* the original letters of authority and *before* the subsequent letters of authority were issued. MCR 7.302(G)(1). That Court is to give the holding of *Waltz v Wyse*, 469 Mich 642 (2004), full retroactive application. The motion to stay is denied as moot, without prejudice to defendant seeking a motion for stay in the trial court and, if necessary, in the Court of Appeals. Jurisdiction is not retained. Court of Appeals No. 259580.

FORSYTH v HOPPER, No. 128433. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.302(G)(1). That Court is to give the holding of *Waltz v Wyse*, 469 Mich 642 (2004), full retroactive application. The April 29, 2005, order granting the motion for stay is vacated, without prejudice to defendants seeking a stay in the trial court and, if necessary, the Court of Appeals. Jurisdiction is not retained. Court of Appeals No. 257907.

Leave to Appeal Denied June 17, 2005:

PEOPLE v GREGORY MARTIN, No. 126937; Court of Appeals No. 248158.

MARKMAN, J. I respectfully dissent. Because I believe the record contains insufficient evidence to establish the premeditation and deliberation necessary to satisfy the elements of first-degree murder, I would vacate defendant's conviction of first-degree murder and remand to the trial court for the entry of a judgment of conviction of second-degree murder.

Defendant initially gave two exculpatory statements to the police. In his third statement to the police, defendant first stated that his father came home "ranting and raving" while defendant was on the telephone with his girlfriend. He asked his father a question, and his father responded by throwing a pan that hit defendant in the head. Defendant claimed his father then asked for the shotgun, in case someone tried to follow him into the apartment. Defendant reached under the couch to retrieve it, thought to himself that he better unload it, and began removing the shells. Defendant claimed he had difficulty removing the last shell, and, in his attempt to remove it, the gun discharged, hitting his father. Defendant sat down on the couch for what he thought was only a minute, but was in reality over an hour (defendant claimed to have blacked out, having consumed a pint of vodka). It was then that he called 911. Defendant's statement then concludes with the following series of responses, which recant his claim that the shooting occurred while he was attempting to remove the last shell:

Q. Mr. Martin, did you shoot your father?

A. Yes.

Q. Mr. Martin, did I force you to say that?

A. No.

Q. Anything else you can tell me?

A. No, I'm sorry, I was mad, I was pissed off.

Q. What do you mean you were pissed off?

A. I was mad and I shot him.

Q. So you did not try to take the rounds out of the shotgun?

A. No, I shot him because I was mad.

Q. So this was not an accident?

A. No, I got the shotgun from under the couch and I shot him. . . .

Q. Were any blows thrown from hands used?

A. No.

Q. Is there anything else?

A. No, I shot him.

The entirety of this third statement was read into the record at trial.

In support of a finding of premeditation, the Court of Appeals made a number of findings that are not supported by the record. I will address them individually:

> [1] In this case, the evidence showed that defendant and his father had a prior relationship characterized by his father's frequent rantings and ravings. This evidence supports an inference of premeditation and deliberation insofar that it shows that defendant had a motive to kill his father. [Slip op at 2.]

However, the record does not reflect that these alleged rantings and ravings were directed *at defendant*; rather, the record shows that his father tended to go off on rants about others. Specifically, defendant's statements indicate that his father "sometimes . . . just pulls stuff out of the air" and that on this occasion, his father was ranting about women drivers and the stupidity of one of his father's friends. A review of defendant's testimony at trial reveals no indication of frequent rantings and ravings that characterized the victim's relationship *with defendant*. As such, the alleged rantings and ravings of his father provided defendant with no motive for the killing, and thus do not support in any way a finding of premeditation. While defendant may have thought to himself "here we go again" when his father began to rant on the night in question, defendant's subvocalized thought in this regard is hardly sufficient to constitute evidence of premeditation.

> [2] Regarding the circumstances of the killing, defendant admitted that he hid the gun under the couch where he was lying immediately before the shooting. [Slip op at 2.]

However, the record contains no testimony or evidence to support such a finding. Rather, in defendant's first statement, he responded to the question of where the gun had come from by saying, "I had it hidden and emptied under the couch for safety purposes." The statement did not indicate that the "safety" he sought was from his father, as opposed to general safety concerns that would motivate one to keep a gun in one's home. Nothing in the record suggests that defendant hid the gun as part of any premeditated plan to kill his father.

Nor does the record reflect *when* defendant hid the gun under the couch. Testimony that defendant hid the gun under the couch shortly before his father arrived home (as opposed to weeks or even months before the shooting) would tend to support an inference of premeditation; however, the record contains no mention of when the gun was placed under the couch. As such, no inference of premeditation can arise by virtue of the fact that the shotgun had been placed under the couch at *some indefinite time* before the shooting.

> [3] The evidence also permitted an inference that a sufficient amount of time elapsed before defendant reached under the couch to get the gun and, thus, had sufficient time to contemplate his actions and take a second look. [Slip op at 2.]

All three of defendant's statements to the police, including the inculpatory third statement, indicate that defendant withdrew the gun from under the couch in response to his father's demand that he produce it. To show first-degree premeditated murder, "[s]ome time span between [the] initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation." *People v Gonzalez*, 468 Mich 636, 641 (2003) (internal citations and quotations omitted). Here, there is no evidence of the duration of any time span between those two events. In fact, the record does not identify any event, other than the victim's demand that defendant give him the gun, from which to measure the time between formation of intent and action.

> [4] Defendant's post-homicide conduct also supports a finding of premeditation and deliberation. The evidence permitted the jury to conclude that defendant attempted to conceal the crime by deliberately breaking the gun and then fabricating a story about an accidental shooting. An attempt to conceal a killing may support a finding of premeditation and deliberation. [Slip op at 2.]

However, an attempt to conceal is only indicative of premeditation where the attempt to conceal comes before the killing, or where other evidence suggests that the defendant had an opportunity to take a second look. See *Gonzalez, supra*; see also *People v Johnson*, 460 Mich 720 (1999) (on which the *Gonzalez* Court relied). Otherwise, postkilling concealment is equally consistent with an effort to disguise a second-degree murder.

Finally, even assuming defendant did in fact shoot his father because he was "mad," the statement still fails to give rise to an inference of premeditation. Rather, such a statement is inconsistent with the required showing that defendant be undisturbed by hot blood.

In light of the misunderstanding of the record by the Court of Appeals, and the lack of evidence that supports a finding of premeditation, I would vacate defendant's conviction of first-degree murder and remand the case to the trial court for the entry of a judgment of conviction of second-degree murder.

CAVANAGH and KELLY, JJ. We join the statement of Justice MARKMAN.

PEOPLE v TYREE WILLIAMS, No. 127276; Court of Appeals No. 246927.

YOUNG, J. I concur in the denial because the "waiver break" in this case occurred before the issuance of *People v Ellis*, 468 Mich 25 (2003), which put the judiciary on notice that a "waiver break" is improper.

PEOPLE v FREEMAN, No. 127331; Court of Appeals No. 247396.

YOUNG, J. I concur in the denial because the "waiver break" in this case occurred before the issuance of *People v Ellis*, 468 Mich 25 (2003), which put the judiciary on notice that a "waiver break" is improper.

PEOPLE v KUJIK, No. 128200; Court of Appeals No. 252766.

MARKMAN, J. I respectfully dissent. Our state's perjury and witness intimidation laws are indispensable to the maintenance of the integrity of the justice system. In this case, I believe that Michigan's principal witness intimidation law has been misinterpreted by the Court of Appeals, and weakened in this process. I would reverse that decision and reinstate defendant's conviction.

Defendant, a high school student, threatened her friend after the friend was subpoenaed to testify in a criminal proceeding against defendant. Defendant was charged with witness intimidation (retaliating against a witness) under MCL 750.122(8), and the jury was instructed that the statute applied regardless of whether an official proceeding had yet taken place. The jury convicted defendant. The Court of Appeals reversed, holding that the statute only applied to threats made *after* a witness has testified, not to threats made to prospective witnesses.

MCL 750.122(8) provides:

> A person who retaliates, attempts to retaliate, or threatens to retaliate against another person *for having been a witness in an official proceeding* is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00, or both. As used in this subsection, "retaliate" means to do any of the following:
>
> (a) Commit or attempt to commit a crime against any person.
>
> (b) Threaten to kill or injure any person or threaten to cause property damage. [Emphasis added.]

The critical question is what effect should be given to the phrase "threatens to retaliate against another person for having been a witness in an official proceeding."

The Court of Appeals majority noted that the challenged jury instruction generally complied with § 9 of the statute, which states:

> This section applies regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person *could be a witness* at any official proceeding. [MCL 750.122(9) (emphasis added).]

However, the Court determined that § 9 did not apply to § 8, because a person who "could be" a witness is not a person "having been" a witness. In determining that § 8 only applied to threats made after a

witness has testified, the majority noted that prospective witnesses are covered by § 3 of the statute, which states:

> A person shall not do any of the following by threat or intimidation:
>
> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, *testifying at a present or future official proceeding*, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding. [MCL 750.122(3) (emphasis added).]

The Court concluded that, because § 3 contained the "present or future" language, while § 8 omitted such language, the latter omission must be intentional. Further, the majority found that applying § 8 to threats made against prospective witnesses would nullify much of § 3. Instead, the majority decided that limiting § 8 to threats made after the witness has testified was in keeping with the plain language of the provisions.

The dissent, meanwhile, argued that §§ 8 and 9 were not incompatible, because the phrase "threatens to retaliate against another person for having been a witness in an official proceeding"

> can refer to the witness' status not at the time the threat is communicated, but at the future time when the threat will be carried out. The statute penalizes threats against a person "for having been a witness in an official proceeding," and this language encompasses a situation in which future harm is threatened against a person in anticipation of that person testifying in an official proceeding. [Slip dissent at 2.]

Consequently, the dissent concluded that §§ 8 and 9 could be harmonized.

While both interpretations are plausible, I believe the dissent has the better argument. Reliance by the Court of Appeals on an apparent conflict between §§ 3 and 8 was inapt, given the express mandate of § 9 that MCL 750.122 *as a whole* "applies regardless of whether . . . the individual has been subpoenaed or otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding." Before considering whether a conflict might be implied by the interplay of §§ 3 and 8, the Court should first have looked at § 9, which makes clear that MCL 750.122 as a whole applies to prospective witnesses.

The inclusion in § 8 of *threats* to retaliate, in addition to retaliation and attempted retaliation, clearly contemplates the act of threatening to

retaliate against a person for being a witness in the future, *after* the witness has testified in an official proceeding.[1] The language chosen by the Legislature includes the situation in which future harm is threatened against a person *in anticipation of* that person testifying in an official proceeding.

Contrary to the findings of the Court of Appeals majority, this reading does not nullify § 3, because that provision speaks only to "threat or intimidation," while § 8 refers specifically to retaliation done by means of crime or attempted crime against a person, or threats of death, injury, or property damage. While at first glance one might reasonably associate "threat or intimidation" with "crime," this is not necessarily the case. For this logic to hold, one would have to accept that the types of harm described in § 8 describe the entire universe of actions that qualify as a "threat or intimidation" under § 3. This is simply not the case.

Imagine, for instance, the at-will employer who vows to discharge an employee if the employee testifies. This would clearly be a "threat," but not a crime. Or, imagine a situation where, as here, the parties are high school students; the threat "I'll make your life miserable at school" may be intimidating, but it is not a threat to injure a person or to damage property. My point is simply that conduct prohibited by § 3 will *not necessarily* be prohibited by § 8; therefore, the Court of Appeals majority erred in concluding that the application of § 8 to threats made against prospective witnesses would "nullify" § 3.

Because I believe that the Court of Appeals majority has misinterpreted the witness intimidation law of our state, I would reverse its decision.

In re PEREZ (FAMILY INDEPENDENCE AGENCY v SARA VAUGHAN) and *In re* VAUGHAN (FAMILY INDEPENDENCE AGENCY v ROOD VAUGHAN), Nos. 128845, 128846; Court of Appeals Nos. 257300, 257529.

Leave to Appeal Denied June 24, 2005:

PEOPLE v GERALD SMITH, No. 127250. Despite discovery violations, the Court is not convinced that a reasonable probability of a different result would exist had there been compliance with the discovery order. See *People v Fink*, 456 Mich 449 (1998). Court of Appeals No. 246931.

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[1] Also, as a matter of logic, what sense would it make for a defendant to *threaten* harm in retaliation against someone who has *already* testified? Such a defendant would simply just commit the harm. In other words, a threat is typically a conditional proposition: "If you do X, then I will be forced to retaliate by doing Y." Once the person threatened has actually done X, the condition is satisfied, and the threat is, in a sense, executory. As such, it would make no sense for a defendant to threaten to harm a witness who has already testified; the defendant would simply proceed with the harm.

KELLY, J. (*concurring*). I agree with the decision to deny defendant's application for leave to appeal. I write separately to express my concern over the failure of the prosecution and the police to comply with the trial court's orders regarding discovery and production of evidence.

Before trial, the court issued a discovery order requiring the prosecution to provide information in its possession to defense counsel. See MCR 6.201. However, the prosecution failed to produce a copy of a statement of one of the identifying witnesses, a pair of shorts worn by one of the victims, records of a photographic lineup, photographs of bullet damage to a vehicle, and records of repairs to the vehicle.

Defense counsel also obtained an order requiring defendant to participate in a lineup before three witnesses. The court entered the order relying on *People v Anderson*,[1] which held that a corporeal lineup is required if a defendant's identity is in issue. However, only two identifying witnesses attended the lineups. Initially they were shown photographs, then given the opportunity to identify defendant at a corporeal lineup in which he wore the same clothing he had worn in the photograph. Defense counsel argued that the failure to initially conduct a corporeal lineup was another violation of the court order. Moreover, it tainted the witnesses' identification of defendant by allowing them to see him repeatedly.

Because of the failures by the police and various prosecutors to comply with the discovery order, the court ordered the prosecutor at trial not to introduce evidence of the shorts. Nonetheless, the prosecutor asked the victim how close the shots had been to him and what they had struck on him. In response to defense counsel's objection, the court warned the prosecutor not to continue attempting to circumvent its orders by eliciting testimony about the shorts.

Additionally, the prosecutor introduced other evidence that had not been provided to defense counsel. In response to defense counsel's objections, the court reduced three of the charges against defendant to one count of assault with intent to do great bodily harm less than murder and two counts of felonious assault.

Prosecutors are officers of the court. MCR 9.103(A). They are obligated to make reasonably diligent efforts to comply with court orders. MRPC 3.4(d); MCR 9.104(A)(4); *In re Albert,* 383 Mich 722, 724 (1970). If the prosecutors were unable to comply with any of the orders in this case, they should have moved to amend or vacate them.

It is critical in an adversarial justice system that each party has a fair opportunity to present its case. To enable this, a court's orders regarding discovery must be complied with. MCR 6.201. The police and prosecutor's failure to comply with lawful court orders can jeopardize a defendant's ability to present a valid defense and can cause the conviction of an innocent person.

If the evidence against defendant in this case were not strong, I would vote to remand for retrial pursuant to *People v Fink,* 456 Mich 449 (1998).

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[1] 389 Mich 155 (1973).

But, even had defense counsel obtained all the information and evidence as ordered before trial, there is not a reasonable probability of a different result on retrial. I agree that leave to appeal should be denied.

Summary Disposition June 28, 2005:

PEOPLE v ZAREMBSKI, No. 127632. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted of defendant's claim that he is entitled to resentencing because offense variable 9, MCL 777.39, was misscored. MCR 7.302(G)(1). Jurisdiction is not retained. Court of Appeals No. 257406.

Leave to Appeal Denied June 28, 2005:

MOUNTS v VAN BEESTE, No. 127006; Court of Appeals No. 243155.

MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION v PUBLIC SERVICE COMMISSION NO 2, CONSUMERS ENERGY COMPANY v PUBLIC SERVICE COMMISSION NO 2, and DETROIT EDISON COMPANY v PUBLIC SERVICE COMMISSION NO 2, Nos. 127094, 127099-127101, 127473; Court of Appeals Nos. 244425, 244429, 244531.

ENGLISH v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 127150; reported below: 263 Mich App 449.

PEOPLE v PHILLIP BROWN, No. 127230; Court of Appeals No. 247313.

PEOPLE v HAYES, No. 127269; Court of Appeals No. 246012.

PEOPLE v SEAN WHITE, No. 127329; Court of Appeals No. 247608.

PEOPLE v YOUNG, No. 127332; Court of Appeals No. 248646.

PEOPLE v SNYDER, No. 127336; Court of Appeals No. 250047.

PEOPLE v WILLIE ANDERSON, No. 127340; Court of Appeals No. 247393.

PEOPLE v SOK, No. 127341; Court of Appeals No. 249057.

PEOPLE v RUGGLES, No. 127350; Court of Appeals No. 247144.

KOSMALSKI v WILLARD, No. 127355; Court of Appeals No. 247697.

PEOPLE v RODNEY WILLIAMS, No. 127357; Court of Appeals No. 232827 (on remand).

PEOPLE v GUTIERREZ, No. 127359; Court of Appeals No. 256373.

RAWLS v HUTZEL HOSPITAL, No. 127362; Court of Appeals No. 255112.

PEOPLE v THREATT, No. 127367; Court of Appeals No. 248949.

EQUITY FUNDING, INC v INVESTMENT VENTURES, INC, No. 127372; Court of Appeals No. 244540.

PEOPLE v FREEMAN JONES, No. 127374; Court of Appeals No. 248329.

PEOPLE v MUTIZWA FINLEY, No. 127380; Court of Appeals No. 248960.

PEOPLE v DARIUS THOMAS, No. 127381; Court of Appeals No. 246819.

PEOPLE v STREETER, No. 127385; Court of Appeals No. 246479.

WRIGHT v DEPARTMENT OF CORRECTIONS, No. 127387; Court of Appeals No. 256404.

PEOPLE v BURSE, No. 127396; Court of Appeals No. 248601.

PEOPLE v WRIGHT, No. 127397; Court of Appeals No. 246822.

O'BRYAN v LOWENTHAL, No. 127400; Court of Appeals No. 255378. CORRIGAN, J., not participating.

PEOPLE v LYONS, No. 127404; Court of Appeals No. 244550.

PEOPLE v PRICE, No. 127412; Court of Appeals No. 246013.

PEOPLE v GIBSON, No. 127415; Court of Appeals No. 243475.

PEOPLE v DONALDSON, Nos. 127417, 127418; Court of Appeals Nos. 248597, 248634.

PEOPLE v RUSSELL RICHARDS, No. 127427; Court of Appeals No. 247747.

WALNO v AZMEH, Nos. 127430, 127431; Court of Appeals No. 248898.

HERNDON v OAKWOOD HEALTHCARE, INC, No. 127432; Court of Appeals No. 255534.

WINDSOR CHARTER TOWNSHIP v REMSING, No. 127443; Court of Appeals No. 249688.

PEOPLE v GOLDEN, No. 127458; Court of Appeals No. 255215.

PEOPLE v RANDALL FIELDS, No. 127461; Court of Appeals No. 249137.

PEOPLE v PROCH, No. 127465; Court of Appeals No. 254857.

PEOPLE v TOLEFREE, No. 127467; Court of Appeals No. 257486.

BROWN v CASSENS TRANSPORT COMPANY, No. 127468; Court of Appeals No. 255905.

PEOPLE v SUTTON, No. 127477; Court of Appeals No. 248652.

PEOPLE v MARLIN HOLLAND, No. 127478; Court of Appeals No. 247038.

PEOPLE v JOHN SMITH, No. 127479; Court of Appeals No. 248039.

PEOPLE v KEVIN WALDEN, No. 127481; Court of Appeals No. 244910.

PEOPLE v KUCHARSKI, No. 127485; Court of Appeals No. 246791.

PEOPLE v CHARLES MULLINS, Nos. 127491, 127493; Court of Appeals Nos. 256965, 256964.

PEOPLE v BELL, No. 127494; Court of Appeals No. 257372.

PEOPLE v GOLLMAN, No. 127499; Court of Appeals No. 247849.

PEOPLE v BLAKE, No. 127505; Court of Appeals No. 248770.

In re LAKE LEVEL FOR BAMBI LAKE (SHIAWASSEE COUNTY v BAMBI LAKE ASSOCIATION), No. 127506; Court of Appeals No. 244794.

In re LILLIAN J BEHRNS TRUST (BEHRNS v BEHRNS), No. 127510; Court of Appeals No. 246654.

PEOPLE v PEDRO HERNANDEZ, No. 127511; Court of Appeals No. 247705.

GUERRERO v FARMER, No. 127512; Court of Appeals No. 253334.

CHASE MANHATTAN BANK v BOS, No. 127514; Court of Appeals No. 247603.

PEOPLE v DURHAM, No. 127516; Court of Appeals No. 248607.

PEOPLE v PATTON, No. 127518; Court of Appeals No. 248608.

PEOPLE v ALTAMIMI, No. 127519; Court of Appeals No. 256962.

PEOPLE v REED, No. 127520; Court of Appeals No. 249571.

PEOPLE v SCHUSTER, No. 127522; Court of Appeals No. 250931.

MAXWELL v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 127528; reported below: 264 Mich App 567.
KELLY, J., not participating.

In re WALKER (PEOPLE v TERRENCE WALKER), No. 127534; Court of Appeals No. 258129.

PEOPLE v FOURNIER, No. 127539; Court of Appeals No. 247533.

ALKIEFY v DAIMLERCHRYSLER CORPORATION, No. 127540; Court of Appeals No. 255989.

PEOPLE v KIRKSEY, No. 127542; Court of Appeals No. 250003.

PEOPLE v RAPPUHN, No. 127546; Court of Appeals No. 249026.

PEOPLE v WILLIAM HUDSON, No. 127550; Court of Appeals No. 247706.

PEOPLE v COLEY, No. 127555; Court of Appeals No. 248598.

PEOPLE v ROBERT WHITE, No. 127556; Court of Appeals No. 256606.

CLARK v HANDZIAK, No. 127561; Court of Appeals No. 248842.

PEOPLE v WILLIAM LEWIS, No. 127562; Court of Appeals No. 251589.

PEOPLE v PITTS, No. 127563; Court of Appeals No. 248263.

PEOPLE v NEWMAN, Nos. 127568, 127570; Court of Appeals Nos. 257821, 257819.

PEOPLE v SCHWARTZ, No. 127571; Court of Appeals No. 247895.

PEOPLE v TALBERT, No. 127574; Court of Appeals No. 257262.

B & B GROUP, LLP v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 127575; Court of Appeals No. 247065.

PEOPLE v MCCOY, No. 127577; Court of Appeals No. 249194.

PEOPLE v COLLINS, No. 127578; Court of Appeals No. 257791.

STONE v CITY OF ROYAL OAK, No. 127582; Court of Appeals No. 247779.

PEOPLE v BUSS, No. 127583; Court of Appeals No. 258106.

PEOPLE v JUSTICE, No. 127584; Court of Appeals No. 249429.

PEOPLE v MCRAE, No. 127609; Court of Appeals No. 248040.

PEOPLE v JIMMIE MALONE, No. 127610; Court of Appeals No. 257767.

CZERYBA v MARZOLO, No. 127612; Court of Appeals No. 247754.

PEOPLE v KENYATTA, No. 127616; Court of Appeals No. 257240.

PEOPLE v BALLINGER, No. 127627; Court of Appeals No. 258167.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v KEFFER, No. 127629; Court of Appeals No. 250152.

PEOPLE v JORGE PEREZ, No. 127631; Court of Appeals No. 248738.

PEOPLE v DEWEESE, No. 127635; Court of Appeals No. 251514.

PEOPLE v CLARK, No. 127645; Court of Appeals No. 248824.

PEOPLE v RODERICK CASEY, No. 127649; Court of Appeals No. 256810.

PEOPLE v SHAWNTELL WILLIAMS, No. 127663; Court of Appeals No. 248373.

PEOPLE v JAMES MITCHELL, No. 127673; Court of Appeals No. 248636.

SEARFOSS v CHRISTMAN COMPANY, INC, No. 127678; Court of Appeals No. 249925.

PEOPLE v EDDINGS, No. 127686; Court of Appeals No. 249421.

PEOPLE v PATRICIA DIXON, No. 127690; Court of Appeals No. 248619.

PEOPLE v LACKEY, No. 127694; Court of Appeals No. 258115.

PEOPLE v MORTON, No. 127696; Court of Appeals No. 257770.

PEOPLE v CALVIN BROWN, No. 127706; Court of Appeals No. 249896.

PEOPLE v MARK WILSON, No. 127711; Court of Appeals No. 257751.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v STANLEY JACKSON, No 127713; Court of Appeals No. 248545.

AMERISURE MUTUAL INSURANCE COMPANY v AMERICAN COUNTRY INSURANCE COMPANY, No. 127716; Court of Appeals No. 245228.

PEOPLE v LEE DAVIS, No. 127720; Court of Appeals No. 256934.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v FERRELL, No. 127721; Court of Appeals No. 249419.

NAVA v KEMPER CORPORATION, No. 127727; Court of Appeals No. 256319.

PEOPLE v YARBROUGH, No. 127729; Court of Appeals No. 249102.

OLIVARES v PERFORMANCE ABATEMENT SERVICES, No. 127742; Court of Appeals No. 257428.

PEOPLE v ANTHONY JACKSON, No. 127744; Court of Appeals No. 249665.

WILCOX v FORD MOTOR COMPANY, No. 127745; Court of Appeals No. 256662.

PEOPLE v BAKER, No. 127749; Court of Appeals No. 248638.

PEOPLE v HARDY, No. 127753; Court of Appeals No. 256273.

PEOPLE v GLEASON, No. 127761; Court of Appeals No. 247615.

PEOPLE v EADS, No. 127763; Court of Appeals No. 258150.

PEOPLE v BYE, No. 127779; Court of Appeals No. 259232.

PEOPLE v AARON JACKSON, No. 127786; Court of Appeals No. 250397.

PEOPLE v RONNIE MIXON, No. 127810; Court of Appeals No. 249181.

PEOPLE v WILKINS, No. 127817; Court of Appeals No. 258222.

PEOPLE v ROBERT DIXON, No. 127828; Court of Appeals No. 249954.

PEOPLE v MAPP, No. 127846; Court of Appeals No. 250182.

PEOPLE v REYNOLDS, No. 127847; Court of Appeals No. 257957.

PEOPLE v RUSSELL, No. 127853; Court of Appeals No. 257724.

VARGO v FORD MOTOR COMPANY, No. 127854; Court of Appeals No. 257175.

BRANDON ASSOCIATES v CASTLE MANAGEMENT, No. 128054; Court of Appeals No. 247192.

LONG v CHILDREN'S HOSPITAL OF MICHIGAN, No. 128118; Court of Appeals No. 259617.

PEOPLE v ANTHONY CAMPBELL, No. 128296; Court of Appeals No. 254807.

Reconsideration Denied June 28, 2005:

SLATER v DEWITT CHARTER TOWNSHIP, No. 126455. Leave to appeal denied at 472 Mich 877. Court of Appeals No. 244791.

SUTTON v FIRST FEDERAL OF MICHIGAN, No. 127074. Leave to appeal denied at 472 Mich 879. Court of Appeals No. 255770.

BARNES v VETTRAINO, No. 123661. Leave to appeal denied at 472 Mich 883. Court of Appeals No. 235357.

Summary Dispositions June 30, 2005:

TRAMEL v CONTINENTAL INSURANCE COMPANY, No. 127265. In lieu of granting leave to appeal, the Court of Appeals judgment is vacated, and the case is remanded to that Court for reconsideration in light of this Court's decision in *Kreiner v Fischer*, No. 124120, and *Straub v Collette*, No. 124757, 471 Mich 109 (2004). MCR 7.302(G)(1). Court of Appeals No. 246597.

CAVANAGH, J. I would deny leave to appeal.

JACKSON v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 127379. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the order of the Wayne Circuit Court is reinstated for the reasons stated in the Court of Appeals dissent. MCR 7.302(G)(1). The application for leave to appeal as cross-appellant is denied. Court of Appeals No. 246388.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied June 30, 2005:

PEOPLE v LUCERO, No. 122014; Court of Appeals No. 231977 (on remand).

CAVANAGH and KELLY, JJ. We would remand this case to the Macomb Circuit Court for further consideration.

NEWARK MORNING LEDGER COMPANY v DEPARTMENT OF TREASURY, No. 126894; Court of Appeals No. 244733.

BRAUN v ANN ARBOR CHARTER TOWNSHIP, No. 126905; reported below: 262 Mich App 154.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE OF THE TOWNSHIP OF BLOOMFIELD v LAWRENCE, No. 126964; Court of Appeals No. 254440.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

HINOJOSA v DEPARTMENT OF NATURAL RESOURCES, No. 127177; reported below: 263 Mich App 537.

KELLY, J. I would grant leave to appeal.

HOSTE v CHRYSLER CORPORATION PLYMOUTH, No 127200. The Antrim Circuit Court correctly analyzed this case and properly determined that defendant Reliable Racing Supply could not be held liable because it had no knowledge or constructive knowledge of the potential hazard. Court of Appeals No. 245804.

CAVANAGH and KELLY, JJ. We would remand this case to the trial court for further proceedings.

PEOPLE v MOORE, No. 127270; Court of Appeals No. 242185.

NAULT v WEBB, No 127476; Court of Appeals No. 251225.

KELLY, J. I would grant leave to appeal.

PEOPLE v EMBERY, No. 127484; Court of Appeals No. 256879.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v CEDRIC FIELDS, No. 127652. The defendant's motion for summary judgment is prohibited by MCR 6.502(G). Court of Appeals No. 255603.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v VENDEVILLE, No. 127671; Court of Appeals No. 248161.

PEOPLE v HURLESS, No. 127675. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 256754.

KELLY, J. I would hold this case in abeyance for *People v Drohan*, lv gtd 472 Mich 881 (2005).

PEOPLE v BOYLES, No. 127925; Court of Appeals No. 249502.

CAVANAGH and KELLY, JJ. We would remand this case to the Oakland Circuit Court for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973).

PEOPLE v DERRICK BROWN, No. 128284; Court of Appeals No. 250582.

Interlocutory Appeal

Leave to Appeal Denied June 30, 2005:

PEOPLE v HAWKINS, No. 127666; Court of Appeals No. 230839 (on remand).

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Reconsideration Denied July 1, 2005:

PEOPLE v DECARLOSE SMITH, No. 126837. See 472 Mich 924. Court of Appeals No. 254724.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal July 1, 2005:

DONOHO v WAL-MART STORES, INC, No. 127537. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall include among the issues to be addressed at oral argument the correct interpretation of MCL 418.315(1). The parties may file supplemental briefs within 28 days of the date of this order, but they should avoid submitting mere restatements of arguments made in application papers. Court of Appeals No. 256525.

Leave to Appeal Denied July 1, 2005:

PEOPLE v CONYERS, No. 128258; Court of Appeals No. 259416.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

Rehearing Denied January 28, 2005:

GILBERT v DAIMLERCHRYSLER CORPORATION, No. 122457. Reported at 470 Mich 749.

CAVANAGH and KELLY, JJ. We would grant rehearing for the reasons stated in the dissenting opinion by Justice CAVANAGH, 470 Mich 793 (2004).

WEAVER, J. I dissent from the decision of the four-justice majority (Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) to deny plaintiff's motion for rehearing. After six weeks of testimony and argument, a jury found defendant, DaimlerChrysler Corporation, liable for several years of sexual harassment suffered at work by plaintiff, Linda Gilbert. Tragically, four months after the four majority justices reversed the jury verdict, plaintiff, Linda Gilbert, died at age 45 of a heart attack.

I would grant plaintiff's motion for rehearing, vacate the majority's reversal of a jury verdict in this exceedingly strong case of sexual harassment, and remand for remittitur.

Orders Entered February 1, 2005:

PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS and PROPOSED ADOPTION OF NEW MICHIGAN RULES OF PROFESSIONAL CONDUCT (EXTENSION OF COMMENT PERIODS). On order of the Court, this is to advise that the Court is extending the comment period from February 1, 2005, to June 1, 2005, for the orders published July 29, 2003, 469 Mich 1206, regarding ADM File No. 2002-29—Proposed Michigan Standards for Imposing Lawyer Sanctions (MSILS), and July 2, 2004, 470 Mich 1211, regarding ADM 2003-62—the Proposed Adoption of New Michigan Rules of Professional Conduct (MRPC). Both matters will be considered at a public hearing before the Court makes a final decision, and the MRPC will be finalized before the publication of a final order regarding the MSILS. When filing a comment, please refer to ADM File Nos. 2002-29 and 2003-62.

Staff Comment: Due to inclement weather, the State Bar Representative Assembly was unable to discuss and vote on matters relevant to these files at its January 22, 2005, meeting. The comment period is being extended in order to maximize the participation of all members of the legal community in the development of these rules and standards.

PROPOSED AMENDMENT OF MCR 3.215. On order of the Court, this is to advise that the Court is considering further amendments of Rule 3.215 of the Michigan Court Rules in addition to the amendments that are

effective May 1, 2005. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

The text of this proposal reflects proposed changes to the text of the May 1, 2005, version of Rule 3.215.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposals in their present form.

[The present language would be amended as indicated below:]

RULE 3.215. DOMESTIC RELATIONS REFEREES.

(A)-(C) [Unchanged.]

(D) Conduct of Referee Hearings.

(1)-(3) [Unchanged.]

(4) An electronic or stenographic record must be kept of all hearings.

(a) The parties must be allowed to make contemporaneous copies of the record if the referee's recording equipment can make multiple copies simultaneously and if the parties supply the recording media.

(b) If ordered by the court, or if stipulated by the parties, the referee must provide a transcript, verified by oath, of each hearing held. The cost of preparing a transcript must be apportioned equally between the parties, unless otherwise ordered by the court.

(c) At least 7 days before the judicial hearing, a party who intends to offer evidence from the record of the referee hearing must provide notice to the court and each other party. If a stenographic transcript is necessary, except as provided in (4)(b), the party offering the evidence must pay for the transcript.

(d) If the court relies on the record of the referee hearing to limit the judicial hearing under subrule (F), the court must make a copy of the record available to the parties at no charge and must allow the parties to file supplemental objections within 7 days of the date the record is provided to the parties. Following the judicial hearing, the court may assess the costs of preparing a copy of the record to one or more of the parties.

(E) Posthearing Procedures.

(1)-(2) [Unchanged.]

(3) The recommended order may be prepared using any of the following methods:

(a) The referee may draft a recommended order;

(b) The referee may approve a proposed recommended order prepared by a party and submitted to the referee at the conclusion of the referee hearing;

(c) Within 7 days of the date of the referee's findings, a party may draft a proposed recommended order and have it approved by all the parties and the referee; or

(d) Within 7 days after the conclusion of the referee hearing, a party may serve a copy of a proposed recommended order on all other parties with a notice to them that it will be submitted to the referee for approval if no written objections to its accuracy or completeness are filed with the court clerk within 7 days after service of the notice. The party must file with the court clerk the original of the proposed recommended order and proof of its service on the other parties.

(i) If no written objections are filed within 7 days, the clerk shall submit the proposed recommended order to the referee for approval. If the referee does not approve the proposed recommended order, the referee may notify the parties to appear on a specified date for settlement of the matter.

(ii) To object to the accuracy or completeness of a proposed recommended order, the party must within 7 days after service of the proposed order, file written objections with the court clerk that state with specificity the inaccuracy or omission in the proposed recommended order, and serve the objections on all parties as required by MCR 2.107, together with a notice of hearing and an alternate proposed recommended order. Upon conclusion of the hearing, the referee shall sign the appropriate recommended order.

(3)-(7) [Renumbered (4)-(8), but otherwise unchanged.]

(F)-(G) [Unchanged.]

Staff Comment: These amendments would establish how the record of a referee hearing will be provided to parties and would establish a procedure for a referee to submit a recommended order.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2005, at P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-40. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/Resources/Administrative/index.htm.

Leave to Appeal From Attorney Discipline Board Denied February 28, 2005:

GRIEVANCE ADMINISTRATOR v ZAMECK, NO. 127653.

Orders Entered March 9, 2005:

PROPOSED AMENDMENT OF MCR 3.211. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.211 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to

afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 3.211. JUDGMENTS AND ORDERS.

(A) [Unchanged.]

(B) [Unchanged.]

(C) A judgment or order awarding custody of a minor must provide that

(1) the domicile or residence of the minor may not be moved from Michigan without the approval of the judge who awarded custody or the judge's successor~~, and~~;

(2) the person awarded custody must promptly notify the friend of the court in writing when the minor is moved to another address~~.~~; and

(3) a parent whose custody or parenting time of a child is governed by the order shall not change the legal residence of the child except in compliance with section 11 of the Child Custody Act of 1970, MCL 722.21 *et seq*.

(D) A judgment or order awarding child support or spousal support must be entered on the latest version of the State Court Administrative Office's approved Uniform Support Order form.

(1)-(4) [Deleted.]

(E) [Deleted.]

~~(F)~~(E) [Relettered but otherwise unchanged.]

~~(G)~~(F) Entry of Judgment or Order.

(1) The party submitting the first judgment or order awarding child custody, parenting time, child support, or spousal support must provide the friend of the court office with a completed copy of the latest version of the State Court Administrative Office's Judgment Information form. The court will not sign the proposed judgment or order unless the Judgment Information form has been submitted with the judgment or order.

(2) Within 21 days after the court renders an opinion or the settlement agreement is placed on the record, the moving party must submit a judgment, order, or a motion to settle the judgment or order, unless the court has granted an extension.

(3) Before it enters a judgment or order awarding child support or spousal support, the court must verify that the Judgment Information form in subrule (F)(1) has been completed and submitted to the friend of the court.

~~(H)~~(G) [Relettered but otherwise unchanged.]

~~(I)~~(H) [Relettered but otherwise unchanged.]

Staff Comment: In subrule (D), the proposed amendments require that all support orders be entered on a standard form approved by the State Court Administrative Office. SCAO regularly updates the form by adding provisions required by new federal and Michigan statutes. Using the SCAO form will reduce paperwork and allow the order format to change without further amending this court rule. The current version of this form is available on the Court's website at http://www.courts.michigan.gov/scao/courtforms/domesticrelations/support/foc10.pdf. In relettered subrule (F), the proposed amendments allow personal information concerning a party to be provided to the friend of the court in a document separate from the court order. This will assure that the friend of the court has all the information that it needs, and that certain confidential information will be provided to the friend of the court without being included in the court order, which is a public document. A draft of the proposed Judgment Information form is available on the Court's website at http://www.courts.michigan.gov/scao/courtforms/domesticrelations/domesticrelationsjudgmentformdraft.pdf. The Court invites comments on both the Uniform Support Order form and the draft Judgment Information form.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2005, at P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-55. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 9.124. On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.124 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing.The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 9.124. PROCEDURE FOR REINSTATEMENT.

(A) [Unchanged.]

(B) Petitioner's Responsibilities.

(1) Separately from the petition for reinstatement, the petitioner must serve only upon the administrator a personal history affidavit. The affidavit is to become part of the administrator's investigative file and may not be disclosed to the public except under the provisions of MCR 9.126. The ~~affidavit must contain the~~ following information must be attached to or contained in the affidavit:

(a) [Unchanged.]

(b) employment history since the time of disqualification, including the nature of employment, the name and address of every employer, the duration of such employment, and the name of the petitioner's immediate supervisor at each place of employment; if requested by the grievance administrator, the petitioner must provide authorization to obtain a copy of the petitioner's personnel file from the employer;

(c)-(e) [Unchanged.]

(f) copies of the petitioner's personal and business federal, state, and local tax returns from the date of disqualification until the filing of the petition for reinstatement, and if the petitioner owes outstanding income taxes, interest and penalties, the petitioner must provide a current statement from the taxation authority of the current amount due; if requested by the grievance administrator, the petitioner must provide a waiver granting the grievance administrator authority to obtain information from the tax authority;

~~(f)-(j)~~ [Paragraphs (f)-(j) are relettered (g)-(k) but otherwise unchanged.]

~~(k)~~(l) whether there are any outstanding judgments against the petitioner; the petitioner must provide copies of the complaints and any judgments or orders of dismissal in such cases;

~~(l)~~(m) whether the petitioner was a defendant or a witness in any criminal case, and the title, docket number, and court in which such case occurred~~.~~; the petitioner must provide copies of the complaints and any judgment of convictions or orders of dismissals in such cases;

(n) whether the petitioner was subject to treatment or counseling for mental or emotional disabilities, or for substance abuse or gambling addiction since the time of disqualification; if so, the petitioner must provide a current statement from the petitioner's service provider setting forth a diagnosis of the petitioner's condition and prognosis for recovery.

(2)-(5) [Unchanged.]

(C) Administrator's Responsibilities. Within 14 days after the commission receives its copy of the petition for reinstatement, the administrator shall submit to the Michigan Bar Journal for publication a notice briefly describing the nature and date of the discipline, the misconduct for which the petitioner was disciplined, and the matters required to be proved for reinstatement. The administrator shall investigate the petitioner's eligibility for reinstatement before a hearing on it, report the findings in writing to the board and the hearing panel within 56 days of the date the board assigns the petition to the hearing panel, and serve a copy on the petitioner. For good cause, the hearing panel may allow the administrator to file the report at a later date, but in no event later than 7 days before the hearing. The report must summarize the facts of all previous misconduct and the available evidence bearing on the petition-

er's eligibility for reinstatement. The report is ~~not a pleading and~~ part of the record but does not ~~serve to~~ restrict the ~~administrator~~ parties in the presentation of relevant evidence at the hearing. Any evidence omitted from the report or received by the administrator subsequent to the filing of the report must be disclosed promptly to the hearing panel and the petitioner.

(D)-(E) [Unchanged.]

Staff Comment: The proposed amendments of MCR 9.124(B)(1) would expand the information a petitioner for reinstatement is required to include in or attach to the petitioner's personal history affidavit. The proposed amendment of subrule (b) would add a requirement that the petitioner, at the grievance administrator's request, provide authorization for the grievance administrator to obtain a copy of the petitioner's personnel file regarding any employment held since the time of disqualification. The proposed amendment of subrule (f) would require a petitioner to attach copies of petitioner's tax returns from the date of disqualification to the date of the petition for reinstatement. The proposed amendment of subrule (l) would add a requirement that a petitioner provide copies of any civil complaints and judgments or orders with respect to any outstanding civil judgments against the petitioner. According to the proposed amendment of subrule (m), a petitioner would be required to provide copies of criminal complaints and judgments of conviction or dismissals for any criminal case in which the petitioner was a defendant or a witness. Subrule (n) would require a petitioner to state on his personal history affidavit whether, since the date of disqualification, the petitioner received treatment for mental or emotional disabilities or substance abuse or gambling addiction. If the petitioner received such treatment, the petitioner would be required to provide a statement from the service providers that contained a diagnosis of the condition and prognosis for recovery.

The proposed amendment of MCR 9.124(C) simply codifies what already occurs in hearings on petitions for reinstatement and appeals from decisions following those hearings.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-53. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered March 10, 2005:

In re MOORE, No. 127163. On order of the Court, the Judicial Tenure Commission has issued a Decision and Recommendation for Discipline, and the Honorable Marion Moore has consented to the Commission's findings of fact, conclusions of law and recommendation of public censure.

As we conduct our de novo review of this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.
>
> The JTC should consider these and other appropriate standards that it may develop in its expertise, when it offers its recommendations.

In this case those standards are being applied to the following findings and conclusions of the Judicial Tenure Commission, which we adopt as our own:

1. Respondent at all relevant times has been a judge of the 36th District Court, City of Detroit, Wayne County, Michigan.

2. Respondent was the 36th District Court judge assigned to *People v Senszyszyn,* 36th District Court Case No. U-938769 ("*Senszyszyn*"), which involves a claim that the defendant improperly operated his taxi cab with a passenger in the front seat, and the rear seat unoccupied.

3. As the judge presiding over the case, Respondent adjourned it numerous times, including some occasions without conducting any court proceeding and others where only some minimal event occurred.

4. Respondent conducted the arraignment on November 4, 2002, and scheduled a final settlement conference for January 21, 2003.

5. On January 21, 2003, the defendant appeared for the final settlement conference. For some unknown reason, Respondent adjourned the conference to January 30.

6. Respondent again adjourned the proceedings scheduled for January 30, 2003, which were also described as a "final settlement conference," without an explanation noted in the file. It appears the new scheduled date was March 19, 2003.

7. On March 7, 2003, Respondent adjourned the "final settlement conference" scheduled for March 19 to May 21, 2003, with the only explanation being a note written in the court file stating "judge not available."

8. On May 21, 2003, the "final settlement conference" was held, but Respondent once again adjourned the case, and a special hearing date was scheduled for July 24, 2003, to allow the parties to insure that the exhibits for trial were properly marked.

9. The matter was re-scheduled for September 9, 2003.

10. On September 9, 2003, the proceedings were adjourned based on Respondent's order for the defendant to undergo a competency evaluation.

11. As revealed by a notation in the court file, the results of the competency evaluation were received on October 27, 2003.

12. On November 10, 2003, Respondent adjourned the competency hearing because her "docket [was] to (*sic*) heavy," as reflected by a note in the court file.

13. As of that hearing date, over a year had passed since the defendant had been arraigned.

14. Respondent's staff scheduled a jury trial for February 16, 2004, almost three months from the hearing date and over 15 months since the arraignment.

15. On November 18, 2003, Respondent's staff adjourned the trial date an additional three weeks to March 9, 2004, as February 16 was a court holiday.

16. Respondent was on vacation during the month of March 2004, and the trial was adjourned in Respondent's absence by Hon. Nancy A. Farmer until April 12, 2004.

17. On April 12, 2004, Respondent adjourned the trial date until May 18, without explanation.

18. Respondent recused herself from the case in May 2004 upon notice of the Judicial Tenure Commission's investigation, at which time 18 months had passed after the arraignment, and a trial had not occurred.

These standards set forth in *Brown* are also being applied to the conclusion of the Judicial Tenure Commission, which we adopt as our own:

Respondent's conduct as admitted and described above constitutes:

(a) Misconduct in office, as defined by the Michigan Constitution of 1963, Article VI, § 30, as amended, and MCR 9.205;

(b) Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, Article VI, § 30, as amended, and MCR 9.205;

(c) Persistent failure to perform judicial duties, as defined by the Michigan Constitution of 1963, Article VI, § 30, as amended and MCR 9.205;

(d) Persistent neglect in the timely performance of judicial duties, contrary to MCR 9.205(B)(1)(b);

(e) Failure to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity of the judiciary, contrary to the Code of Judicial Conduct, Canon 2B;

(f) Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to the Code of Judicial Conduct, Canon 1; and

(g) Conduct violative of MCR 9.104(1), and (2) in that such conduct:

(1) is prejudicial to the proper administration of justice; and

(2) exposes the legal profession or the courts to obloquy, contempt, censure or reproach.

After reviewing the Recommendation of the Judicial Tenure Commission, the respondent's consent, the standards set forth in *Brown*, and the above findings and conclusions, we order that the Honorable Marion Moore be publicly censured. This order stands as our public censure.

Order Entered March 15, 2005:

PROPOSED AMENDMENT OF MCR 8.108. On order of the Court, this is to advise that the Court is considering amendments of Rule 8.108 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(F) [Unchanged.]

(G) Certification.

(1) Certification Requirement.

(a) ~~Except as provided in this subrule, o~~Only reporters, ~~or~~ recorders, operators, or voice writers certified pursuant to this subrule may record or prepare transcripts of proceedings held in Michigan courts or of depositions taken in Michigan pursuant to these rules. This rule applies to the preparation of transcripts of videotaped courtroom proceedings or videotaped or audiotaped depositions, but not to the recording of such proceedings or depositions by means of videotaping. An ~~recorder~~ operator holding a CEO certification under subrule (G)(7)(b) may record proceedings, but may not prepare transcripts.

(b) Proceedings held pursuant to MCR 6.102 or 6.104 need not be recorded by persons certified under this rule; however, transcripts of such

proceedings must be prepared by court reporters, ~~or~~ recorders, operators, or voice writers certified pursuant to this rule.

(c)-(f) [Unchanged.]

(2) Court Reporting and Recording Board of Review.

(a) The Supreme Court shall appoint a Court Reporting and Recording Board of Review, composed of

(i) [Unchanged.]

(ii) a circuit ~~or recorder's~~ judge;

(iii)-(ix) [Unchanged.]

(b)-(d) [Unchanged.]

(3) Certification by Testing.

(a) At least twice each year the board shall administer an examination testing knowledge and speed, and, as to a recorder, operator, or voice writer, familiarity with basic logging techniques and minor repair and maintenance procedures. The board shall determine the passing score.

(b) In order to be eligible for registration for an examination, an applicant must

(i) be at least 18 years of age,

(ii) be a high school graduate, and

(iii) not have been under sentence for a felony for a period of two years.

(c) In addition, an applicant for the certified shorthand reporter examination must have satisfactorily completed a~~n~~ post-high school approved, accredited, or recognized course of study in court reporting and submit documentation of same prior to testing.

(d) An applicant for the CER/CSMR/CEO examination must have satisfactorily completed a post-high school Board of Review approved workshop or course of study provided by MJI, MECRA, or other Board-approved curriculum and submit documentation of same prior to testing.

(e) All CERs/CSMRs/CEOs who are fully certified by December 31, 2005, are exempt from the requirements of subparagraph (d).

~~(e)~~(f) The registration fee is $60.

(4) Reciprocal Certification. A reporter, ~~or~~ recorder, operator, or voice writer certified in another state may apply to the board for certification based on the certification already obtained.

(5) Temporary Certification. A new reporter, ~~or~~ recorder, operator, or voice writer may receive one temporary certification to enable him or her to work until the results of the next test are released. If the person does not take the test, the temporary certification may not be extended unless good cause is shown. If the person takes the test and fails, the board may extend the temporary certification.

(6) Renewal, Review, and Revocation of Certification.

(a) Certifications under this rule must be renewed annually. The fee for renewal is $50. ~~$30.~~ Renewal applications must be filed by August 1. A renewal application filed after that date must be accompanied by an additional late fee of $30. The board may require certified reporters, ~~and~~ recorders, operators, and voice writers to submit, as a condition of renewal, such information as the board reasonably deems necessary to determine that the reporter, ~~or~~ recorder, operator, or voice writer has

used his or her reporting or recording skills during the preceding year.

(b) The board must review the certification of a reporter, ~~or~~ recorder, operator, or voice writer who has not used his or her skills in the preceding year, and shall determine whether the certification of such a reporter ~~or~~, recorder, operator, or voice writer may be renewed without the necessity of a certification test.

(c) The board may review the certification of a reporter, ~~or~~ recorder, operator, or voice writer and may impose sanctions, including revoking the certification, for good cause after a hearing before the board.

(d) If, after a reporter's, recorder's, operator's, or voice writer's certification is revoked or voided by the board and the reporter, recorder, operator, or voice writer applies to take the certification examination and passes, the board may issue a conditional certification for a prescribed period of time imposing restrictions or conditions that must be met for continued certification. At the end of the conditional period, an unconditional certification may be issued.

(7) Designations. The board shall assign an identification number to each person certified. A court reporter, ~~or~~ recorder, operator, or voice writer must place the identification number assigned on his or her communications with the courts, including certificates, motions, affidavits, and transcripts. The board will use the following certification designations:

(a) certified electronic recorder (CER);

(b) certified electronic operator (CEO);

(c) certified shorthand reporter (CSR);

(d) certified voice writer/stenomask reporter (CSMR).

The designations are to be used only by reporters, ~~or~~ recorders, operators, or voice writers certified by the board. A reporter, ~~or~~ recorder, operator or voice writer may be given more than one designation by passing different tests.

Staff Comment: The proposed amendment of MCR 8.108(G), as recommended by the Michigan Court Reporting and Recording Board of Review, would expand the rule's coverage to include "operators" and "voice writers" and would mandate completion of a board-approved course as a condition for certification.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-48. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Reconsideration Denied March 29, 2005:

GRIEVANCE ADMINISTRATOR v WARREN, No. 127192. Leave to appeal denied at 471 Mich 1216.

Order Entered March 30, 2005:

PROPOSED AMENDMENTS OF MCR 9.223 AND 9.224. On order of the Court, this is to advise that the Court is considering amendments of Rules 9.223 and 9.224 of the Michigan Court Rules. Before determining whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 9.223. ~~CERTIFICATION TO SUPREME COURT.~~ FILING AND SERVICE OF DOCUMENTS BY COMMISSION.

~~(A) Filing and Service of Documents by Commission.~~ Within 21 days after entering an order recommending action with regard to a respondent, the commission must take the action required by subrules (A) and (B).

~~(1)~~ (A) Filings in Supreme Court. The commission must file in the Supreme Court:

~~(a)~~(1) the original record arranged in chronological order and indexed and certified;

~~(b)~~(2) 24 copies of the order; and

~~(c) 24 copies of an appendix; and~~

~~(d)~~(3) a proof of service on the respondent;.

~~(2)~~(B) Service on Respondent. The commission must serve the respondent with:

(~~a~~1) notice of the filing under MCR 9.223(A)(1);

(~~b~~2) 2 copies of the order ~~and appendix~~;

(~~c~~3) 2 copies of the index to the original record; and

(~~d~~4) a copy of a portion of the original record not submitted by or previously furnished to the respondent.

~~(B) Contents of Appendix. The appendix must include, in chronological order:~~

~~(1) an index;~~

~~(2) all pleadings, including those filed with a master;~~

~~(3) all orders, including those issued by a master;~~

~~(4) all reports, findings of fact, and conclusions of law made by the commission or a master; and~~

~~(5) other material necessary to fairly judge the issues.~~

RULE 9.224. REVIEW BY SUPREME COURT.

(A) Petition by Respondent. Within 28 days after being served, a respondent may file in the Supreme Court 24 copies of

(1) [Unchanged.]

(2) an appendix presenting portions of the record ~~not included in the commission's appendix~~ that the respondent believes necessary to fairly judge the issues.

The respondent must serve the commission with 3 copies of the petition and 2 copies of the appendix and file proof of that service.

(B) Brief of Commission. Within 21 days after respondent's petition is served, the commission must file

(1) 24 copies of a brief supporting its finding, and

(2) proof that the respondent was served with 2 copies of the brief.

The commission may file 24 copies of an appendix containing portions of the record not included in the respondent's appendix that the commission believes necessary to fairly judge the issues.

(C)-(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 9.223 would eliminate the requirement that the Judicial Tenure Commission file an appendix with its recommendation for discipline against a judge.

The proposed amendment of MCR 9.224(A) would require the respondent judge to file an appendix if the respondent files a petition to reject or modify the commission's decision. The proposed amendment of 9.224(B) would allow the Judicial Tenure Commission to file a supplemental appendix with its brief in response to a respondent judge's petition.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-32. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Orders Entered April 5, 2005:

PROPOSED AMENDMENT OF MCR 3.925. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.925 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT FILES; SETTING ASIDE ADJUDICATIONS.

(A)-(D)[Unchanged.]

(E) Destruction of Court Files and Records. This subrule governs the destruction of court files and records.

(1) Destruction Generally; Effect. The court may at any time for good cause destroy its own files and records pertaining to an offense by or against a minor, other than an adjudicated offense described in MCL 712A.18e(2), except that the register of actions must not be destroyed. Destruction of a file does not negate, rescind, or set aside an adjudication.

(2) Delinquency Files and Records.

(a) The court must destroy the diversion record of a juvenile within 28 days after the juvenile becomes 17 years of age.

(b) The court must destroy all files of matters heard on the consent calendar within 28 days after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If the case is transferred to the consent calendar and a register of actions exists, the register of actions must be maintained as a nonpublic record.

(c) Except as provided by subrules (a) and (b), the court must destroy the files and records pertaining to a person's juvenile offenses~~, other than any adjudicated offense described in MCL 712A.18e(2),~~ when the person becomes 30 years old.

(d) If the court destroys its files regarding a juvenile proceeding on the formal calendar, it shall retain the register of actions, and, if the information is not included in the register of actions, whether the juvenile was represented by an attorney or waived representation.

(3) [Unchanged.]

(F)-(G)[Unchanged.]

Staff Comment: The April 5, 2005, proposed amendment of MCR 3.925(E)(2)(c) would require that records and files of all juvenile offenses be destroyed when the person becomes 30 years old, instead of the current language, which requires that the records and files of certain adjudicated juvenile offenses be retained permanently.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-56. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 7.205. On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.205 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) Late Appeal.

(1)-(2) [Unchanged.]

(3 Except as provided in subrule (F)(4), leave to appeal may not be granted if an application for leave to appeal is filed more than ~~12~~ 6 months after the later of:

(a) entry of a final judgment or other order that could have been the subject of an appeal of right under MCR 7.203(A), but if a motion described in MCR 7.204(A)(1)(b) was filed within the time prescribed in that rule, then the ~~12~~ 6 months are counted from the entry of the order denying that motion; or

(b) entry of the order or judgment to be appealed from, but if a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period, then the ~~12~~ 6 months are counted from the entry of that order denying the motion.

(4) The limitation provided in subrule (F)(3) does not apply to an application for leave to appeal by a criminal defendant if the defendant files an application for leave to appeal within 21 days after the trial court decides a motion for a new trial, for judgment of acquittal, to withdraw a plea, or for resentencing, if the motion was filed within the ~~12~~ 6-month period, or if

(a) the defendant has filed a delayed request for the appointment of counsel pursuant to MCR 6.425(F)(1) within the ~~12~~ 6-month period,

(b) the defendant or defendant's lawyer, if one is appointed, has ordered the appropriate transcripts within 28 days of service of the order granting or denying the delayed request for counsel, unless the transcript has already been filed or has been ordered by the court under MCR 6.425(F)(2), and

(c) the application for leave to appeal is filed in accordance with the provisions of this rule within 42 days after the filing of the transcript. If

the transcript was filed before the order appointing or denying the appointment of counsel, the 42-day period runs from the date of that order.

A defendant who seeks to rely on one of the exceptions in subrule (F)(4) must file with the application for leave to appeal an affidavit stating the relevant docket entries, a copy of the docket or calendar entries, or other documentation showing that the application is filed within the time allowed.

(5) [Unchanged.]

(G) [Unchanged.]

Staff Comment: The April 5, 2005, proposed amendment of MCR 7.205(F)(3) would reduce the time for filing a late application for leave to appeal from the current deadline of 12 months from the entry of the final judgment or order appealed from or entry of an order resolving a timely filed postconviction motion to a deadline of 6 months from the entry of such orders. The proposed amendment of MCR 7.205(F)(4) would implement a 6-month deadline that corresponds to the reduction in subrule (3). The 6-month deadline in subrule (4) would make the limitation in (F)(3) inapplicable where the defendant files a postconviction motion within 6 months of the judgment or order appealed from and filed an application for leave to appeal within 21 days of the decision on a postconviction motion or if the defendant sought the appointment of counsel within 6 months of the order appealed from, counsel ordered the transcripts within 28 days of the appointment order, and defendant files an application for leave to appeal within 42 days of the filing of the complete transcripts or within 42 days of the order appointing counsel if the transcript was filed before entry of that order.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-04. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered April 12, 2005:

PROPOSED AMENDMENT OF MCR 6.412. On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.412 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 6.412. SELECTION OF THE JURY.

(A)-(E) [Unchanged.]

(F) Discrimination in the Selection Process

(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.

(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection.

~~(F)~~(G) [Relettered but otherwise unchanged.]

Staff Comment: The April 12, 2005, proposed amendment of MCR 6.412(F) is new language that states that discrimination on the basis of race, color, religion, national origin, or sex during the selection process of a jury is prohibited even in cases where the purpose would be to achieve balanced representation. Former subrule (F) is relettered as (G).

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-04. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered April 13, 2005:

PROPOSED AMENDMENT OF MCR 9.205. On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.205 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 9.205. STANDARDS OF JUDICIAL CONDUCT.

(A) [Unchanged.]

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for conviction of a felony, physical or mental disability that prevents the performance of judicial duties, misconduct in office, persistent failure to perform judicial duties, habitual intemperance, or conduct that is clearly prejudicial to the administration of justice.

[ALTERNATIVE A]

In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint.

[ALTERNATIVE B]

In addition to any other sanction imposed, a judge may be ordered to pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint only if the judge engaged in conduct involving fraud, deceit, or intentional misrepresentation, or if the judge made misleading statements to the commission, the commission's investigators, the master, or the Supreme Court.

(1)-(3) [Unchanged.]

Staff Comment: This order invites comments on two alternative proposed amendments of MCR 9.205(B). Both would allow the Judicial Tenure Commission to recommend and this Court to order that a disciplined judge pay the costs, fees, and expenses incurred by the commission in prosecuting the complaint of judicial misconduct. Alternative B is narrower in that it only allows costs to be assessed where the judge is engaged in conduct involving fraud, deceit, intentional misrepresentation, or misleading statements to the commission, the commission's investigators, the master, or the Supreme Court. Cf. *In re Noecker,* 472 Mich 1 (2005).

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-60. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

WEAVER, J. I propose for public comment Alternative C: consideration of whether this Court has the constitutional authority to assess a judge for the costs incurred as a result of a Judicial Tenure Commission (JTC) proceeding instituted against that judge.

Article 6, § 30(2) of the 1963 Michigan Constitution provides:

> On recommendation of the judicial tenure commission, the supreme court may *censure, suspend with or without salary, retire or remove a judge* for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. *The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.* [Emphasis added.]

It has been suggested that the emphasized text in § 30 provides the authority for the Supreme Court to assess costs. However, the language is very specific: the Supreme Court has the authority to "censure, suspend . . ., retire or remove a judge . . . ." There is no grant of power to this Court to assess costs. Further, while it has also been suggested that the grant of power to "make rules implementing this section" authorizes the Court to adopt a rule assessing costs, that suggestion is at best questionable. The rulemaking authority granted by the Michigan Constitution applies only to the specifically enumerated powers granted to this Court, i.e., to "censure, suspend . . ., retire, or remove a judge . . . ." Moreover, the rulemaking authority is applicable to *procedural* rules, not substantive rules.

The state of Montana has a constitutional provision authorizing judicial discipline that is virtually identical to Michigan Const 1963, art 6, § 30. In *Harris v Smartt*, 316 Mont 130 (2003), the Montana Supreme Court addressed the issue of imposing costs on a respondent judge, and ultimately held that the Montana Constitution did not provide the authority to assess costs. Specifically, the constitutional language that provided for the creation of Montana's Judicial Standards Commission enumerated a limited number of powers to the state supreme court. The pertinent portion of the Montana Constitution provides:

> Upon recommendation of the commission, the supreme court may:
>
> (a) Retire any justice or judge for disability that seriously interferes with the performance of his duties and is or may become permanent; or
>
> (b) Censure, suspend, or remove any justice or judge for willful misconduct in office, willful and persistent failure to perform his duties, violation of canons of judicial ethics adopted by the supreme court of the state of Montana, or habitual intemperance. [Mont Const, art 7, § 11(3).]

The Montana Supreme Court held that this language did not provide the court with the authority to assess costs:

> [T]he framers of the Constitution specified what the Commission can recommend and what sanctions the Supreme Court can impose; retirement, censure, suspension or removal from office.

> *Expressio unius est exclusio alterius.* The express mention of the above sanctions implies the exclusion of non-expressed sanctions. We conclude that the imposition of costs and attorney fees exceeds the power granted to either the Commission or this Court by the Montana Constitution. [*Harris, supra* at 134-135.]

Since Michigan's comparable constitutional provision is virtually identical to that of the Montana Constitution, it is questionable whether this Court has authority to assess costs. Where the Michigan Constitution specifically lists only certain powers available to this Court, it follows that this Court may not exceed its authority by adding a new power not specifically granted to the Court.

The Montana Constitution also has a rulemaking provision that instructs the state's Judicial Standards Commission to "investigate complaints, and make rules implementing this section." Mont Const, art 7, § 11(2). In *Harris*, the Judicial Standards Commission had argued that its rulemaking authority allowed it to adopt a rule assessing costs against a respondent judge because such a rule was "procedural." The *Harris* court took issue with the commission's characterization of the rule as procedural:

> Such a rule serves as a deterrent and is thus substantive rather than procedural. As the $52,000 statement of costs in the present case graphically illustrates, an award of costs and attorney fees amounts to a very substantive "deterrent." The prospect of having to pay not only one's retained counsel but also the costs and attorney fees of counsel for the Commission would not only serve to deter unethical conduct but also would most certainly serve to deter judges from properly defending a charge of unethical conduct. [*Harris, supra* at 135.]

In finding the rule assessing costs to be "substantive" rather than "procedural," the *Harris* court determined that the commission had exceeded its constitutional authority.

Likewise, in Michigan, it appears that a cost assessment rule would be substantive, not procedural. Const 1963, art 6, § 30(2) grants this Court the authority to "make rules implementing this section," but this Court may not use the provision as the basis for adopting a rule that is not specifically tied to the enumerated powers to censure, suspend, retire, or remove a judge.

This issue most recently arose in *In re Noecker,* 472 Mich 1 (2005). There the JTC recommended that the Court assess as costs the $22,572.76 in expenses it had incurred in prosecuting the matter to conclusion before the master. In addition, a minority of the JTC recommended the Court impose as costs the expenses incurred by the taxpayers for visiting judges who replaced Judge Noecker during his suspension.

As I said in concurring in *In re Noecker, supra* at 18-19:

I would not assess costs because it appears to me that this Court has no constitutional authority to assess the judge for the costs of the proceedings. Const 1963, art 6, § 30 provides that "the supreme court may censure, suspend with or without salary, retire or remove a judge . . . ." Nothing in this constitutional provision gives this Court any authority to discipline the judge by assessing the judge the costs of the Judicial Tenure Commission proceedings against him or her.

Order Entered May 18, 2005:

PROPOSED AMENDMENT OF MCR 8.123. On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.123 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 8.123. COUNSEL APPOINTMENTS; PROCEDURE AND RECORDS.

(A)-(C) [Unchanged.]

(D) Required Records. At the end of each calendar year, a trial court must compile an annual ~~written or~~ electronic report of~~:~~

~~(1) the number of appointments given to each attorney by that court;~~

~~(2) the number of appointments given to each attorney by each judge of that court;~~

~~(3)~~ the total public funds paid to each attorney for appointments by that court~~; and~~

~~(4) the total public funds paid to each attorney for appointments by each judge of that court~~.

This subsection applies to appointments of attorneys in any capacity, regardless of the indigency status of the represented party. Trial courts that contract for services to be provided by an affiliated group of attorneys may treat the group as a single entity when compiling the required records ~~of appointments and compensation~~.

The records required by this subrule must be retained for the period specified by the State Court Administrative Office's General Schedule 16.

(E) [Unchanged.]

(F) Reports to State Court Administrator. A trial court must submit its annual electronic report to the State Court Administrator in the form specified by the State Court Administrator. When requested by the State Court Administrator, a trial court must cooperate in providing~~:~~

~~(1) provide a copy of its most recent annual report; and~~

~~(2) provide~~ additional data on an individual attorney, ~~or~~ judge, or attorney group for a period specified by the request, including the number of appointments by each judge, the number of appointments received by an individual attorney or attorney group, and the public funds paid for appointments by each judge.

Staff Comment: The proposed amendments of MCR 8.123 would broaden the rule's reporting requirements to cover court appointments of attorneys in all capacities, regardless of the indigency status of the represented party, while also simplifying the reporting requirements for trial courts. The amendments further would require trial courts to electronically submit their annual reports of counsel appointments to the State Court Administrative Office, in addition to continuing to maintain them for public inspection at the courts. Trial courts also would be required to cooperate with the State Court Administrator by providing additional data on appointments to individual attorneys or attorney groups, and on appointments by an individual judge, without having to include this data in their annual reports.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2001-10. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered May 24, 2005:

PROPOSED AMENDMENT OF MCR 4.101. On order of the Court, this is to advise that the Court is considering an amendment of Rule 4.101 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A)-(B) [Unchanged.]

(C) Appearance by Police Officer at Informal Hearing.

If a police officer has been notified by the court to appear at an informal hearing, the police officer must appear at the informal hearing unless the State Court Administrative Office has approved a local administrative order allowing a defendant to waive the appearance of the police officer at the informal hearing. The order shall include provisions for:

(1) allowing a defendant to waive the appearance of the police officer at the informal hearing,

(2) receipt by the court of a written statement of the police officer setting forth the facts that the police officer would testify to at the informal hearing if present,

(3) receipt of a copy of the police officer's written statement by the defendant at or before the commencement of the informal hearing,

(4) a provision allowing the defendant, after having an opportunity to review the police officer's written statement, the right to request an adjournment without penalty to require the officer's presence at the hearing when such presence was previously waived, but only if the request for adjournment is made at or before the commencement of the informal hearing, and

(5) procedures by which the court will notify the police officer of

(a) the defendant's waiver of the officer's appearance,

(b) the right of the police officer to appear at the informal hearing, and

(c) the right of the police officer, in lieu of appearing at the informal hearing, to provide a written statement setting forth the facts that the police officer would testify to at the informal hearing.

Failure of the police officer to appear as required by this rule shall result in a dismissal of the case without prejudice.

~~(C)~~-~~(G)~~(D)-(H) [Renumbered but otherwise unchanged.]

Staff Comment: The proposed amendment of MCR 4.101 would require certain procedures to be implemented by courts to allow the waiver of a police officer's attendance at civil infraction informal hearings, and would establish procedures if the police officer fails to appear for a hearing.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-16. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Certified Questions Declined May 26, 2005:

In re CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (MELSON V PRIME INSURANCE SYNDICATE, INC), No. 127088. The request to answer questions certified by the United States Court of Appeals for the Sixth Circuit is declined.

WEAVER, J. I concur in the order declining to answer the questions certified by the United States Court of Appeals for the Sixth Circuit because I continue to question this Court's authority to answer such questions. See, e.g., *Proposed Amendment of MCR 7.305,* 462 Mich 1208 (2000); *In re Certified Question (Wayne Co v Philip Morris Inc),* 622 NW2d 518 (Mich, 2001); *In re Certified Question (Kenneth Henes Special Projects Procurement, Marketing & Consulting Corp v Continental Biomass Industries, Inc)*, 468 Mich 109 (2003). Justice YOUNG also questions this Court's authority to answer questions certified by the federal courts, *post*;[1] and Justice LEVIN has questioned this Court's authority. See *In re Certified Question (Bankey v Storer Broadcasting Co),* 432 Mich 438, 462-471 (1989) (separate opinion of LEVIN, J.). Therefore, I decline to answer the questions in this case.

In light of the reasons offered by Justice MARKMAN as support for his opinion that the Court has the authority to answer such questions, as well as the statements that have been made by Justice LEVIN, Justice YOUNG, and myself on this issue, this Court should open an administrative file to consider the constitutionality of MCR 7.305. After taking public comment on this important issue, the Court can then decide definitively whether or not it has authority to answer certified questions, and, if it decides that it does have authority, clearly identify the basis for that authority because, to date, as Justice MARKMAN notes, no basis has been clearly identified.

YOUNG, J. I concur in the order declining to answer the questions certified by the United States Court of Appeals for the Sixth Circuit. Any construction of Michigan law that we would have provided by answering the certified questions would have been merely "advisory" because our decision would not have been binding. Absent an express constitutional exception, such as Const 1963, art 3, § 8,[1] any nonbinding decision issued by this Court is beyond the "judicial power" of this Court and, therefore, unconstitutional.

In 2000, this Court considered repealing MCR 7.305(B). I joined then-Chief Justice WEAVER's dissenting statement, which concluded that the certified question process was unconstitutional.[2] I wrote separately

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[1] See also *In re Certified Question (Wayne Co v Philip Morris Inc),* 622 NW2d 518 (Mich, 2001) (YOUNG, J., concurring).

[1] Const 1963, art 3, § 8 provides:

> Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.

[2] *Proposed Amendment of MCR 7.305*, 462 Mich 1208 (2000).

and reiterated this position in *In re Certified Question (Wayne Co v Philip Morris Inc)*.[3] Having realized, however, that my concerns about the constitutionality of MCR 7.305(B) failed to carry the day, I have since honored the majority position of this Court and participated in certified question matters.[4] However, Justice MARKMAN's lengthy statement justifying MCR 7.305(B) and these particular certified questions warrant an equally thorough response.[5]

I. THIS COURT MAY CONSTITUTIONALLY EXERCISE ONLY "JUDICIAL POWER"

The Michigan Constitution specifically provides that "[t]he *judicial power* of the state is vested exclusively in one court of justice . . . ."[6] I agree with Justice MARKMAN that "the entirety of the 'judicial power' has been given to this Court" by the people of this state.[7] I disagree, however, with Justice MARKMAN's apparent belief that the "judicial power" is an unbounded grant of judicial authority that permits this Court to entertain certified questions from courts of other jurisdictions.[8] The central flaw in Justice MARKMAN's analysis is his belief that the Supremacy Clause[9] and *Erie*[10] doctrine grant to *this* Court a power that the people of this state did not—the power to issue advisory opinions on Michigan law to the courts of other jurisdictions.

II. "JUDICIAL POWER" DOES NOT ENCOMPASS THE AUTHORITY TO ISSUE NONBINDING ADVISORY OPINIONS

The phrase "judicial power" is a legal term of art. Indeed, it has been

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[3] 622 NW2d 518 (Mich, 2001).

[4] See, e.g., *In re Certified Question (Kenneth Henes v Continental Biomass Industries, Inc)*, 468 Mich 109 (2003).

[5] As Justice MARKMAN has noted, I have previously relied on the "negative implication" theory of Const 1963, art 3, § 8 in questioning the constitutionality of MCR 7.305(B). *Post* at 1235. For the reasons indicated by Justice MARKMAN in his statement, however, I agree that the "negative implication" theory is flawed. Instead, it is the fact that MCR 7.305(B) exceeds our "judicial power" under Const 1963, art 6, § 1 that renders MCR 7.305(B) constitutionally infirm.

[6] Const 1963, art 6, § 1 (emphasis added).

[7] *Post* at 1235.

[8] *Id*. at 1236 ("the judicial power of Michigan is broad enough to encompass the consideration of [certified questions from other courts]").

[9] US Const, art VI, cl 2.

[10] *Erie R Co v Tompkins*, 304 US 64 (1938).

used identically in the Michigan constitutions of 1835,[11] 1850,[12] 1908,[13] and 1963.[14] Because the phrase is a legal term of art, we are to construe the phrase in its "technical, legal sense" in order to give effect to the intent of the ratifiers of Const 1963, art 6, § 1, who understood the phrase to have a "peculiar and appropriate meaning in the law."[15] This understanding can only be discerned by "delving into [the] body of case law" interpreting the phrase.[16]

An examination of the case law clearly indicates that the phrase "judicial power" does not have the all-encompassing scope that Justice MARKMAN's statement accords it. Instead, the phrase has a much more limited meaning. One such fundamental definitional limitation of judicial authority is that any opinion issued by a Michigan court must be *binding*. Justice CAMPBELL explained this essential point in 1867 in the case of *Underwood v McDuffee*:

> The judicial power, even when used in its widest and least accurate sense, involves the power to "*hear and determine*" the matters to be disposed of; and this can only be done by some order or judgment which needs no additional sanction to entitle it to be enforced. No action which is merely preparatory to an order or judgment to be rendered by some different body, can be properly termed judicial.[17]

This Court wholly endorsed *Underwood* and the *binding* nature of "judicial power" in the 1884 case of *Risser v Hoyt*,[18] in which Justice CHAMPLIN stated:

> [T]he exercise of *judicial power* in its strict legal sense can be conferred only upon courts named in the Constitution. The *judicial power* referred to is the authority to hear and decide controversies, *and to make binding orders and judgments respecting them*.[19]

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[11] Const 1835, art 6, § 1 ("The judicial power shall be vested in one supreme court . . . .").

[12] Const 1850, art 6, § 1 ("The judicial power is vested in one supreme court . . . .").

[13] Const 1908, art 7, § 1 ("The judicial power shall be vested in 1 supreme court . . . .").

[14] Const 1963, art 6, § 1 ("The judicial power of the state is vested exclusively in one court of justice . . . .").

[15] MCL 8.3a; *Wayne Co v Hathcock*, 471 Mich 445, 469 (2004); see also *People v Babcock*, 469 Mich 247, 257 (2003).

[16] *Hathcock, supra* at 471.

[17] 15 Mich 361, 368 (1867) (emphasis in original).

[18] 53 Mich 185 (1884).

[19] *Id*. at 193 (emphasis added).

In fact, just four years before the 1963 Constitution was ratified, this Court again endorsed the *Underwood*/*Risser* definition of "judicial power" in the 1959 case of *Johnson v Kramer Bros Freight Lines, Inc*.[20]

It is clear, therefore, that the ratifiers of the 1963 Constitution understood the phrase to be a legal term of art with a very precise meaning—a meaning that had been consistently construed in the case law for approximately one hundred years before the ratification of Const 1963, art 6, § 1. Indeed, writing for the Court in *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*,[21] Justice MARKMAN recently noted that the phrase "judicial power" was "well understood by scholars, lawyers, judges, and even laymen" at the time of the 1961 constitutional convention.[22]

Moreover, in 2001, Chief Justice TAYLOR, writing for the Court in *Lee v Macomb Co Bd of Comm'rs*,[23] specifically relied on the *Risser* Court's definition of "judicial power."[24] Additionally, just last term in *Nat'l Wildlife*, Justice MARKMAN aptly noted that "[t]he 'judicial power' has traditionally been defined by a combination of considerations," including "*the ability to issue proper forms of effective relief* . . . ."[25]

It is undeniable, therefore, that the proper exercise of "judicial power" by this Court must involve a decision that is *binding* and not merely *advisory*. A nonbinding decision issued by this Court would be an unconstitutional exercise of power. Justice MARKMAN wisely pointed out in *Nat'l Wildlife* that, " 'judicial power' is a matter of considerable constitutional significance"[26] and that this Court must refrain from "transforming the 'judicial power' from a concept of constitutional stature into a mere prudential concept . . . ."[27]

III. THIS COURT HAS NO POWER TO ENFORCE ANY DECISION IT MAKES ON THE ISSUES CERTIFIED

In the present case, our answers to the Sixth Circuit's certified questions would not have been binding in *any* way. Such a nonbinding, advisory opinion would have been inconsistent with the "judicial power" granted to this Court by the people of this state and, therefore, an unconstitutional exercise of our power.[28] Indeed, no certified question

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[20] 357 Mich 254, 258 (1959).

[21] 471 Mich 608 (2004).

[22] *Id*. at 627 n16.

[23] 464 Mich 726 (2001).

[24] *Id*. at 738.

[25] *Nat'l Wildlife*, *supra* at 614 (emphasis added).

[26] *Id.*

[27] *Id*. at 624-625 n 12.

[28] As this Court noted in *Hathcock*, "The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the

from a court of another jurisdiction could ever pass constitutional muster because this Court would lack authority to force the other jurisdiction to follow our decision. We have absolutely no authority to force a federal court, sister state court, or tribal court to adopt our answer to a certified question.[29]

In his statement, Justice MARKMAN attempts to overcome this constitutional impediment to the certified question process by asserting that this Court's answers to the certified questions "will be relied upon" by the Sixth Circuit.[30] While I tend to agree with Justice MARKMAN that it is entirely likely that the Sixth Circuit would have relied on our answers to the certified questions, this is beside the point. The point is not whether the Sixth Circuit would or would not have relied on our answer, but rather that we could not have *compelled* the Sixth Circuit to rely on our decision. Because we would have no enforcement power, our decision necessarily would have been advisory and nonbinding and therefore not a proper exercise of "judicial power" in the constitutional sense. Even Justice MARKMAN conceded in *Nat'l Wildlife* that an "advisory opinion" issued by this Court is "potentially beyond the traditional 'judicial power.' "[31] I agree with his position in *Nat'l Wildlife* rather than his statement here.

I am also not persuaded by Justice MARKMAN's assertion in his statement that the certified question process is constitutional because "the Michigan Legislature since at least 1963 has statutorily affirmed the jurisdiction of this Court over 'any case brought before it for review in accordance with the court rules promulgated by the supreme court,'

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request of either house of the Legislature or the Governor—and, then, only 'on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.' " *Hathcock*, *supra* at 484 n 98.

[29] Even given that the *Erie* doctrine would have made our answer to a certified question binding on a federal court, it is the effect of *federal*, not Michigan, law that would have made this so. Moreover, Justice MARKMAN offers no justification as to why our answer to a certified question would be binding on a sister state court or tribal court, both of which are permitted under MCR 7.305(B) to certify questions to this Court. While I realize that the latter two cases are not presently before us, they illustrate the constitutional shortcomings of MCR 7.305(B) and the limited reach of Justice MARKMAN's *Erie* analysis. As long as we do not have to worry about whether our answer to a certified question would be binding on a sister state court or tribal court, why limit the reach of MCR 7.305(B) only to those courts?

[30] *Post* at 1237.

[31] *Nat'l Wildlife*, *supra* at 625. Justice MARKMAN noted that the "advisory opinion" authority granted under Const 1963, art 3, § 8, was an exception to the traditional notion of "judicial power." *Id*. at 624-625.

including presumably MCR 7.305(B), MCL 600.215."[32] To describe MCL 600.215 as a "statutory affirmation" of this Court's certified question procedure seems an unduly expansive view of legislative regard for our rules. It merely recognizes our constitutional authority to make rules of procedure. It surely constitutes no legislative endorsement of MCR 7.305(B).[33]

More significant, an unconstitutional court rule does not magically become constitutional because the Legislature has acquiesced in or even endorsed it. The Legislature has no authority to absolve a rule that is constitutionally flawed. As Justice MARKMAN perceptively noted in *Nat'l Wildlife*:

> When a broadening and redefinition of the "judicial power" comes not from the judiciary itself, usurping a power that does not belong to it, but from the Legislature purporting to confer new powers upon the judiciary, the exercise of such power is no less improper.[34]

IV. THE QUESTIONS CERTIFIED DO NOT CLEARLY IMPLICATE MICHIGAN LAW

Additionally, I disagree with Justice MARKMAN's statement that "[t]he Sixth Circuit has acted responsibly" in certifying the present questions to us.[35] Setting aside the substantial constitutional concerns that I have

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[32] *Post* at 1240. MCL 600.215 provides:

> The supreme court has jurisdiction and power over:
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> (1) any matter brought before it by any appropriate writ to any inferior court, magistrate, or other officer;
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> (2) any question of law brought before it in accordance with court rules, by certification by any trial judge of any cause pending or tried before him;
>
> (3) any case brought before it for review in accordance with the court rules promulgated by the supreme court.

[33] If anything, I would categorize the Legislature's apparent inaction in denouncing MCR 7.305(B) more a legislative "acquiescence" than "affirmation." As we stated last term in *Neal v Wilkes*, " '[l]egislative acquiescence' has been repeatedly rejected by this Court . . . ." 470 Mich 661, 668 n 11 (2004). However, I can see no other justification for Justice MARKMAN's reliance on MCL 600.215 as support for his position.

[34] *Nat'l Wildlife, supra* at 616.

[35] *Post* at 1240.

already discussed, there are numerous *practical* reasons why it was proper to decline the Sixth Circuit's request in this instance. First, the Sixth Circuit has asked us to interpret *Michigan* law in helping it to resolve the underlying contract dispute between the parties, despite the fact that the parties' contract has an unambiguous *Illinois* choice of law provision. Second, it is not clear that the legislation the Sixth Circuit has asked us to interpret even applies to the defendant, a "surplus line carrier." Third, the parties have indicated that the Sixth Circuit has misunderstood and misstated their arguments. These practical concerns were reason alone to deny the Sixth Circuit's request.

V. CONCLUSION

We are permitted to exercise only that power which is authorized under our Constitution. Because nonbinding decisions issued pursuant to MCR 7.305(B) fall outside the "judicial power" authorized under Const 1963, art 6, § 1, it is entirely proper for this Court to refrain from answering the questions presented. By declining to answer the certified questions, we are not "ceding responsibility for the interpretation of Michigan law,"[36] but rather remaining true to the highest form of law in our state—our Constitution—and honoring those who gave the law: the people of Michigan.

MARKMAN, J. (*dissenting*). This is to respond to the concurring statements of Justices WEAVER and YOUNG, the former of which questions this Court's authority to answer certified questions and the latter of which concludes that to answer such questions would be "inconsistent with the 'judicial power' granted to this Court . . . ." *Ante* at 1228. I respectfully disagree with the latter statement, and conclude that this Court does possess the authority to answer certified questions. Moreover, I believe that it is important that we answer such questions. Nonetheless, I commend Justices WEAVER and YOUNG for recognizing this Court's obligation to identify the source of its authority in this matter, something that we have not clearly done in the past. While the opposition argument has been made, not only by Justice YOUNG, but also by Justice LEVIN in his separate opinion in *In re Certified Question (Bankey v Storer Broadcasting Co)*, 432 Mich 438 (1989), no substantial argument has yet been made in support of the exercise of federal certified question authority despite the fact that this Court has been expressly authorized by its own rules for more than four decades to answer such questions, GCR 1963, 797; MCR 7.305(B), and has, in fact, answered certified questions on a sporadic basis for more than two decades, *In re Certified Questions (Karl v Bryant Air Conditioning)*, 416 Mich 558 (1982).

In my judgment, this Court's authority to answer federally certified questions derives from the following sources of law:

(1) Michigan Sovereignty. As the Supreme Court of Oklahoma has observed, "This Court needs no explicit grant of jurisdiction to answer certified questions from the federal court; such power comes from the

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[36] *Post* at 1242.

United States Constitution's grant [sic, recognition of the reservation, see US Const, Am X] of state sovereignty." *Shebester v Triple Crown Insurers*, 826 P2d 603, 606 n 4 (Okla, 1992). The Ohio Supreme Court has similarly observed, "[W]e need no grant of jurisdiction in order to answer certified questions. . . . In our view, such a power exists by virtue of Ohio's very existence as a state in our federal system." *Scott v Bank One Trust Co, NA*, 62 Ohio St 3d 39, 42 (1991).

> We begin with a truism: the Ohio Constitution permits the state to exercise its own sovereignty as far as the United States Constitution and laws permit. Since federal law recognizes Ohio's sovereignty by making Ohio law applicable in federal courts, the state has the power to exercise and the responsibility to protect that sovereignty. Therefore, if answering certified questions serves to further the state's interests and preserve the state's sovereignty, the appropriate branch of state government—this court—may constitutionally answer them. [*Id.*]

See also *Sunshine Mining Co v Allendale Mut Ins Co*, 105 Idaho 133, 136 (1983); *In re Elliott*, 74 Wash 2d 600, 616-617 (1968). In answering a certified question, what this Court does is to preserve the integrity of the laws and Constitution of Michigan in a circumstance in which a judicial body that is not a part of this state nonetheless is constitutionally obligated to apply Michigan laws and the Michigan Constitution. There are few elements more fundamental to a state's sovereignty than the maintenance and preservation of its own legal institutions. There is perhaps no more indispensable badge of sovereignty than the ability of a government to enforce its own laws. "The state's sovereignty is unquestionably implicated when federal courts construe state law." *Scott*, *supra* at 42. "Certification serves to preserve the state's sovereignty by ensuring that federal courts correctly apply [state law]." *Grover v Eli Lilly & Co*, 33 F3d 716, 719 (CA 6, 1994). To the extent that answering a certified question assists a federal court to apply Michigan laws and the Michigan Constitution accurately and in accord with the governmental processes that have been established by "we the people" of Michigan, the sovereign interests of this state have been furthered. For whenever Michigan law is misinterpreted, no matter how much care has been taken by a federal court to faithfully give meaning to that law, a toll has been taken in terms of the integrity of that law. As the Chief Justice of the Indiana Supreme Court has observed, the "certified question insures that the state supreme court decides important and often novel issues of state constitutional law." Shepard, *Is Making State Constitutional Law through Certified Questions a Good Idea or a Bad Idea?*, 38 Val U L R 327, 339 (2004). As with any other sovereign, Michigan is entitled to undertake actions that are reasonably necessary to maintain and preserve the elements of its sovereignty, including those protective of the foundations

of its own rule of law. And no affirmative grant of authority is required beyond the inherent attributes of sovereignty.

(2) Federal Structure. In *Erie R Co v Tompkins*, 304 US 64, 71 (1938), the United States Supreme Court made clear that a federal court sitting in a diversity case must apply "the laws of the several states," including the interpretations of those laws by the courts of these states.

> "[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally, but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . . [T]he authority and only authority is the State, and, if that be so, the voice adopted by the state as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." [*Id*. at 79 (citation omitted).]

Therefore, the Supreme Court concluded that the rule of *Swift v Tyson*, 41 US (16 Pet) 1 (1842), in which federal "common law" authority had been placed in the federal courts in diversity cases, posed an " 'unconstitutional assumption of powers by Courts of the United States,' " *Erie, supra* at 79 (citation omitted), and "invaded rights which in our opinion are reserved by the Constitution to the several states." *Id*. at 80. Answering certified questions is one reasonable means by which this Court minimizes the risk that Michigan laws will be misconstrued and misapplied by the federal courts. That there may be other means available for communicating the laws of this state—all of a less effective character than the certified question, for each would allow the litigant in the certified case itself to chance the misapplication of Michigan law, without recourse to this Court—does not preclude Michigan from choosing to employ the certified question as one important vehicle for ensuring the integrity of its own laws.

In conjunction with *Murdock v City of Memphis*, 87 US (20 Wall) 590 (1874), in which the United States Supreme Court held that it lacked appellate jurisdiction to review questions of state law, *Erie* makes clear that Michigan is fully responsible for its own law and possesses the necessary constitutional ammunition to protect that law. "Together *Murdock* and *Erie* give states control over their own law." Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv L R 881, 921 (1986). Such control, however, is potential rather than actual until the states act affirmatively to maintain their own constitutional prerogatives.

In addition to vindicating this *state* right, the certified question also serves to vindicate a corollary *federal* right, which is the right of a litigant to bring certain types of lawsuits involving issues of state law in federal court. The certified question procedure assists in ensuring that litigants are subject to the *same* state law, whether their lawsuit is brought in

state or federal court. A Michigan litigant, for example, need not sacrifice his or her constitutional right to bring a lawsuit in federal court out of concern that a different, and perhaps less protective, state law will be applied in federal court than in state court. See *Elliott*, *supra* at 616 ("We believe the citizens of the state are entitled to have the same rule of law applied on an issue regardless of whether it arises in a federal or state court.") The certified question procedure ensures a more uniform understanding of Michigan law, in whatever forum that law is applied. Thus, at the same time that the certified question reinforces the sovereign institutions of our state and prevents the infringement of our state's constitutional prerogative to maintain its own law, it also serves to uphold the right to invoke the federal judicial power by promoting the equal application of the law in federal and state judicial forums.

> Certification is perhaps uniquely suited to further the principles of judicial federalism underlying the Supreme Court's decision in *Erie*. By allowing state, rather than federal, courts to supply "an authoritative response" in the very case in which an unsettled question of state law arises, certification ensures that states—acting through the agents of their choice—rather than federal courts will exercise the "sovereign prerogative of choice" inherent in the resolution of unsettled questions of state law. [Clark, *Ascertaining the Laws of the Several States*, 145 U Pa L R 1459, 1550 (1997) (citations omitted).]

Nothing in the Michigan Constitution expressly grants jurisdiction to the courts of Michigan to entertain federal claims; it has long been understood that state courts may be required under some circumstances to resolve such claims, and to adjudicate federal rights. *FERC v Mississippi*, 456 US 742 (1982); *Testa v Katt*, 330 US 386 (1947). These judicial obligations arise out of the federal structure of our constitutional system and the Supremacy Clause of the federal constitution, art VI. Although I do not view it as obligatory that a state court must respond to a federally certified question, cf. Smith, *The Anticommandeering Principle and Congress's Power to Direct State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law*, 31 Conn L R 649 (1999), the authority to answer such questions, just as the obligation to resolve certain federal claims and to adjudicate certain federal rights, is a function of the relationship between the national and state governments within our federal constitutional architecture.

(3) Equal Footing Doctrine. The United States Supreme Court in *Coyle v Smith*, 221 US 559, 580 (1911), observed that our system of government was predicated upon the "constitutional equality" of the states, such equality being "essential to the harmonious operation of the scheme upon which the Republic was organized." Although it may be that Michigan can choose to deny itself some aspect of its own sovereignty, such as preserving the integrity of its own laws when they are applied by a court of the United States, I would not assume such a denial—one that

would place us on unequal footing with virtually every other state of the Union in terms of the constitutionally available tools for maintaining our sovereign institutions—absent a clear limitation in our own Constitution. No such limitation exists, in my judgment. I would not deprive Michigan, virtually alone among the states, see Schneider, "*But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law,* 41 Wayne L R 273, 275 n 1, Appendix (1995); Kaye & Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L R 373, Appendix A (2000), of the authority to maintain effective control over its own laws, nor erode the right of the people of Michigan in diversity cases, virtually alone among the people of the United States, to have the dispositive law of their home state applied. As Const 1963, art 1, § 1 states, "Government is instituted for the[] equal benefit, security and protection [of the people]." For this Court to nullify the certified question procedure, either by repeal or disuse, would be to undermine a procedure that is designed to assist in upholding this guarantee.

(4) Judicial Power. One argument in opposition to this Court's authority to answer federally certified questions is predicated upon Const 1963, art 3, § 8. See *Bankey*, *supra* at 468-469. This provision, contained in the "General Government" article of the Constitution, which precedes the "Legislative Branch," "Executive Branch," and "Judicial Branch" articles, allows either house of the Legislature or the Governor to certify questions to this Court. It is argued that this statement of authority implies the absence of federal certified question authority. This analysis is in error, in my judgment, for these distinct classes of certified questions have little in common beyond their nomenclature. The certified question authority set forth in article 3 modifies the relationships between the three branches of Michigan government, and would be inappropriately located in any of the three succeeding articles that address only the powers of a single one of these branches. Federal certified question authority, on the other hand, does not affect the "separation of powers" (which is another matter of attention in article 3, see art 3, § 2), but rather concerns the sovereignty of Michigan within the American system of federalism. There is no negative implication for the existence of the federal certified question authority that reasonably arises from the creation of the legislative and executive certified question authority since these two authorities serve altogether different constitutional purposes.

The more relevant provisions to assess in determining whether there exists federal certified question authority are Const 1963, art 1, § 1 and art 6, § 1. The former specifies that "*[a]ll* political power is inherent in the people" (emphasis added), while the latter specifies that *all* the "judicial power" is reposed in "one court of justice." That is, from the source of *all* of Michigan's political power, "the people," the entirety of the "judicial power" has been given to this Court. Such power could have been withheld, in whole or part, or granted to some other institution of government, but it was not. It was reposed in this Court. While "the courts receive judicial power by grant in the State Constitution, the *whole of such power* reposing in the sovereignty is granted to those bodies

except as it may be restricted in the same instrument." *Washington-Detroit Theater Co v Moore*, 249 Mich 673, 680 (1930) (emphasis added).

> The historical argument [that a declaratory proceeding is not part of the judicial power], however much it may circumscribe a government of granted powers, is not applicable to a sovereign State [of inherent powers]. [*Id*.]

The determination of Michigan law is at the core of the judicial power of this Court. There being no constitutional prohibition upon the consideration of federally certified questions, which are designed only to elicit such a determination, I believe that the judicial power of Michigan is broad enough to encompass the consideration of such questions. As a function of Michigan's general powers under both the United States and Michigan constitutions, in contrast to the limited powers of the federal government under the federal constitution, see US Const, Am X, it is simply insufficient to argue, as does Justice YOUNG, that the absence of a specific grant of authority to a state court of Michigan is the equivalent of a denial of such authority. The argument must instead be that the "judicial power" of this state, which is *all* that this Court has been granted, is not broad enough to encompass federal certified question authority.

In its analysis of the judicial power, this Court continued in *Moore*:

> When an actual controversy exists between parties, it is submitted in formal proceedings to a court, the decision of the court is binding upon the parties and their privies and is *res adjudicata* of the issue in any other proceedings in court in which it may be involved, what else can the decision be but the exercise of judicial power? [*Id.* at 680-681.]

In *In re Richards*, 223 A2d 827, 829-830 (1966), the Maine Supreme Court expressly relied on *Moore*'s definition of the judicial power and proceeded to its conclusion:

> We conclude . . . that our participation in the certification procedure will constitute a valid exercise of the "judicial power." We are satisfied that more will be involved than the mere rendering of a purely advisory opinion. The certification by the federal court becomes by the force of our statute the jurisdictional vehicle for placing the matter before the court for its action. Parties are before the court and are provided with the opportunity for presentation of briefs and oral argument customary upon appeal. The certification will make it apparent that there is a genuine live controversy between the parties pending in the federal court, a controversy based upon an existing factual situation which will be determined

> by our response to questions. . . . We rely upon the doctrine of [*Erie*] to make our decision and opinion given in answer to questions under this procedure conclusive and determinative in the federal courts with respect to the state of the law in Maine. [*Id.* at 832 (citations omitted).]

Cf. *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112 (2002) (recognizing this Court's authority in the exercise of the judicial power to adjudicate moot cases or controversies where they present an issue that is likely to recur yet regularly evade judicial review).

The subject matter of the federal certified question falls within the traditional scope of this Court's "judicial power," pertaining as it does to the meaning of Michigan law. Indeed, as noted, it falls within the *exclusive* "judicial power" of this Court to give dispositive meaning to such law. Further, the federal certified question entails the consideration of fully justiciable questions that are typically within the cognizance of the judicial power. Nor does the federal certified question call for a response that is truly in the nature of an "advisory opinion." Rather, while the answer to the federal certified question is sought in a context that is sui generis, the answer elicited from this Court will be relied upon to resolve an actual case or controversy. In *Grover*, *supra* at 719, the Sixth Circuit Court of Appeals made clear that this Court's response to a certified question will be treated as dispositive of that question:

> Permission to certify questions of law has been graciously extended by the highest courts of all the states in our circuit. Certification has proved to be an important tool for federal courts sitting in diversity . . . . A federal court that certifies a question of state law should not be free to treat the answer as merely advisory unless the state court specifically contemplates that result. When a state supreme court accepts a certified question, it voluntarily undertakes a substantial burden and its resolution of the issue must not be disregarded.
>
> . . . Certification serves to preserve the state's sovereignty by ensuring that federal courts correctly apply the law of [the state]. That state interest in protecting sovereignty would be undermined were federal courts to ignore the declarations of state law obtained through certification. [Citations omitted.]

See also *Hosp Underwriting Group, Inc v Summit Health Ltd,* 63 F3d 486, 493 (CA 6, 1995) (federal courts are "not free to ignore applicable state law, even if the law is unpopular or represents a minority view, especially where the state's legislature and supreme court continue to approve of the law"). Federal certified questions appertain to genuine disputes between real disputants, albeit in federal, not state, court. For this reason, Michigan court rules wisely require a "factual statement" from the federal court, MCR 7.305(B)(2)(b), and the submission of briefs

and a joint appendix from the parties, MCR 7.305(B)(3)(b)-(c), in order to reasonably remove the federal certified question from the realm of the abstract. The court's "factual statement" must be sufficient to afford context to this Court in understanding the question certified, a question that Michigan law "may resolve"—not to persuade us that the proper question has been certified by the court—for the resolution of the underlying case remains the responsibility of the federal court. The parties' briefings and appendix must similarly supply us with the information necessary to reasonably resolve the certified question.

Finally, there is no other impediment to the invocation of the judicial power that arises *from the question itself* being certified in this case, i.e., the certified question does not constitute a "political question" or a question of a sort that we would not address even if the question had originated in litigation brought in state court. As a result then of the specific character of the federal certified question, and as a result of the procedures established in Michigan for addressing such questions, I am convinced that this Court's authority to answer such questions is within our judicial power, and there is nothing in our Constitution that removes it from this Court's power.

Practical Impact. In addition to addressing the matter of constitutional authority to answer the federal certified question, it would be derelict not to also recognize the many practical benefits of answering federal certified questions. The intelligent exercise of such authority: (a) contributes to an expedited process by which the definitive law of Michigan is resolved by this Court and made available to the federal courts, *Arizonans for Official English v Arizona*, 520 US 43, 76 (1997) (certification process is one useful in "reducing the delay, cutting the cost and increasing the assurance of gaining an authoritative [state court] response"); (b) ensures that Michigan law is correctly and equally applied not only to litigants in diversity cases, but also to litigants in lower state courts that, in the absence of a definitive decision by this Court, might be inclined to defer excessively to existing federal court interpretations; (c) avoids litigative delays and costs far greater than the delays and costs inherent in certification caused when a federal court determines to abstain entirely from resolving an undecided issue of state law; (d) reduces incentives for forum shopping on the part of litigants who may seek out different federal and state formulations of state law; (e) avoids a legal regime in which, as former Sixth Circuit Court of Appeals Judge Wade McCree observed, pending a decision by the Michigan Supreme Court, "potential litigants are likely to behave as if the federal decision were the law of the state." McCree, *Foreword, 1976 Annual Survey of Michigan Law*, 23 Wayne L R 255, 257 n 10 (1977), that is, the impact of failing to answer a certified question is not exclusively upon the federal litigants in that case, but is also felt by the general citizenry of Michigan, which in order to avoid litigation will tend to conform their conduct to what they understand as current law, the law of the federal court; (f) stabilizes the development of Michigan law by diminishing the degree of fluctuation in that law likely to result when two parallel judicial tribunals are responsible for the interpretation of the law; (g) minimizes the

duplication of federal and state judicial decision-making resources; (h) assures the long-term stability of federal court judgments that might otherwise be called into question by the articulation of state law that is inconsistent with prior federal interpretations; and (i) obviates the problem of federal courts having to engage in the unusual judicial exercise of assessing not what *that court* understands the law to be in a given case, but what *another court will say* that law to be. This is a decidedly distinct exercise from a court assessing the law of a superior court and applying such law to the case before it, but rather involves judicial prediction. While I agree with *Erie* that this exercise is compelled by our nation's constitutional structure, I note merely that it is an unusual responsibility on the part of a federal judge and one with regard to which in the realm of Michigan law this Court can be of considerable assistance to federal courts.

Judicial Comity. To answer the federal certified question is also to serve the interest of comity between federal court and state court, and such an interest should be served whenever possible. The Sixth Circuit has demonstrated comity here by the act of certification, for "by using . . . certification . . . the federal courts [seek to avoid] federal intrusion into the state law-making function." Scanelli, *The Case for Certification*, 12 Wm & Mary L R 627, 641 (1971). When not inconsistent with other governmental interests, such comity is, I believe, expected by the people of Michigan, who are served by both state and federal institutions. As noted, the Sixth Circuit here is engaged in carrying out the important and necessary, but nonetheless unusual, responsibility of attempting to discern the meaning of as-of-yet undecided state law. To the extent that this Court can assist the federal court in this *nontraditional* responsibility by exercising its own *traditional* responsibilities of saying what Michigan law is, I can see no reason why this should not be done. The comity reflected in answering certified questions goes well beyond our willingness to respond to the request for assistance by another institution of government; it is also reflected in the various future tensions that will be avoided by our answer. As former Fifth Circuit Court of Appeals Judge John R. Brown once observed, "It has been awkward—and, to some, not a little embarrassing—when our first guess turns out to be wrong and the state court makes the second and last guess by reversing our holding." Brown, *Certification in Action*, 7 Cumb L R 455, 455 (1977). "One invaluable attribute of the certification process . . . is that it presents the rare occasion when courts of different systems can talk to one another about common problems." *Cuesnongle v Ramos*, 835 F2d 1486, 1493 (CA 1, 1987).

Where this Court answers a certified question, there is one less instance in which a state court will be required to opine that it "disagrees" with the federal court, or in which a federal court will be required to opine that it and the Michigan Supreme Court have "disagreed." Further, in one less instance, neither of these courts will be required to fashion questionable distinctions in the law in order to avoid disagreements and confrontations with the other. And in one less instance, no state court will dismissively treat a federal court decision as nonprecedential and then expect such federal court in return to respect-

fully abide by the state court decision. As Professor Phillip Kurland has written, certification constitutes "a demonstration of cooperative judicial federalism which would justify those of us who think the federal form of government has a contribution to make toward the preservation of justice in this country." Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 FRD 481, 490 (1960); *Lehman Bros v Schein*, 416 US 386, 390-391 (1974) ("certification- . . . helps build a cooperative judicial federalism").

The Sixth Circuit has acted responsibly in certifying questions to the state courts within its boundaries, including those state courts that have been more receptive to certified questions over the years than this Court. See *Schneider*, *supra* at 321 ("Relative to the Michigan Supreme Court, the highest courts of the other states within the Sixth Circuit appear to be much more receptive of certified questions from the Sixth Circuit."); see, for example, the odd situation of *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 310 (1986), in which this Court cited as persuasive authority a federal district court case decided only after this Court refused to answer a certified question. The Sixth Circuit has acted responsibly, and this Court should act equally responsibly in assisting it to understand the law of our own state, a law to which we are constitutionally empowered to give dispositive meaning. The comity inherent in answering the certified question is a comity that is in the interest of both federal and state courts, as well as of the constitutional institutions that the judges of these courts take an oath to honor.

Consensus of Authority. Finally, in addition to the several sources of constitutional authority set forth in this statement, I also draw some confidence that the federal certified question is a constitutional process in Michigan from the overwhelming consensus that has developed in support of this procedure. This consensus is evidenced in part from the following facts: (a) the overwhelming number of states, although possessing constitutions similar in relevant respects to Michigan's concerning the judicial power, themselves entertain certified questions, see Goldschmidt, American Judicature Society, *Certification of Questions of Law: Federalism in Practice*, pp 34-35 n 10 (survey reporting that only seven out of 284 state judges questioned had ever refused to certify a question from a federal court); *Schneider*, *supra* at Appendix; (b) Michigan's court rule, MCR 7.305(B), permitting certified questions has been in continuous existence since 1963; (c) the Michigan Legislature since at least 1963 has statutorily affirmed the jurisdiction of this Court over "any case brought before it for review in accordance with the court rules promulgated by the supreme court," including presumably MCR 7.305(B), MCL 600.215; (d) this Court, albeit sporadically, has entertained certified questions since at least 1982, *Karl*, *supra*, and as recently as 2003, *In re Certified Question (Henes Corp v Continental Biomass Industries)*, 468 Mich 109 (2003), and in 2000, we voted to reject the repeal of MCR 7.305(B); (e) each of the federal circuits, as well as the United States Supreme Court itself, see, e.g., *Fiore v White*, 528 US 23 (1999); *Kaye & Weissman*, *supra* at 384 n 65, has certified questions to state courts, and the Supreme Court has also spoken approvingly of the procedure, without apparent dissent, on various occasions, see, e.g., *Arizonans for*

Official English, *supra; Clay v Sun Ins Office Ltd*, 363 US 207, 212 (1960); and (f) the federal certification procedure is supported by the Standing Committee on the United States Courts of the State Bar of Michigan, the Appellate Practice Section of the State Bar of Michigan, the United States District Courts for the Eastern District and the Western District of Michigan, the Sixth Circuit Court of Appeals, and the Federal Bar Association of Michigan.

Response to Justice YOUNG. The thoughtful statement of Justice YOUNG deserves particular response. To begin with, Justice YOUNG characterizes my position as favoring an "unbounded" grant of judicial authority. I respectfully but strongly disagree. Rather, I favor an understanding of the "judicial power" that is in accord with its traditional exercise, and consistent with the powers accorded the judiciary under our Constitution. That my understanding of this power is broader than that of Justice YOUNG hardly makes this understanding "unbounded."

The principal flaw in Justice YOUNG's analysis is its failure to recognize that the exercise of this Court's "judicial power" is not merely "advisory," but is binding on the federal courts. Of course, in this unique judicial context, it cannot be binding on the federal courts in the exact way that our decisions are binding upon the Michigan Court of Appeals or the circuit court in Oakland County. But it is binding, not merely because the federal circuit court with jurisdiction over questions certified to this Court has said that it is binding, but more importantly because of *why* they have said it is binding. It is binding because *Erie*, itself based on our nation's constitutional structure, makes it binding. It is not by mere sufferance or even comity that the Sixth Circuit has made our determinations of Michigan law binding. Rather, "certification serves to preserve [Michigan's] sovereignty by ensuring that federal courts correctly apply the law of [Michigan]. That state interest in protecting sovereignty would be undermined were federal courts to ignore the declarations of state law obtained through certification." *Grover*, *supra* at 719. This "state interest," in truth, constitutes the interest of all governmental institutions, state and federal, operating within the boundaries of the United States Constitution.

Moreover, in recognizing this interest, the Sixth Circuit relied on exactly the same source of law—the United States Constitution and its definition of the relationship between the national and state governments—as that relied on in this statement. This is, the one source of law that the state and federal courts have in common. While Justice YOUNG views answers to certified questions as merely "advisory" because one sovereign ultimately cannot force its will upon another, this authority is better viewed as binding, in my judgment. There is a common source of law that is supreme to both judicial institutions, and it has been affirmatively recognized and invoked by each of these institutions in formal proceedings.

However, even if the Sixth Circuit did not feel so bound—and it has said that it *does*—this Court's exercise of the "judicial power" ultimately is not delegitimated by the responses or reactions of institutions or parties beyond our control. An executive officer may promise to ignore the decisions of this Court, or "massive resistance" may be employed in

opposition to its determinations, but that does not transform a proper exercise of the "judicial power" into an improper exercise. For the reasons set forth in this statement, I believe that certified question authority constitutes a legitimate exercise of "judicial power," and that Justice YOUNG has identified nothing within our Constitution or elsewhere that would deprive Michigan, nearly alone among the states, of this authority.

Finally, Justice YOUNG not only misapprehends this Court's "judicial power" by defining it in an overly narrow fashion, but arguably manages at the same time to define this power in what some may view an overly broad fashion by suggesting that it is within our authority to instruct the federal judiciary that they may have certified the wrong question to the wrong court. However, resolving "choice of law" questions and interpreting federal statutes are matters that are properly within the jurisdiction of the federal courts. Thus, at least some will view Justice YOUNG as having his constitutional understandings backward. He would interject this Court in matters that may be beyond our purview, while denying this Court a role in matters essential to maintaining the integrity of our state's legal institutions.

The truly unfortunate result of Justice YOUNG's position is that the institutions created by the people of Michigan for creating and defining the laws of our state will necessarily be undermined and greater responsibility for the interpretation of these laws will be ceded to institutions that are not subject to the exclusive control of the people of Michigan. It is Justice YOUNG's argument that this is what the people of Michigan desire, and this is what they have stated in their charter of government. I could not disagree more.

Conclusion. For the reasons set forth above, I would answer the certified questions presented.

By its refusal to answer these certified questions, the majority contributes to the distortion of our federal system of government by ceding responsibility for the interpretation of Michigan law to the federal judiciary, and by diminishing the control of the people of Michigan over the course of their own law. Those in the majority who have explained their rationale for their decision have grounded such decision in an understanding of the Michigan Constitution that did not, and never could have been able to, secure the support of the independent citizenry of this or of any other state. Those in the majority who have not explained their rationale have neglected to identify the prudential considerations that in their judgment outweigh the defense of state sovereignty.

TAYLOR, C.J., and CORRIGAN, J. We join the statement of Justice MARKMAN.

Order Entered May 26, 2005:

In re CONRAD, No. 128451. The Judicial Tenure Commission has issued a Decision and Recommendation for an Order of Discipline, to which the respondent, 37th District Court Magistrate James P. Conrad, consents. It is accompanied by a Settlement Agreement and Verified Waiver, Consent, and Agreement. Respondent has agreed to a public censure and a 180-day suspension without pay. Respondent has also agreed to remain in the alcohol counseling program that is administered through the 37th District Court until being discharged from it.

In resolving this matter, we are mindful of the standards set forth in *In re Brown*, 461 Mich 1291, 1292-1293 (2000):

> [E]verything else being equal:
>
> (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
>
> (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
>
> (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
>
> (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
>
> (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
>
> (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
>
> (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

In the present case, those standards are being applied in the context of the following stipulated findings of fact of the Judicial Tenure Commission, which, following our de novo review, we adopt as our own:

> 1. Respondent is, and at all material times was, a magistrate of the 37th District Court for the city of Warren, Macomb County, Michigan.
>
> 2. As a magistrate, he is subject to all the duties and responsibilities imposed on him by the Michigan Supreme Court, and is subject to the standards for discipline set forth in MCR 9.104 and MCR 9.205.
>
> 3. On October 4, 2003, two police officers observed Respondent driving at the intersection of Sherwood and Iowa in Detroit.
>
> 4. The officers effectuated a traffic stop based on a suspicion that Respondent was under the influence of alcohol.
>
> 5. After taking Respondent into custody, the police administered him two breathalyzer tests.

6. The results of each test established that Respondent's blood alcohol content was .21.

7. A blood alcohol content of .21 is over the legal limit for operating a motor vehicle in Michigan, and constitutes operating a vehicle under the influence of intoxicating liquor, under MCL 257.625.

8. Respondent was the defendant in *People v James P. Conrad*, 36th District Court Case No. 521712, which was dismissed on the trial date of December 6, 2004 when the arresting officer failed to appear.

9. On April 2, 1998, Respondent was driving on Gratiot in Roseville, Michigan in the early morning hours.

10. A state police trooper effectuated a traffic stop at approximately 2:45 a.m., under a suspicion that Respondent was driving under the influence of alcohol.

11. The Macomb County Sheriff department administered Respondent two breathalyzer tests after Respondent was taken into custody.

12. The results of each test established that Respondent's blood alcohol content was .20.

13. At the time, a blood alcohol content of .10 or higher was over the legal limit for operating a motor vehicle in Michigan, and constituted operating a vehicle under the influence of intoxicating liquor, under MCL 257.625.

14. Respondent admits that his conduct in both instances was wrong, and he deeply regrets any disgrace or embarrassment he has brought to the judiciary as a result.

After reviewing the recommendation of the Judicial Tenure Commission, the settlement agreement, the standards set forth in *Brown*, and the above findings of fact, we accept the recommendation of the Commission and order that Magistrate James Conrad be publicly censured and suspended without pay for 180 days. Because of respondent's status as 80% court administrator and 20% magistrate, respondent is ordered to repay to the district court $3,000 of his salary after 90 days of suspension, and $3,000 of his salary after 180 days of suspension. This order stands as our public censure.

Leave to Appeal Granted May 27, 2005:

GRIEVANCE ADMINISTRATOR v FIEGER, No. 127547. The parties are directed to include among the issues to be briefed: (1) whether the Attorney Discipline Board is empowered to declare Michigan Rules of Professional Conduct unconstitutional, and (2) whether it is significant that the

respondent's remarks were made before the expiration of the time period for filing an application for leave to appeal to this Court in the case that was the subject of the respondent's comments. The motion for recusal and for an evidentiary hearing is also considered, and it is denied.

CORRIGAN, J. (*concurring*). For the reasons stated in my concurring opinion in *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91 (2005), the recusal decisions of the other six members of the Court over the last two years, like Justice WEAVER's 251 pre-2003 recusal decisions, comport with the Constitution and the Michigan Court Rules.

WEAVER, J. (*dissenting*). I oppose the entry of any order in this case at this time and would hold this case in abeyance until this Court addresses, resolves, and makes clear for all to know the proper procedures for handling motions for the recusal of Supreme Court justices from participation in a case.[1] This Court opened an administrative file on the question on May 20, 2003, but has yet to address the matter further. See ADM 2003-26.

The question regarding the participation or nonparticipation of justices frequently recurs and is a matter of public significance because even one justice's decision to participate or not participate can affect the decision and outcome in a case. As I wrote in *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 97-101 (2005) (WEAVER, J., concurring):

> A justice's nonparticipation in a case may arise in one of two ways. A justice may decide, on his own initiative, not to participate in a case, and be shown as not participating. Alternatively, a party may request the recusal of a justice from a case. Recusal is defined as "[t]he process by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self interest, bias or prejudice." Black's Law Dictionary (6th ed).
>
> It is now clear to me that there is a right and an expectation of the people of Michigan that a justice will participate in every case unless there is a valid publicly known reason why the justice should not participate in a particular case. Traditionally, in this Court a justice's decision on whether to participate or not participate in a case has been a secret matter, and justices have not made public the reasons for that decision. . . . But a justice's decision whether to participate or not participate in a case and the reasons for that decision should not be governed by tradition and secrecy; they should be governed by the law, the Constitution, and the Michigan Court Rules made in conformance with the Constitution;

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[1] The various circumstances under which a justice should be disqualified from a case continue to arise. See, e.g., *Scalise v Boy Scouts of America,* Docket No. 128085.

and they should be made publicly and in writing for the record. This Court should set the highest standards for clear, fair, orderly, and public procedures.

The question whether a justice should participate or not participate in a case arises with regularity. Since May 2003, when I proposed opening an administrative file on the recusal procedure in *In re JK,* 468 Mich 1239 (2003), a justice has been shown as not participating, with no reason given, in at least 31 cases. . . .

The questions raised in this and any other case in which a justice's participation or nonparticipation arises are:

1) Are individual justices bound by the requirements of art 6, § 6 of the 1963 Michigan Constitution that states, "Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . ."?

2) Do the procedures regarding the disqualification of judges set forth in Michigan Court Rule 2.003 apply to Supreme Court justices?

Const 1963, art 6, § 6, which states that "Decisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . ." requires that justices give written reasons for each decision.[3] There is no more fundamental purpose for the requirement that the decisions of the Court be in writing than for the decisions to be accessible to the citizens of the state. Because a justice's decision to not participate in a case can, itself, change the outcome of a case, the decision is a matter of public significance and public access and understanding regarding a justice's participation or nonparticipation is vital to the public's ability to assess the performance of the Court and the performance of the Court's individual justices. Thus, the highest and best reading of art 6, § 6 requires that a justice's self-initiated decision not to participate, or a challenged justice's decision to participate or not participate, should be in writing and accessible to the public.

Further, Michigan Court Rule 2.003, which regulates the procedures for the disqualification of judges, applies to Michigan Supreme Court justices. . . . Michigan Court Rule 2.001 provides that the rules in chapter 2, which includes MCR 2.003, apply to all courts established by the Constitution and laws of the state of Michigan.[5] The Michigan Supreme Court is a court established by the Michigan Constitution. Thus, a plain reading of the court rule shows that MCR 2.003 governs the procedures for the disqualification of Michigan Supreme Court justices.

Almost two years ago, in May 2003, this Court's longstanding failure to follow and apply MCR 2.003 to itself became apparent to

me.[6] As a result, I proposed an amendment of MCR 2.003 that would clarify the applicability of MCR 2.003 and bring MCR 2.003 into conformance with the requirements of Const 1963, art 6, § 6. The amendment I proposed requires a justice to publish in the record of the case the reason(s) for the justice's decision whether to participate or not participate in a case.[7] In response to my recommendation that the Court open an administrative file and take public comments on such a rule, the Court opened an administrative file, ADM 2003-26, on May 20, 2003. But almost two years later, the Court has not yet placed the proposed amendment or the issue on any of the public hearing agendas on administrative matters held during that time. There have been five such public hearings since May 2003: September 23, 2003, January 29, 2004, May 27, 2004, September 15, 2004, and most recently January 27, 2005. Nor has the Court taken any other action regarding a clear, fair, orderly, and public procedure for the participation or nonparticipation of justices of the Supreme Court.

A justice's decision whether to participate or not participate in a case and the reasons for that decision should not be governed by tradition and secrecy; they should be governed by the law, the Constitution, and the Michigan Court Rules made in conformance with the Constitution; and they should be made publicly and in writing for the record. This Court should set the highest standards for clear, fair, orderly, and public procedures.

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[3] Art 6, § 6 of the 1963 Michigan Constitution states, in full:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[5] MCR 2.001 states:

> The rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the limited jurisdiction of a court makes a rule inherently inapplicable or where a rule applicable to a specific court or a specific type of proceeding provides a different procedure.

[6] In *In re JK,* 468 Mich 1239 (2003), my participation in a case became an issue, which led me to research the procedures governing the participation and disqualification of justices.

[7] See *In re JK*, 468 Mich 1239 (2003).

Thus, as I concluded in *Advocacy Org for Patients & Providers, supra* at 101, I conclude again by saying:

> I continue to urge the Court to recognize, open for public comment, and address this ongoing need to have clear, fair, orderly, and public procedures concerning the participation or nonparticipation of justices.

Leave to Appeal From Attorney Discipline Board Denied May 31, 2005:

GRIEVANCE ADMINISTRATOR v LEWIS, No. 127598.

Order Entered June 7, 2005:

PROPOSED AMENDMENTS OF MCR 8.103, 8.107 AND 8.110. On order of the Court, this is to advise that the Court is considering amendments of Rules 8.103, 8.107, and 8.110 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 8.103. STATE COURT ADMINISTRATOR.

The state court administrator, under the Supreme Court's supervision and direction, shall:

(1)–(3) [Unchanged.]

(4) File a request for investigation with the Judicial Tenure Commission against each judge who consistently fails to comply with the caseload management standards articulated in Administrative Order No. 2003-7 or fails to accurately report all matters undecided in compliance with the reporting requirement articulated in MCR 8.107.

(4)-(11) [Renumbered (5)-(12), but otherwise unchanged.]

RULE 8.107. STATEMENT BY TRIAL JUDGE AS TO MATTERS UNDECIDED.

(A) Time. Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission. For the purpose of this rule, the time of submission is the time the last argument or presentation in the matter

was made, or the expiration of the time allowed for filing the last brief or production of transcripts, as the case may be.

(B) Report as to Matters Undecided. ~~Every trial judge shall, o~~On the first business day of January, ~~May, and September,~~ April, July, and October of each year, every trial judge shall file a certified statement with the state court administrator ~~a certified statement~~ in the form prescribed by the state court administrator.~~, containing full information on any matter submitted to the judge for decision more than 4 months earlier which remains undecided which exceeded 56 days from submission at any time during the reporting period. The judge shall also set forth in the statement the reason a matter remains undecided. For the purpose of this rule the time of submission is the time the last argument or presentation in the matter was made or the expiration of the time allowed for filing the last brief, as the case may be. If the judge has no cases to report, the word "none" on a signed report is required.~~ The statement shall provide information on all matters pending during the reporting period that were not decided within 56 days from submission. The judge shall state the reason that a decision was not made within 56 days. A report is required regardless of whether there is any case to report. A copy of the report shall be filed with the chief judge of the court.

RULE 8.110. CHIEF JUDGE RULE.

(A)-(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1) [Unchanged.]

(2) As the presiding officer of the court, a chief judge shall:

(a) call and preside over meetings of the court;

(b) appoint committees of the court;

(c) initiate policies concerning the court's internal operations and its position on external matters affecting the court;

(d) meet regularly with all chief judges whose courts are wholly or partially within the same county;

(e) represent the court in its relations with the Supreme Court, other courts, other agencies of government, the bar, the general public, and the news media, and in ceremonial functions; ~~and~~

(f) counsel and assist other judges in the performance of their responsibilities~~.~~; and

(g) cooperate with all investigations conducted by the Judicial Tenure Commission.

(3)-(4) [Unchanged.]

(5) The chief judge of the court in which criminal proceedings are pending shall have filed with the state court administrator a monthly report setting forth the reasons for delay in the proceedings:

(a) in felony cases in which there has been a delay of ~~28 days between the hearing on the preliminary examination or the date of the waiver of the preliminary examination and the arraignment on the information or indictment;~~ more than 154 days between the order binding the defendant over to circuit court and adjudication;

~~(b) in felony cases in which there has been a delay of 6 months between the date of the arraignment on the information or indictment and the beginning of trial;~~

(b)~~(c)~~ in misdemeanor cases and cases involving local ordinance violations that have criminal penalties in which there has been a delay of ~~6 months~~ more than 91 days between the date of the ~~arraignment~~ defendant's first appearance on the warrant and complaint or citation and ~~the beginning of the trial~~ adjudication;

(c) In computing the 91-day and 154-day periods, the court shall exclude periods of delay

(1) between the time a preadjudication warrant is issued and a defendant is arraigned;

(2) between the time a defendant is referred for evaluation to determine whether he or she is competent to stand trial and the receipt of the report; or

(3) during the time a defendant is deemed incompetent to stand trial.

~~(d) in felony cases in which a defendant is incarcerated longer than 6 months and in misdemeanor cases in which a defendant is incarcerated longer than 28 days.~~

(6)-(7) [Unchanged.]

(D) [Unchanged.]

Staff Comment: New MCR 8.107(A) would require a judge to decide matters promptly after submission. MCR 8.107(B) would require a judge to submit quarterly reports that include information on all matters pending during the reporting period that were not decided within 56 days of submission.

The amendments of MCR 8.110(C) would require monthly reports to the state court administrator in felony cases where there has been a delay of more than 154 days between the order binding a defendant over to circuit court and adjudication in felony cases, or a delay of more than 91 days between a defendant's first appearance on the warrant and complaint, or citation, and adjudication in misdemeanor cases and local ordinance violations that carry criminal penalties.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-42. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered June 8, 2005:

PROPOSED AMENDMENT OF MCR 9.221. On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.221 of the Michigan Court Rules. Before determining whether the proposal should

be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 9.221. CONFIDENTIALITY; DISCLOSURE.

(A)-(H) [Unchanged.]

(I) Disclosure to Michigan Supreme Court. Regardless of whether a formal complaint has been filed, providing any information to the Michigan Supreme Court means that both confidentiality and privilege has been waived for that information, and the Court may include that information in its decisions.

Staff Comment: New subrule (I) would waive confidentiality and privilege, thus allowing inclusion of the information in the Supreme Court's decisions regardless of whether a formal complaint has been filed.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-33. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Rehearing Denied June 14, 2005:

JARRAD V INTEGON NATIONAL INSURANCE COMPANY, No. 126176. Reported *ante* at 207.

CAVANAGH and KELLY, JJ. We would grant rehearing.

Order Entered June 15, 2005:

PROPOSED AMENDMENT OF MRPC 1.15. On order of the Court, this is to advise that the Court is considering amendments of Rule 1.15 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a

public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[MRPC 1.15 is replaced with the following new language, but note Alternatives A-C in subsection (e) as indicated below:]

RULE 1.15. SAFEKEEPING PROPERTY.

(a) Definitions.

(1) "Allowable reasonable fees" for IOLTA accounts are per check charges, per deposit charges, a fee in lieu of a minimum balance, federal deposit insurance fees, sweep fees, and a reasonable IOLTA account administrative or maintenance fee. All other fees are the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account. Fees or charges in excess of the interest or dividends earned on the account for any month or quarter shall not be taken from interest or dividends earned on other IOLTA accounts or from the principal of the account.

(2) An "eligible institution" for IOLTA accounts is a bank or savings and loan association authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government, or is an open-end investment company registered with the Securities and Exchange Commission authorized by federal or state law to do business in Michigan. The eligible institution must pay no less on an IOLTA account than the highest interest rate or dividend generally available from the institution to its non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications. Interest or dividends and fees shall be calculated in accordance with the eligible institution's standard practice, but institutions may elect to pay a higher interest or dividend rate and may elect to waive any fees on IOLTA accounts.

(3) "IOLTA account" refers to an interest- or dividend-bearing account, as defined by the Michigan State Bar Foundation, at an eligible institution from which funds may be withdrawn upon request as soon as permitted by law. An IOLTA account shall include only client or third person funds that cannot earn income for the client or third person in excess of the costs incurred to secure such income while the funds are held.

(4) "Non-IOLTA account" refers to an interest- or dividend-bearing account from which funds may be withdrawn upon request as soon as permitted by law in banks, savings and loan associations, and credit unions authorized by federal or state law to do business in Michigan, the deposits of which are insured by an agency of the federal government. Such an account shall be established as:

(A) a separate client trust account for the particular client or matter on which the net interest or dividend will be paid to the client or third person, or

(B) a pooled client trust account with subaccounting by the bank or savings and loan association or by the lawyer, which will provide for computation of net interest or dividend earned by each client or third person's funds and the payment thereof to the client or third person.

(5) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.

(b) A lawyer shall:

(1) promptly notify the client or third person when funds or property in which a client or third person has an interest is received;

(2) preserve complete records of such account funds and other property for a period of five years after termination of the representation; and

(3) promptly pay or deliver any funds or other property that the client or third person is entitled to receive, except as stated in this rule or otherwise permitted by law or by agreement with the client or third person, and, upon request by the client or third person, promptly render a full accounting regarding such property.

(c) When two or more persons (one of whom may be the lawyer) claim interest in the property, it shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) A lawyer shall hold property of clients or third persons in connection with a representation separate from the lawyer's own property. All client or third person funds shall be deposited in an IOLTA or non-IOLTA account. Other property shall be identified as such and appropriately safeguarded.

ALTERNATIVE A

(e) In determining whether client or third person funds should be deposited to an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

ALTERNATIVE B

(e) In determining whether client or third person funds should be deposited to an IOLTA account or a non-IOLTA account, a lawyer shall consider the following factors:

(1) the amount of interest or dividends the funds would earn during the period that they are expected to be deposited in light of (a) the amount of the funds to be deposited; (b) the expected duration of the deposit, including the likelihood of delay in the matter for which the funds are held; and (c) the rates of interest or yield at financial institutions where the funds are to be deposited;

(2) the cost of establishing and administering non-IOLTA accounts for the client or third person's benefit, including service charges or fees, the lawyer's services, preparation of tax reports, or other associated costs;

(3) the capability of financial institutions or lawyers to calculate and pay income to individual clients or third persons; and

(4) any other circumstances that affect the ability of the funds to earn a net return for the client or third person.

The lawyer shall base the decision solely on whether the funds could be invested to provide a positive net return for the client.

ALTERNATIVE C

(e) In determining whether client or third person funds should be deposited to an IOLTA account or a non-IOLTA account, a lawyer shall base the decision solely on whether the funds could be invested to provide a positive net return for the client.

(f) A lawyer may deposit the lawyer's own funds in a client trust account only in an amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of service charges or fees.

(g) Legal fees and expenses that have been paid in advance shall be deposited in a client trust account and may be withdrawn only as fees are earned or expenses incurred.

(h) No interest or dividends from the client trust account shall be available to the lawyer.

(i) The lawyer shall direct the eligible institution to:

(1) remit the interest and dividends from an IOLTA account, less allowable reasonable fees, if any, to the Michigan State Bar Foundation at least quarterly;

(2) transmit with each remittance a report which shall identify each lawyer for whom the remittance is sent, the amount of remittance attributable to each IOLTA account, the rate and type of interest or dividends applied, the amount of interest or dividends earned, the amount and type of fees deducted, if any, and the average account balance for the period in which the report is made; and

(3) transmit to the depositing lawyer a report in accordance with normal procedures for reporting to its depositors.

(j) A lawyer's good-faith decision regarding the deposit or holding of such funds in an IOLTA account is not reviewable by a disciplinary body. A lawyer shall review the IOLTA account at reasonable intervals to determine whether changed circumstances require the funds to be deposited prospectively in a non-IOLTA account.

Staff Comment: The proposal to amend MRPC 1.15 would conform with the decision in *Brown v Legal Foundation of Washington,* 538 US 216; 123 S Ct 1406; 155 L Ed 2d 376 (2003), to create interest rate parity with non-IOLTA investments consistent with changes in financial products presently available on the market, and to make other revenue-enhancing modifications to the IOLTA program.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2005, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2003-19. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Clarification Granted June 24, 2005:

In re CONRAD, No. 128451. The order of May 26, 2005, 472 Mich 1242, is amended to provide that the 180-day suspension without pay of 37th District Court Magistrate James P. Conrad shall commence on July 1, 2005.

Order Entered June 28, 2005:

PROPOSED AMENDMENTS OF MCR 5.144, 5.203, 5.207, 5.302, 5.307, 5.404, and 5.409. On order of the Court, this is to advise that the Court is considering amendments of Rules 5.144, 5.203, 5.207, 5.302, 5.307, 5.404, and 5.409 of the Michigan Court Rules. Before determining whether the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted on the Court's website at www.courts.michigan.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposals in their present form.

[The present language would be amended as indicated below:]

RULE 5.144. ADMINISTRATIVELY CLOSED FILE.

(A) Administrative Closing. The court may administratively close a file

(1) for failure to file a notice of continuing administration as provided by MCL 700.3951(3) or

(2) for other reasons as provided by MCR 5.203(D) or, after notice and hearing, upon a finding of good cause.

In a conservatorship, the court may administratively close a file only when there are insufficient assets in the estate to employ a successor or special fiduciary after notice and hearing, upon a finding of good cause.

(B) [Unchanged.]

RULE 5.203. FOLLOW-UP PROCEDURES.

Except in the instance of a personal representative who fails to timely comply with the requirements of MCL 700.3951(1), if it appears to the court that the fiduciary is not properly administering the estate, the court shall proceed as follows:

(A)-(C) [Unchanged.]

(D) Suspension of Fiduciary, Appointment of Special Fiduciary. If the fiduciary fails to perform the duties required within the time allowed, the court may do any of the following: suspend the powers of the dilatory fiduciary, appoint a special fiduciary, and close the estate administration. If the court suspends the powers of the dilatory fiduciary or closes the estate administration, the court must notify the dilatory fiduciary, the attorney of record for the dilatory fiduciary, the sureties on any bond of the dilatory fiduciary that has been filed, the financial institution where the dilatory fiduciary has deposited funds, any guardian ad litem, and the interested persons at their addresses shown in the court file. This rule does not preclude contempt proceedings as provided by law.

(E) [Unchanged.]

RULE 5.207. SALE OF REAL ESTATE.

(A) Petition. Any petition to approve the sale of real estate must contain the following:

(1) the terms and purpose of the sale,

(2) the legal description of the property, ~~and~~

(3) the financial condition of the estate before the sale, and

(4) an appended copy of the most recent assessor statement showing the State Equalized Value of the property. If the court is not satisfied that the evidence provides the fair market value, a written appraisal may be ordered.

(B) [Unchanged.]

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES. [Alternative A]

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding. Except as provided in this court rule, requiring additional documentation at the time of filing the petition or application for commencement, such as a death certificate or additional information about the proposed personal representative, is prohibited.

(B)-(D) [Unchanged.]

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES. [Alternative B]

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition

for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding. When filing either an application or petition to commence a decedent estate, a certified copy of the death certificate must be attached. Requiring additional documentation, such as information about the proposed personal representative, is prohibited.

(B)-(D) [Unchanged.]

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) Inventory Fee. Within 91 days of the date of the letters of authority, the personal representative must submit to the court the information necessary for computation of the probate inventory fee. In calculating the inventory fee, deductions shall be allowed for secured loans on property listed on the inventory, but no other deductions shall be allowed. The inventory fee must be paid no later than the filing of the petition for an order of complete estate settlement under MCL 700.3952, the petition for settlement order under MCL 700.3953, or the sworn statement under MCL 700.3954, or one year after appointment, whichever is earlier.

(B)-(D) [Unchanged.]

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) Petition for Guardianship of Minor. If the court requires the petitioner to file a social history before hearing a petition for guardianship of a minor, it shall do so on a form approved by the State Court Administrative Office. The information in the social history for minor guardianship is confidential, and it is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order.

~~(A)-(E)~~(B)-(F) [Relettered, but otherwise unchanged.]

RULE 5.409. REPORT OF GUARDIAN; INVENTORIES AND ACCOUNTS OF CONSERVATORS.

(A) [Unchanged.]

(B) Inventories.

(1) [Unchanged.]

(2) Filing and Service. Within 56 days after appointment, a conservator or, if ordered to do so, a guardian shall file with the court a verified inventory of the estate of the protected person, serve copies on the persons required by law or court rule to be served, and file proof of service with the court. In valuing joint property listed on the inventory, the conservator or guardian must identify the value of the part of the property owned by the ward.

(C) Accounts.

(1) Filing, Service. A conservator must file an annual account unless ordered not to by the court. A guardian must file an annual account if ordered by the court. The account must be served on interested persons, and proof of service must be filed with the court. The copy of the account served on interested persons must include a notice that any objections to

the account should be filed with the court and noticed for hearing. When required, an accounting must be filed within 56 days after the end of the accounting period.

(2)-(3) [Unchanged.]

(4) Exception, Conservatorship of Minor. Unless otherwise ordered by the court, no accounting is required in a minor conservatorship where the assets are restricted or in a conservatorship where no assets have been received by the conservator. If the assets are ordered to be placed in a restricted account, proof of the restricted account must be filed with the court within 14 days of the conservator's appointment or receipt of funds. The conservator must file with the court an annual verification of funds on deposit with a copy of the corresponding financial institution statement attached.

(5) Contents. The accounting is subject to the provisions of MCR 5.310(C)(2)(c) and (d), except that references to a personal representative shall be to a conservator. A copy of the corresponding financial institution statement for all liquid assets, dated within 30 days of the end of the accounting period, must be appended to verify assets on hand at the end of the accounting period, unless waived by the court for good cause.

(6) Periodic Review. The court shall either review or allow accounts annually. Accounts should be allowed at least once every three years. ~~Unless accounts have been allowed, the court shall review the accounts no less often than once every three years.~~

(D)-(F) [Unchanged.]

Staff Comment: The proposed amendments result from the State Court Administrative Office's statewide conservatorship case review prompted by the Performance Audit of Selected Probate Court Conservatorship Cases by the Michigan Office of the Auditor General, and the State Bar of Michigan Probate and Estate Planning Section's Uniformity of Practice Committee's survey of probate court practices. The amendment of MCR 5.144(A)(2) eliminates the ability to close a conservatorship estate because of suspension of a fiduciary unless there are insufficient funds available to hire a special fiduciary, only after notice, hearing, and a showing of good cause. The amendment of MCR 5.203(D) adds the financial institution and guardian ad litem to the list required to receive notice when a fiduciary is suspended. The amendment of MCR 5.207(A) allows for better court oversight when real property is sold. [Alternative A—The amendment of MCR 5.302(A) prohibits a court from requiring documentation to commence an estate that is not legally required.] [Alternative B—The amendment of MCR 5.302(A) requires that a certified copy of a death certificate be attached to the petition or application when commencing a decedent estate and requiring additional documentation is prohibited.] The amendment of MCR 5.307(A) allows for the deduction of secured loans when calculating the inventory fee due. The amendment of MCR 5.409(C)(1) clarifies that the fiduciary must serve the account on the interested persons and file the proof of service with the court. The amendment of MCR 5.404(A) creates a new subsection that requires the use of an SCAO approved social history form when one is required to be filed with a petition for guardianship of a minor. The

amendment of MCR 5.409(B)(2) requires the valuation of the portion of joint property listed on the inventory that belongs to the protected individual. The amendment of MCR 5.409(C)(4) provides the process for filing a proof of restricted account and annual verification of funds on deposit with the court. The amendment of MCR 5.409(C)(5) adds the requirement to attach a financial institution statement to the annual account. The amendment of MCR 5.409(C)(6) requires the court to either review or allow the account annually and to allow the accounts at least once every three years.

The staff comment is published only for the benefit of the bench and bar and is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2005, at P. O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-54. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

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information (42 USC 9831 *et seq*.). *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Development Bd*, 472 Mich 479.

PARTIES

4. To have standing to bring an action where standing is not expressly conferred by the Constitution or by statute, first, a plaintiff must have suffered an injury in fact, that is an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical, second, there must be a causal connection between the injury and the conduct complained of, the injury must be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party, and third, it must be likely, not merely speculative, that the injury will be redressed by a favorable decision. *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117.

ACTUAL CONTROVERSIES—*See*

ACTIONS 1

ADVERSE INFERENCES—*See*

EVIDENCE 2

ALLOWABLE EXPENSES—*See*

INSURANCE 4

AMPUTATIONS—*See*

WORKER'S COMPENSATION 1

APPEAL—*See*

JURY 1
MUNICIPAL CORPORATIONS 2
SENTENCES 1, 2

BOUNDARIES

HOME RULE CITIES

1. The Home Rule City Act does not allow a single petition and a single vote to encompass detachment of land from a city for addition to multiple townships (MCL 117.1 *et seq*.). *Casco Twp v Secretary of State*, 472 Mich 566.
2. Residents of one township are not qualified electors for

recover contribution from another tortfeasor liable for the same injury where none of the circumstances enumerated in § 2925a(3)(a)-(d) exists; the amount of contribution that may be recovered is limited to the amount paid in settlement in excess of the settling tortfeasor's pro rata share. *Gerling Konzern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44.

coordination under § 3109a of the no-fault act (MCL 500.3109a). *Jarrad v Integon National Ins Co*, 472 Mich 207.

3. The central question in determining whether coverage is "other health and accident coverage" subject to coordination under the no-fault act is not whether an insurance company actually provided the coverage, but rather whether the coverage is typically provided by an insurance company (MCL 500.3109a). *Jarrad v Integon National Ins Co*, 472 Mich 207.
4. An expense, to be compensable under the personal protection insurance provisions of the no-fault act, must be for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle and be reasonably necessary for the injured person's care, recovery, or rehabilitation; the expenses must be causally connected to the accidental bodily injury arising out of an automobile accident and the injury must arise out of or be caused by the ownership, operation, maintenance, or use of a motor vehicle (MCL 500.3105[1]). *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521.
5. A no-fault insurer is liable under the personal protection insurance provisions of the no-fault act for "allowable expenses" for the cost of products, services, and accommodations reasonably necessary for an injured person's care, recovery, or rehabilitation; products, services, and accommodations that are reasonably necessary for the injured person's recovery or rehabilitation are those that are reasonably necessary to restore the person to the condition he was in before sustaining injury or to bring the person to a condition of health or ability to resume his preinjury life; products, services and accommodations reasonably necessary for the injured person's care are those whose provision is necessitated by the injury sustained in the motor vehicle accident (MCL 500.3105[1], 500.3107[1][a]). *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521.

INTENT—*See*

CRIMINAL LAW 2

MUNICIPAL CORPORATIONS

ATTORNEY FEES

1. The decision of a municipality whether to pay an officer's attorney fees under MCL 691.1408(2) is within the discretion of the municipality; the statute does not place limits on the exercise of such discretion nor does it provide standards by which a court may review the exercise of that discretion. *Warda v Flushing City Council*, 472 Mich 326.

DISCRETIONARY DECISIONS

2. Where a statute empowers a governmental agency to undertake a discretionary decision, and neither places limits on the exercise of that discretion nor provides standards by which a court can review the exercise of that discretion, the decision is not subject to judicial review absent an allegation that the exercise of that discretion was unconstitutional. *Warda v Flushing City Council*, 472 Mich 326.

NOTICE TO THE SECOND INJURY FUND—*See*

WORKER'S COMPENSATION 3

PAROLE

EXPEDITED PAROLE ELIGIBILITY

1. A prisoner's cooperation with law enforcement, for purposes of a motion for judicial determination of cooperation under MCL 791.234(10), may occur at any time before the motion is filed and the prisoner is released on parole; a pledge of future cooperation does not constitute cooperation. *People v Stewart*, 472 Mich 624.
2. A prisoner may be considered to have cooperated with law enforcement for purposes of a motion for judicial determination of cooperation under MCL 791.234(10) where the prisoner engaged in conduct where he or she worked with law enforcement toward a common purpose, provided useful or relevant information to law enforcement, or establishes that although the prisoner provided law enforcement any information he or she had, and it turned out not to be relevant or useful, the prisoner never had any relevant or useful information to provide; a prisoner who never provided any information or who had relevant or useful information but chose not

constitute "accrued financial benefits" that are subject to protection from diminishment or impairment under Const 1963, art 9, § 24 (MCL 38.1391[1]). *Studier v MPSERB*, 472 Mich 642.

2. The statute that established health care benefits for public school retirees did not create for retirees a contractual right to receive health care benefits that could not be changed by a later legislature without impairing a contractual obligation in violation of the federal and state constitutions (US Const, art I, § 10; Const 1963, art 1, § 10; MCL 38.1391[1]). *Studier v MPSERB*, 472 Mich 642.

SEARCHES AND SEIZURES

FOURTH AMENDMENT

1. The Fourth Amendment is not implicated when an officer, in the ordinary course of his duties, asks a person to provide identification; therefore, a police officer is not required to have a reasonable suspicion of criminal activity before requesting identification (US Const, Am IV; Const 1963, art 1, § 11). *People v Jenkins*, 472 Mich 26.

REASONABLENESS

2. The reasonableness of a search or seizure depends on whether the police officer's action was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *People v Williams*, 472 Mich 308.

TRAFFIC STOPS

3. A traffic stop is reasonable as long as the driver is detained only for the purpose of allowing a police officer to ask reasonable questions concerning the alleged violation of the law and its context for a reasonable period; the determination of reasonableness must take into account the evolving circumstances faced by the officer; an officer is justified in extending the detention long enough to resolve any suspicions raised when a traffic stop reveals, or unveils, a new set of circumstances. *People v Williams*, 472 Mich 308.

SENTENCE DEPARTURES—*See*

SENTENCES 1

the specific loss of a leg (MCL 418.361[2], 418.361[3][b]). *Cain v Waste Management, Inc (After Remand)*, 472 Mich 236.