MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 23, 2004 to January 26, 2005

DANILO ANSELMO
REPORTER OF DECISIONS

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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
MAURA D. CORRIGAN, Grosse Pointe Park	2007[1]
CLIFFORD W. TAYLOR, Laingsburg	2009[2]
Justices	
MICHAEL F. CAVANAGH, East Lansing	2007
ELIZABETH A. WEAVER, Glen Arbor	2011
MARILYN KELLY, Bloomfield Hills	2013
CLIFFORD W. TAYLOR, Laingsburg	2009[1]
MAURA D. CORRIGAN, Grosse Pointe Park	2007[2]
ROBERT P. YOUNG, Jr., Grosse Pointe Park	2011
STEPHEN J. MARKMAN, Mason	2013

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FRANK J. GRECO, Chief Commissioner[4]
MICHAEL J. SCHMEDLEN, Deputy Chief Commissioner[3]

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TIMOTHY J. RAUBINGER
LYNN K. RICHARDSON
KATHLEEN A. FOSTER
GLEN M. BIS[4]
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NELSON S. LEAVITT
SHARI M. OBERG
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PATRICK J. WRIGHT
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JÜRGEN O. SKOPPEK
DANIEL C. BRUBAKER
MICHAEL S. WELLMAN
MICHAEL J. SCHMEDLEN[4]
GARY L. ROGERS[5]
RICHARD B. LESLIE[6]
FREDERICK M. BAKER, Jr.[7]

State Court Administrator: JOHN D. FERRY, Jr.[8]
State Court Administrator: CARL L. GROMEK[9]

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

[1] To January 6, 2005.
[2] From January 6, 2005.
[3] From December 1, 2004.
[4] To December 1, 2004.
[5] From November 8, 2004.
[6] From January 3, 2005.
[7] From January 10, 2005.
[8] To December 31, 2004.
[9] From January 3, 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
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

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH, Jonesville,	2009
2.	ALFRED M. BUTZBAUGH, Berrien Springs,	2007
	CASPER O. GRATHWOHL, Niles,	2005
	JOHN M. DONAHUE, St. Joseph,	2011[1]
	CHARLES T. LaSATA, St. Joseph,	2011[1]
	JOHN T. HAMMOND, St. Joseph,	2005[2]
	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[1]
	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, Detroit,	2009

[1] From January 1, 2005.

[2] Retired December 3, 2004.

	Term Expires January 1 of
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
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
JAMES J. RASHID, Northville,	2005[3]
DANIEL P. RYAN, Redford,	2007
MICHAEL F. SAPALA, Grosse Pointe Park,	2007
LOUIS F. SIMMONS, Jr., Detroit,	2005
RICHARD M. SKUTT, Detroit,	2007[4]
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

[3] Retired August 1, 2004.

[4] From August 23, 2004.

		Term Expires January 1 of
	ISIDORE B. TORRES, Grosse Pointe Park,	2011
	LEONARD TOWNSEND, Detroit,	2005
	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
	NANCI J. GRANT, West Bloomfield,	2009
	RICHARD D. KUHN, Waterford,	2005
	DENISE LANGFORD-MORRIS, West Bloomfield,	2007
	CHERYL A. MATTHEWS, Sylvan Lake,	2011[5]
	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[5]
	ROBERT M. RANSOM, Flushing,	2009
	RICHARD B. YUILLE, Flint,	2009
8.	DAVID A. HOORT, Portland,	2011

[5] From January 1, 2005.

		Term Expires January 1 of
	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
	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[6]
17.	GEORGE S. BUTH, Grand Rapids,	2011
	KATHLEEN A. FEENEY, Belmont,	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

[6] From January 1, 2005.

		Term Expires January 1 of
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[7]
21.	PAUL H. CHAMBERLAIN, Blanchard,	2011
	MARK H. DUTHIE, Mt. Pleasant,	2013[7]
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
	JOHN R. WEBER, Marquette,	2009
26.	JOHN F. KOWALSKI, Alpena,	2009
	JOSEPH P. SWALLOW, Alpena,	2005
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
	THOMAS LEO BROWN, East Lansing,	2005
	WILLIAM E. COLLETTE, East Lansing,	2009
	JOYCE DRAGANCHUK, Lansing,	2011[7]
	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

[7] From January 1, 2005.

		Term Expires January 1 of
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
	WILLIAM F. LaVOY, Monroe,	2005
	MICHAEL A. WEIPERT, Monroe,	2011[8]
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.	DANIEL A. BURRESS, Howell,	2005
	STANLEY J. LATREILLE, Howell,	2007
	DAVID READER, Howell,	2011[8]
45.	JAMES P. NOECKER, Sturgis,	2007[9]
46.	ALTON T. DAVIS, Grayling,	2011
	DENNIS F. MURPHY, Gaylord,	2009
47.	STEPHEN T. DAVIS, Escanaba,	2011
48.	HARRY A. BEACH, Otsego,	2009
	GEORGE R. CORSIGLIA, Allegan,	2011
49.	LAWRENCE C. ROOT, Big Rapids,	2007
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
56.	THOMAS S. EVELAND, Dimondale,	2007
	CALVIN E. OSTERHAVEN, Grand Ledge,	2009
57.	CHARLES W. JOHNSON, Petoskey,	2007

[8] From January 1, 2005.

[9] To February 2, 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[1]
	PAUL J. BRIDENSTINE, Kalamazoo,	2007
	ANN L. HANNON, Kalamazoo,	2005
	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
	LYSLE G. HALL, Jackson,	2005
	JOSEPH S. FILIP, Jackson,	2011[1]

[1] From January 1, 2005.

		Term Expires January 1 of
	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
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
	VIRGINIA A. SOBOTKA, Dearborn,	2007[2]
	MARK W. SOMERS, Dearborn,	2009
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
	ANTHONY S. GUERRIERO, Allen Park,	2005
	RICHARD A. PAGE, Allen Park,	2011[3]
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
	DONALD L. SWANK, Trenton,	2005[4]
	EDWARD A. NYKIEL, Grosse Ile,	2011[3]
34.	TINA BROOKS GREEN, New Boston,	2007

[2] Retired January 10, 2005.

[3] From January 1, 2005.

[4] Retired November 1, 2004.

		Term Expires January 1 of
	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
	IZETTA F. BRIGHT, Detroit,	2011
	DONALD COLEMAN, Detroit,	2007
	NANCY A. FARMER, Detroit,	2007
	DEBORAH GERALDINE FORD, Detroit,	2011[5]
	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
	MARION A. MOORE, Detroit,	2005
	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

[5] From January 1, 2005.

		Term Expires January 1 of
40.	MARK A. FRATARCANGELI, St. Clair Shores,	2007
	JOSEPH CRAIGEN OSTER, St. Clair Shores,	2009[6]
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.	WILLIAM H. CANNON, Clinton Twp.,	2007[7]
	LINDA DAVIS, Clinton Twp.,	2009
	JOHN C. FOSTER, Clinton Twp.,	2011
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
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.	EDWARD AVADENKA, West Bloomfield,	2005
	MARC BARRON, Birmingham,	2011[6]
	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.	MICHAEL BATCHIK, White Lake,	2005
	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[6]
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

[6] From January 1, 2005.

[7] Retired January 31, 2005.

		Term Expires January 1 of
	DENNIS C. DRURY, Troy,	2007
	MICHAEL A. MARTONE, Troy,	2011
53.	FRANK R. DEL VERO, Howell,	2005[8]
	L. SUZANNE GEDDIS, Brighton,	2011[9]
	MICHAEL K. HEGARTY, Brighton,	2009
	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[9]
	THOMAS E. BRENNAN, Jr., East Lansing,	2005
	PAMELA J. McCABE, Mason,	2009
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

[8] Retired July 31, 2004.

[9] From January 1, 2005.

		Term Expires January 1 of
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
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.	JOHN HENRY HART, Midland,	2009
	PHILIP M. VAN DAM, Midland,	2005[10]
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

[10] Died December 11, 2004.

		Term Expires January 1 of
86.	JOHN D. FORESMAN, Traverse City,	2011[11]
	THOMAS S. GILBERT, Traverse City,	2005
	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.	BARBARA J. BROWN, St. Ignace,	2005
	BETH GIBSON, Newberry,	2009[11]
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

[11] From January 1, 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
NORENE S. REDMOND, Eastpointe,	2004
MATTHEW R. RUMORA, Grosse Pointe Farms,	2006
MARTIN J. SMITH, Eastpointe,	2004

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[1]
Barry	STEPHANIE S. FEKKES	2005
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	DAVID J. NEWBLATT	2005
Genesee	ROBERT E. WEISS	2007

[1] From January 1, 2005.

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	NANNETTE M. BOWLER	2005
Ionia	ROBERT SYKES, JR.	2007[2]
Iosco	JOHN D. HAMILTON	2007
Iron	C. JOSEPH SCHWEDLER	2007
Isabella	WILLIAM T. ERVIN	2007
Jackson	SUSAN E. VANDERCOOK	2007
Kalamazoo	PATRICIA N. CONLON	2009
Kalamazoo	DONALD R. HALSTEAD	2011
Kalamazoo	CAROLYN H. WILLIAMS	2007[3]
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
Macomb	TRACEY A. YOKICH	2005
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

[2] From January 1, 2005.

[3] Retired January 1, 2005.

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
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	PATRICIA B. CAMPBELL	2005
Wayne	JUDY A. HARTSFIELD	2007[4]
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

[4] From July 26, 2004.

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

21 CASES; 53 OPINIONS; 1,105 ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL GRANTED OR DENIED

(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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TABLE OF SPECIAL ORDERS NOT RELATED TO SPECIFIC CASES

TABLE OF ADMINISTRATIVE ORDERS AND RULES ADOPTED

ADMINISTRATIVE ORDER
No. 2004-5

EXPEDITED SUMMARY DISPOSITION
DOCKET IN THE COURT OF APPEALS

Entered October 5, 2004, effective January 1, 2005, for a two-year period (File Nos. 2002-34, 2002-44)—REPORTER.

1. Applicability. This administrative order applies to appeals filed on or after January 1, 2005, arising solely from orders granting or denying motions for summary disposition under MCR 2.116. These appeals are to be placed on an expedited appeal track under which they shall generally be briefed, argued, and disposed of within six months of filing. A motion to remove is required to divert such appeals to the standard appeal track.

2. Time Requirements. Appeals by right or by leave in cases covered by this order must be taken within the time stated in MCR 7.204 or MCR 7.205. Claims of cross-appeal must be filed within 14 days after the claim of appeal is filed with the Court of Appeals or served on the cross-appellant, whichever is later, or within 14 days after the clerk certifies the order granting leave to appeal.

3. Trial Court Orders on Motions for Summary Disposition. If the trial court concludes that summary disposition is warranted under MCR 2.116(C), the court

shall render judgment without delay in an order that specifies the subsection of MCR 2.116(C) under which the judgment is entered.

4. Claim of Appeal—Form of Filing. With the following exceptions, a claim of appeal filed under this order shall conform in all respects with the requirements of MCR 7.204.

(A) A docketing statement will not be required as long as the case proceeds on the summary disposition track.

(B) When the claim of appeal is filed, it shall be accompanied by:

(1) evidence that the transcript of the hearing(s) on the motion for summary disposition has been ordered, or

(2) a statement that there is no record to transcribe, or

(3) a statement that the transcript has been waived.

Failure to file one of the above three documents with the claim of appeal will *not* toll subsequent filing deadlines for transcripts or briefs. Sustained failure to provide the required documentation may result in dismissal of the appeal under MCR 7.201(B)(3), as long as the Court of Appeals provides a minimum 7-day warning.

5. Application for Leave—Form of Filing. An application for leave to appeal filed under this administrative order shall conform in all pertinent respects with the requirements of MCR 7.205.

6. Claim of Cross-Appeal. A claim of cross-appeal filed under this administrative order shall conform in all pertinent respects with the requirements of MCR 7.207.

7. Removal From Summary Disposition Track. A party may file a motion to remove the case from the summary disposition track to the standard track.

(A) Time to File. Motions to remove by the appellant or the cross-appellant must be filed with the claim of appeal or claim of cross-appeal, respectively, or within 7 days after the date of certification of an order granting application for leave to appeal. Motions to remove by the appellee or cross-appellee must be filed no later than the time for filing of the appellee's brief.

(B) Form. Motions to remove shall concisely state the basis for removal, and must be in the form prescribed by the Court of Appeals. This form shall include a statement advising whether the appellee is expected to oppose the motion.

(C) Answer. An answer to a motion to remove must be filed within 7 days after service of the motion. The answer should state whether the appellee is expected to file a claim of cross-appeal.

(D) Disposition. Within 14 days after the filing of the motion to remove, the Court of Appeals shall issue an order disposing of the motion and setting the time for further filings in the case. The time for further filings in the case will commence on the date of certification of the order on the motion.

(E) Docketing Statement. If the case is removed from the summary disposition track, a docketing statement must be filed within 14 days after the date of certification of the order on the motion.

(F) The Court of Appeals may remove a case from the summary disposition track at any time, on its own motion, if it appears to the Court that the case is not an appropriate candidate for processing under this administrative order.

(G) Effect of Removal. If the Court of Appeals removes a case from the summary disposition track, the parties are entitled to file briefs in accordance with the time and page limitations set forth in MCR 7.212. The time for filing the briefs commences from the date of certification of the order removing the case from the summary disposition docket.

8. Transcript—Production for Purposes of Appeal.

(A) Appellant.

(1) The appellant may waive the transcript. See section 4(B)(3) above.

(2) If the appellant desires the transcript for the appeal, the appellant must order the transcript before or contemporaneously with the filing of the claim of appeal.

(3) If the transcript is not timely filed, the appellant must file one of the following motions with the Court of Appeals within 7 days after the transcript is due:

(a) a motion for an order for the court reporter or recorder to show cause, or

(b) a motion to extend time to file the transcript.

(4) The time for filing the appellant's brief will be tolled by the timely filing of one of the above motions. The order disposing of such motion shall state the time for filing the appellant's brief.

(5) If the ordered transcript is not timely filed, and if the appellant fails to file either of the above motions within the time prescribed, the time for filing the brief will commence on the date the transcript was due. In such event, the appellant's brief shall be filed within 56 days after the claim of appeal was filed or 28 days after certification of the order granting leave to appeal.

(B) Appellee.

(1) The appellee may order the transcript within 14 days after service of the claim of appeal and notice that the appellant has waived the transcript.

(2) The appellee's transcript order will not affect the time for filing the appellant's brief.

(3) If the transcript is not timely filed, the appellee must file one of the following motions with the Court of Appeals within 7 days after the transcript is due:

(a) a motion for an order for the court reporter or recorder to show cause, or

(b) a motion to extend the time to file the transcript.

(4) The time for filing the appellee's brief will be tolled by the timely filing of one of the above motions. The order disposing of such motion shall state the time for filing the appellee's brief.

(5) If the ordered transcript is not timely filed, and if the appellee fails to file either of the above motions within the time prescribed, the time for filing the brief will commence on the date the transcript was due.

(C) Court Reporter. The court reporter or recorder shall file the transcript with the trial court or tribunal within 28 days after it is ordered by either the appellant or the appellee. The court reporter or recorder shall conform in all other respects with the requirements of MCR 7.210.

(D) Transcript Fee. The court reporter or recorder shall be entitled to the sum of $3.00 per original page and 50 cents per page for each copy for transcripts ordered and timely filed in appeals processed under the expedited docket. If the court reporter or recorder does not timely file the transcript, the rate will remain $1.75 per original page and 30 cents per page for each transcript, as set by MCL 600.2543.

9. Briefs on Appeal.

(A) With the following exceptions, the parties' briefs shall conform to the requirements of MCR 7.212.

(B) Time For Filing.

(1) The appellant's brief shall be filed within 28 days after the claim of appeal is filed, the order granting leave is certified, or the timely ordered transcript is timely filed with the trial court, whichever is later, or as ordered by the Court. In appeals by leave, the appellant may rely on the application for leave to appeal rather than filing a separate brief by filing 5 copies of the application for leave to appeal with a cover letter indicating that the appellant is relying on the application in lieu of filing a brief on appeal.

(2) The appellee's brief shall be filed within 21 days after the appellant's brief is served on the appellee, or as ordered by the Court.

(3) Time for filing any party's brief may be extended for 14 days on motion for good cause shown. If the motion is filed by the appellant within the original 28-day brief filing period, the motion will toll the time for any sanctions for untimely briefs. A motion may include a statement from opposing counsel that counsel does not oppose the 14-day extension. A motion to extend the time for filing a brief will be submitted for disposition forthwith; opposing counsel need not file an answer.

(4) If the appellant's brief is not filed within 7 days after the date due, the Court of Appeals shall issue an order assessing costs and warning the appellant that the case will be dismissed if the brief is not filed within 14 days after the deadline. If the brief is not filed within that 14-day period, the Court of Appeals shall issue an order that dismisses the appeal and that may assess additional costs.

(C) Length and Form. Briefs filed under this administrative order are limited to 35 pages, double-spaced, exclusive of tables, indexes, and appendices.

(1) At the time each brief is filed, the filing party must provide the Court of Appeals with that party's trial court summary disposition motion or response, brief, and appendices. Failure to file these documents at the time of filing the appellant's brief will not extend the time to file the appellee's brief, however.

(2) The appellant may wish to include a copy of the transcript (if any) if it was completed after the lower court file was transmitted to the Court of Appeals.

(D) Reply briefs may be filed within 14 days of the filing of appellee's brief and are limited to 5 pages, double-spaced, exclusive of tables, indexes, and appendices.

10. Record on Appeal. The Court of Appeals shall request the record on appeal from the trial court or tribunal clerk as soon as jurisdiction has been confirmed and material filing deficiencies have been corrected. The trial court or tribunal clerk shall transmit the record as directed in MCR 7.210(G).

11. Notice of Cases. Within 7 days after the filing of the appellee's brief, or after the expiration of the time for filing the appellee's brief, the clerk shall notify the parties that the case will be submitted as a "calendar case" on the summary disposition track.

12. Decision of the Court. The opinion or order of the panel shall be issued no later than 35 days after submission of the case to, or oral argument before, a panel of judges for final disposition.

This order will remain in effect for two years from the date of its implementation, during which time the Court of Appeals Delay Reduction Work Group will

monitor the expedited docket program. If, at any time during that monitoring process, it becomes apparent to the work group that procedural aspects of the program need to be modified, the group is encouraged to seek authorization from this Court to implement modifications. The work group will provide this Court with written updates on the pilot program before the one-year and eighteen-month anniversaries of the program's implementation. At the end of the two-year pilot period, this Court will evaluate expedited processing of summary disposition appeals to determine whether the procedure will be discontinued, changed, or continued.

Staff Comment: This is a new procedure requested by the Court of Appeals for the processing of appeals from orders granting or denying summary disposition. The new procedure applies to appeals filed after January 1, 2005. The procedure will be in effect for a two-year pilot period with ongoing monitoring by the delay reduction work group. That group will provide updates to the Court before the one-year and eighteen-month anniversaries of the pilot period. The group is authorized, during the two-year pilot period, to seek from the Court modification of the expedited docket procedures.

The transcript rate is authorized by statute. 2004 PA 328.

The Court of Appeals offered the following explanation of the expedited docket procedure:

The Court of Appeals estimates that summary disposition appeals make up about 50% of the Court's nonpriority civil cases. The procedure proposed by the Court's Case Management Work Group and announced in this administrative order is structured to facilitate disposition of eligible appeals within about 180 days after filing with the Court of Appeals. The work group's report can be accessed on the Court of Appeals website at http://courtofappeals.mijud.net/resources/specialproj.htm.

The procedure announced here is intended to apply to appeals arising solely from orders on motions for summary disposition. Orders that reference other issues between the parties will not be eligible for this track. If an eligible appeal is deemed to be inappropriate for the expedited docket, the Court can remove it, either on its own motion or on motion of one or both of the parties. Such motions must be in the form prescribed by the Court of Appeals. See http://courtofappeals.mijud.net/resources/forms.htm.

The procedure encourages parties to evaluate whether a transcript of hearing(s) on the motion would be helpful on appeal. If little was stated on the record, or there is nothing to be gained from the transcript, it can be waived. In such cases, the appellant's brief (accompanied by the appellant's trial court motion, brief, and appendices) will be due within 28 days after filing the claim of appeal or entry of an order granting leave to appeal. If the transcript is ordered, it will be due within 28 days, with the appellant's brief due 28 days later. The appellee's brief (accompanied by its trial court motion, brief, and appendices) will be due 21 days from service of the appellant's brief. Motions to extend the time for filing briefs will be granted only on good cause shown and, generally, only for a maximum of 14 days. As a general matter, good cause will be limited to unexpected events that directly affect the ability to timely file the brief. When the motion is premised on work load considerations, at a minimum the motion should identify the cases and the courts in which filing deadlines are converging and specify the least amount of time that would be required to file the brief. Once briefing has been completed, the case will be referred to the Court's research attorneys for an expedited review and it will then be submitted to a panel of judges for disposition.

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

ADMINISTRATIVE ORDER
No. 2004-6

MINIMUM STANDARDS FOR INDIGENT
CRIMINAL APPELLATE DEFENSE SERVICES

Entered October 5, 2004, effective January 1, 2005 (File No. 2000-32) —REPORTER.

On order of the Court, this is to advise that the Court has considered revised minimum standards for indigent criminal appellate defense services proposed by the Appellate Defender Commission pursuant to 1978 PA 620, MCL 780.711 to 780.719. The Court approves the standards with some revisions replacing those adopted in Administrative Order No. 1981-7, effective January 1, 2005.

PREAMBLE:

The Michigan Legislature in MCL 780.712(5) requires the Appellate Defender Commission to develop minimum standards to which all criminal appellate defense services shall conform. Pursuant to this mandate, these standards are intended to serve as guidelines to help counsel achieve the goal of effective appellate and postjudgment representation. Criminal appellants are not constitutionally entitled to counsel's adherence to these guidelines. Hence, counsel's failure to comply with any standard does not of itself constitute grounds for either a claim of ineffective assistance of

counsel or a violation of the Michigan Rules of Professional Conduct, and no failure to comply with one or more of these standards shall, unless it is independently a violation of a rule of professional conduct, serve as the basis for a request for investigation with the Attorney Grievance Commission.

STANDARD 1

Counsel shall promptly examine the trial court record and register of actions to determine the proceedings, in addition to trial, plea, and sentencing, for which transcripts or other documentation may be useful or necessary, and, in consultation with the defendant and, if possible, trial counsel, determine whether any relevant proceedings have been omitted from the register of actions, following which counsel shall request preparation and filing of such additional pertinent transcripts and review all transcripts and lower court records relevant to the appeal. Although the trial court is responsible for ordering the record pursuant to MCR 6.425(F)(2), appellate counsel is nonetheless responsible for ensuring that all useful and necessary portions of the transcript are ordered.

STANDARD 2

Before filing the initial postconviction or appellate motion or brief and after reviewing the relevant transcripts and lower court records, counsel must consult with the defendant about the proposed issues to be raised on appeal and advise of any foreseeable benefits or risks in pursuing the appeal generally or any particular issue specifically. At counsel's discretion, such confidential consultation may occur during an interview with the defendant in person or through an attorney agent, by a comparable video alternative, or by such

other reasonable means as counsel deems sufficient, in light of all the circumstances.

STANDARD 3

Counsel should raise those issues, recognizable by a practitioner familiar with criminal law and procedures on a current basis and who engages in diligent legal research, which offer reasonable prospects of meaningful postconviction or appellate relief, in a form that protects where possible the defendant's option to pursue collateral attacks in state or federal courts. If a potentially meritorious issue involves a matter not reflected in the trial court record, counsel should move for and conduct such evidentiary hearings as may be required.

STANDARD 4

When a defendant insists that a particular claim or claims be raised on appeal against the advice of counsel, counsel shall inform the defendant of the right to present the claim or claims *in propria persona*. Defendant's filing shall consist of one brief filed with or without an appropriate accompanying motion. Counsel shall also provide such procedural advice and clerical assistance as may be required to conform the defendant's filing for acceptability to the court. The defendant's filing *in propria persona* must be received by the Court of Appeals within 84 days after the appellant's brief is filed by the attorney, but if the case is noticed for submission within that 84-day period, the filing must be received no later than 7 days before the date of submission, or within the 84-day period, whichever is earlier. The 84-day deadline may be extended only by the Court of Appeals on counsel's motion, upon a showing of good cause for the failure to file defendant's pleading within the 84-day deadline.

STANDARD 5

An appeal may never be abandoned by counsel; an appeal may be dismissed on the basis of the defendant's informed consent, or counsel may seek withdrawal pursuant to *Anders v California,* 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967), and related constitutional principles.

STANDARD 6

Counsel should request oral argument, and preserve the right to oral argument by timely filing the defendant's brief on appeal. Oral argument may be waived if counsel subsequently concludes that the defendant's rights will be adequately protected by submission of the appeal on the briefs alone.

STANDARD 7

Counsel must keep the defendant apprised of the status of the appeal and promptly forward copies of pleadings filed and opinions or orders issued by a court.

STANDARD 8

Upon final disposition of the case by the court, counsel shall promptly and accurately inform the defendant of the courses of action that may be pursued as a result of that disposition, and the scope of any further representation counsel may provide. If counsel's representation terminates, counsel shall cooperate promptly and fully with the defendant and any successor counsel in the transmission of records and information.

STANDARD 9

Upon acceptance of the assignment, counsel is pro-

hibited from seeking or accepting fees from the defendant or any other source beyond those authorized by the appointing authority.

YOUNG, J. (*dissenting*). I respectfully dissent from this Court's adoption of Standard 4. As we held in *People v Adkins (After Remand)*, 452 Mich 702, 720 (1996), a criminal defendant has a constitutional right of self-representation or to counsel, but not both. The "right" to which Standard 4 refers—assistance from counsel when a defendant proceeds *in propria persona*—is a hybrid right that has no basis in law.

Additionally, by adopting Standard 4, this Court potentially places counsel who assists a defendant proceeding *in propria persona* in an ethical dilemma. Standard 4 requires counsel to assist the criminal defendant with a claim even after counsel has made a professional judgment that the claim is unwise, improper, or without merit. This obligation may conflict with counsel's duties under Rules 1.2(c), 3.3(a), and 8.4 of the Rules of Professional Conduct.

While I continue to believe that a criminal defendant has no right to assistance of counsel when proceeding *in propria persona*, and therefore dissent from the adoption of Standard 4, I believe that the following sentence should be added to Standard 4 to address the potential ethical dilemma that counsel may face:

Nothing in this provision shall be construed as requiring counsel to assist in an unethical act or in behavior inconsistent with the Rules of Professional Conduct.

CORRIGAN, C.J. I concur with Justice YOUNG.

Staff Comment: The Appellate Defender Commission submitted proposed revised standards for indigent criminal appellate defense services. The revised standards replace those adopted in Administrative Order No. 1981-7, effective January 1, 2005.

Standard 1 corresponds to former Standard 6 regarding counsel's obligation to review the lower court records and promptly request and review the transcripts. Standard 1 recognizes that pursuant to MCR 6.425(F)(2), the trial court bears the primary responsibility for ordering the record, but also highlights counsel's responsibility for ensuring that the trial court orders all useful and necessary portions of the transcript.

Standard 2 corresponds to former Standards 3 and 4, which related to counsel's obligation to consult with the client about the appellate issues and any foreseeable risks or benefits in pursuing the appeal. It clarifies that counsel generally should warn defendant not only of the risks and benefits of pursuing the appeal, but also the risks and benefits of pursuing a particular issue. This standard does not mandate a personal meeting with the defendant as did former Standard 3.

Standard 3 corresponds to former Standard 9, regarding counsel's duties to raise issues that offer reasonable prospects of meaningful postconviction relief and to former Standard 8, regarding counsel's obligation to move for and conduct any necessary evidentiary hearings.

Standard 4 corresponds to former Standard 11 regarding briefs filed by defendants *in propria persona*. This standard sets a deadline for the filing of such briefs of 84 days from the date that the attorney files the appellant's brief. The standard continues the requirement that appellate counsel provide the defendant with clerical assistance in filing the brief *in propria persona* and allows extensions of this deadline only upon a showing of good cause for the failure to file the defendant's brief within the 84-day deadline.

Standard 5 replaces former Standard 12 regarding dismissal of the appeal. It deletes the requirement for written consent and allows counsel to dismiss the appeal on the basis of the defendant's "informed consent." It also allows counsel to seek permission to withdraw where, in counsel's opinion, there are no meritorious appellate issues.

Standard 6 incorporates the principles articulated in former Standards 15 and 16 relating to counsel's obligation to timely file the defendant's pleadings and request and present an oral argument on the defendant's behalf.

Standard 7 is a more concise version of former Standard 17, but its provisions are essentially identical. Counsel is required to keep the defendant apprised of the appeal and send the defendant copies of pleadings and court orders or opinions.

Standard 8 incorporates the requirements of former Standards 18 and 19. It states that upon the court's final disposition of the case, counsel shall promptly and accurately inform the defendant of the courses of action that may be pursued and the scope of any further representation counsel may provide. If the Court of Appeals disposition terminates counsel's representation, counsel shall cooperate fully with the defendant or successor counsel in the transmission of records and information.

Standard 9 corresponds to former Standard 20, prohibiting appointed counsel from seeking or accepting fees from the defendant or any other source beyond those authorized by the appointing authority.

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

ADMINISTRATIVE ORDER
No. 2004-7

ADOPTION OF CONCURRENT JURISDICTION PLANS
FOR THE THIRD CIRCUIT OF WAYNE COUNTY,
THE 19TH DISTRICT COURT, THE 29TH DISTRICT COURT,
AND THE 35TH DISTRICT COURT

Entered December 8, 2004, effective May 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 the Court.

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

Third Circuit of Wayne County and the 19th District Court

Third Circuit of Wayne County and the 29th District Court

Third Circuit of Wayne County and the 35th District 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*.

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

ADMINISTRATIVE ORDER

Entered September 14, 2004, effective immediately (File No. 2004—12)-REPORTER.

On order of the Court, Administrative Order No. 1969-4 is reinstated and the Court's order of June 4, 2004, rescinding Administrative Order No. 1969-4 is vacated, effective immediately.

The Court was informed erroneously that there are no longer individuals confined in state institutions because of their status as criminal sexual psychopaths and, therefore, Administrative Order No. 1969-4 was obsolete and should be rescinded. The Court has since learned that, in fact, there are two individuals still confined by the Michigan Department of Community Health as criminal sexual psychopaths. Administrative Order No. 1969-4 is not obsolete and the rescission order that was entered on June 4, 2004, is vacated and Administrative Order No. 1969-4 is reinstated.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted October 5, 2004, effective January 1, 2005 (File No. 2004-09)—REPORTER.

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

RULE 2.603. DEFAULT AND DEFAULT JUDGMENT.

(A) Entry of Default; Notice; Effect.

(1) If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.

(2) Notice that the default has been entered must be sent to all parties who have appeared and to the defaulted party. If the defaulted party has not appeared, the notice to the defaulted party may be served by personal service, by ordinary first-class mail at his or her last known address or the place of service, or as otherwise directed by the court.

(a) In the district court, the court clerk shall send the notice.

(b) In all other courts, the notice must be sent by the party who sought entry of the default. Proof of service and a copy of the notice must be filed with the court.

(3) Once the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court in accordance with subrule (D) or MCR 2.612.

(B) Default Judgment.

(1) Notice of Request for Default Judgment.

(a) A party requesting a default judgment must give notice of the request to the defaulted party, if

(i) the party against whom the default judgment is sought has appeared in the action;

(ii) the request for entry of a default judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or

(iii) the pleadings do not state a specific amount demanded.

(b) The notice required by this subrule must be served at least 7 days before entry of the requested default judgment.

(c) If the defaulted party has appeared, the notice may be given in the manner provided by MCR 2.107. If the defaulted party has not appeared, the notice may be served by personal service, by ordinary first-class mail at the defaulted party's last known address or the place of service, or as otherwise directed by the court.

(d) If the default is entered for failure to appear for a scheduled trial, notice under this subrule is not required.

(2) Default Judgment Entered by Clerk. On request of the plaintiff supported by an affidavit as to the amount

due, the clerk may sign and enter a default judgment for that amount and costs against the defendant, if

(a) the plaintiff's claim against a defendant is for a sum certain or for a sum that can by computation be made certain;

(b) the default was entered because the defendant failed to appear; and

(c) the defaulted defendant is not an infant or incompetent person.

The clerk may not enter or record a default judgment based on a note or other written evidence of indebtedness until the note or writing is filed with the clerk for cancellation, except by special order of the court.

(3) Default Judgment Entered by Court. In all other cases, the party entitled to a default judgment must file a motion that asks the court to enter the default judgment.

(a) A default judgment may not be entered against a minor or an incompetent person unless the person is represented in the action by a conservator, guardian ad litem, or other representative.

(b) If, in order for the court to enter a default judgment or to carry it into effect, it is necessary to

(i) take an account,

(ii) determine the amount of damages,

(iii) establish the truth of an allegation by evidence, or

(iv) investigate any other matter,

the court may conduct hearings or order references it deems necessary and proper, and shall accord a right of trial by jury to the parties to the extent required by the constitution.

(4) Notice of Entry of Default Judgment. The court clerk must promptly mail notice of entry of a default judgment to all parties. The notice to the defendant shall be mailed to the defendant's last known address or the address of the place of service. The clerk must keep a record that notice was given.

(C) Nonmilitary Affidavit. Nonmilitary affidavits required by law must be filed before judgment is entered in actions in which the defendant has failed to appear.

(D) Setting Aside Default or Default Judgment.

(1) A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

(2) Except as provided in MCR 2.612, if personal service was made on the party against whom the default was taken, the default, and default judgment if one has been entered, may be set aside only if the motion is filed

(a) before entry of a default judgment, or

(b) if a default judgment has been entered, within 21 days after the default judgment was entered.

(3) In addition, the court may set aside a default and a default judgment in accordance with MCR 2.612.

(4) An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

(E) Application to Parties Other Than Plaintiff. The provisions of this rule apply whether the party entitled to the default judgment is a plaintiff or a party who

pleaded a cross-claim or counterclaim. In all cases a default judgment is subject to the limitations of MCR 2.601(B).

Staff Comment: The October 5, 2004, amendment, effective January 1, 2005, of MCR 2.603 clarified some ambiguities created by the former rule's inconsistent usage of "default," "default judgment," and some related terms. See, e.g., *ISB Sales* v *Dave's Cakes*, 258 Mich App 520 (2003).

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

Retained October 5, 2004 (File No. 2004-15)—REPORTER.

RULE 6.429. CORRECTION AND APPEAL OF SENTENCE.

[Amendment of Rule 6.429 is retained.]

WEAVER, J. (*dissenting*). I would not continue the June 29, 2004, amendment of MCR 6.429(C). For the reasons set forth in my dissent in *People v Kimble,* 470 Mich 305, 315 (2004), I would hold that MCL 769.34(10) requires that defendants preserve alleged errors in scoring of offense variables and, therefore, would interpret both the statute, MCL 769.34(10), and the amended court rule, MCR 6.429(C), to similarly require that defendants preserve such errors.

YOUNG, J. I concur with Justice WEAVER.

Adopted October 5, 2004, effective immediately (File No. 2002-34, 2002-44)—REPORTER.

RULE 7.203. JURISDICTION OF THE COURT OF APPEALS.

(A)-(F) [Unchanged.]

(G) Appeals from Orders Granting or Denying Motions for Summary Disposition. Appeals arising solely from orders granting or denying motions for summary

disposition under MCR 2.116 are to be processed in accordance with Administrative Order No. 2004-5.

Staff Comment: New subrule MCR 7.203(G) implements the Court of Appeals expedited summary disposition docket. Subrule (G) alerts litigants involved in appeals from orders disposing of summary disposition motions that they are to follow the procedures set forth in the administrative order.

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

Adopted October 19, 2004, effective immediately (File No. 2004-37)—REPORTER.

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 clerk will not accept for filing a late motion for reinstatement.

Staff Comment: The amendment of MCR 7.217(D) prohibits the Court of Appeals clerk from accepting untimely motions for reinstatement of an appeal that is involuntarily dismissed for want of prosecution. The amendment makes the rule consistent with MCR 7.215(I)(4), which prohibits the acceptance of a late motion for reconsideration.

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

Adopted November 2, 2004, effective immediately (File No. 2004-43) —REPORTER.

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

RULE 7.204. FILING APPEAL OF RIGHT; APPEARANCE.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.203(A). The provisions of MCR 1.108 regarding computation of time apply. For purposes of subrules (A)(1) and (A)(2), "entry" means the date a judgment or order is signed, or the date that data entry of the judgment or order is accomplished in the issuing tribunal's register of actions.

(1) An appeal of right in a civil action must be taken within

(a)-(b) [Unchanged.]

(c) 14 days after entry of an order of the family division of the circuit court terminating parental rights under the Juvenile Code, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or

(d) [Unchanged.]

(2)-(3) [Unchanged.]

(B)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 7.204(A)(1)(c) clarifies that the 14-day time limit for seeking an appeal from an order terminating parental rights or entry of an order denying postjudgment relief from an order terminating parental rights is limited to appeals from orders entered under the Juvenile Code. This limitation is consistent with MCL 710.65, which provides a 21-day limit for appeals from orders entered under the Adoption Code.

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

Adopted November 2, 2004, effective immediately (File No. 2004-53) —REPORTER.

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

RULE 9.124. PROCEDURE FOR REINSTATEMENT.

(A) Filing of Petition. An attorney petitioning for reinstatement shall file the original petition for reinstatement with the Supreme Court clerk and a copy with the board and the commission.

(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:

(a)-(l) [Unchanged.]

(2) The petitioner must, contemporaneously with the filing of the petition for reinstatement and service on the administrator of the personal history affidavit, remit

(a) to the administrator the fee for publication of a reinstatement notice in the Michigan Bar Journal.

(b) to the board the basic administrative costs required under MCR 9.128(B)(1)

(i) an administrative cost of $750 where the discipline imposed was a suspension of less than 3 years;

(ii) an administrative cost of $1,500 where the discipline imposed was a suspension of 3 years or more or disbarment.

(3) If the petition is facially sufficient and the petitioner has provided proof of service of the personal history affidavit upon the administrator and paid the

publication fee required by subrule (B)(2), the board shall assign the petition to a hearing panel. Otherwise, the board may dismiss the petition without prejudice.

(4) A petitioner who files the petition before the term of suspension ordered has fully elapsed must file an updated petition and serve upon the administrator an updated personal history affidavit within 14 days after the term of suspension ordered has fully elapsed. All petitioners remain under a continuing obligation to provide updated information bearing upon the petition or the personal history affidavit.

(5) The petitioner must cooperate fully in the investigation by the administrator into the petitioner's eligibility for reinstatement by promptly providing any information requested. If requested, the petitioner must participate in a recorded interview and answer fully and fairly under oath all questions about eligibility for reinstatement.

(C)-(E) [Unchanged.]

RULE 9.126. OPEN HEARINGS; CONFIDENTIAL FILES AND RECORDS.

(A)-(B) [Unchanged.]

(C) Papers. Formal pleadings, reports, findings, recommendations, discipline, reprimands, transcripts, and orders resulting from hearings must be open to the public. A personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document that is not open to the public. This subrule does not apply to a request for a disclosure authorization submitted to the board or the Supreme Court pursuant to subrules (D)(7) or (E)(5).

(D)-(F) [Unchanged.]

Staff Comment: The amendment of MCR 9.124(B)(1) requires a petitioner for reinstatement to file a personal history affidavit only with

the grievance administrator and prevent its disclosure to the public except as provided by MCR 9.126. The amendment of MCR 9.124(B)(2) clarifies that a petition for reinstatement must be accompanied by both a publication fee and administrative costs imposed by MCR 9.128(B)(1). The amendment of MCR 9.126(C) clarifies that a personal history affidavit filed pursuant to MCR 9.124(B)(1) is a confidential document and is not open to the public.

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

Adopted January 4, 2005, effective immediately (File No. 2004-22)—REPORTER.

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

RULE 7.201. ORGANIZATION AND OPERATION OF COURT OF APPEALS.

(A) [Unchanged.]

(B) Court of Appeals Clerk; Place of Filing Papers; Fees.

(1) [Unchanged.]

(2) Papers to be filed with the court or the clerk must be filed in the clerk's office in Lansing or with a deputy clerk in Detroit, Troy, or Grand Rapids. Fees paid to a deputy clerk must be forwarded to the clerk's office in Lansing. Claims of appeal, applications, motions, and complaints need not be accepted for filing until all required documents have been filed and the requisite fees have been paid.

(3) [Unchanged.]

(C)-(H) [Unchanged.]

Staff Comment: The amendment of MCR 7.201(B)(2) replaces the reference to Southfield with a reference to Troy. This amendment corresponds with the Court of Appeals November 29, 2004, relocation of its Southfield office to Troy.

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

Adopted January 11, 2005, effective immediately (File No. 2003-20) —REPORTER.

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

RULE 9.216. APPEARANCE BEFORE COMMISSION.

When the master files the report, the commission shall set a date for hearing objections to the report. The respondent and the examiner must file written briefs at least 7 days before the hearing date. The briefs must include a discussion of possible sanctions and, except as otherwise permitted by the Judicial Tenure Commission, are limited to 50 pages in length. Both the respondent and the examiner may present oral argument at the hearing.

Staff Comment: The amendment of MCR 9.216 imposes a 50-page limit for briefs filed with the Judicial Tenure Commission. It reflects the page limit that the commission currently imposes for briefs filed in Judicial Tenure Commission proceedings.

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

AMENDMENT OF MICHIGAN RULES OF EVIDENCE

Administrative file closed August 11, 2004. (File No. 2001-51)—REPORTER.

On order of the Court, the proposed amendment of Rule 404 of the Michigan Rules of Evidence having been published for comment at 469 Mich 1203-1205 (2003), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to modify the rule of evidence. The administrative file is closed without further action.

Justices KELLY, TAYLOR, and YOUNG concur, and Chief Justice CORRIGAN, and Justices WEAVER and MARKMAN dissent in statements below.

KELLY, J. (*concurring*). I agree with the majority of my colleagues that the proposed amendment is attractive because, as we know, victims of domestic violence are frequently reluctant to testify against abusive partners. However, I am unwilling to modify MRE 404 for only one class of crime victims. Also, like Justice YOUNG, I am not convinced that the principles undergirding the rule as currently written are faulty. I too remain open to be convinced of the wisdom of alternative approaches.

TAYLOR, J. (*concurring*). I concur with the Court's decision not to amend MRE 404(b) to adopt a domestic violence exception.

There is currently great enthusiasm for prosecution of "domestic violence" offenders. As is customary at a time of such zeal, reformers want the courts to gut traditional evidentiary protections so as to facilitate prosecutions. While I am as horrified by the specter of domestic abuse as any, I do not feel it, or any other imaginable domestic peril, justifies the wholesale dumping of our traditional defendant protection rules. The rules at issue often are not popular rules, and to champion them, especially when the blood is up to jettison them to accomplish so much good, is to invite misunderstanding, but this is what judges have always been required to do. In refusing to dismantle these canons established bit by bit over hundreds of years, even for a worthy cause, the majority integrates itself into that tradition.

YOUNG, J. (*concurring*). I join in Justice TAYLOR's statement and write separately to make a few additional points.

I recognize that there is a growing body of literature suggesting that victims are frequently reluctant to testify against abusive domestic partners. I also recognize the frustration that this kind of reluctance presents to prosecutors and all who seek to protect such victims. However, rules of evidence are stubborn things, characteristically frustrating to those who are committed to the idea that more expeditious trial processes would lead to convictions of those they believe to be guilty of crimes.

Although I respect the sincere ardor of the proponents urging amendment of this rule, I do not believe that they have made a compelling case that the rule should be modified to accommodate this narrow class of crime victims. Surely all victims would be equally desirous of having the *propensity* of the defendant to

commit bad acts made known to the trier of fact to lighten the burden of having to prove that the defendant committed the charged offense. Further, I am unconvinced that domestic abuse perpetrators, as a class, have a higher recidivism rate than many other classes of perpetrators, such as rapists or child molesters. While the Congress has recently adopted crime-specific exceptions to the general prohibition against propensity evidence, see FRE 413 and 414, I am unconvinced that the principles undergirding MRE 404 ought to be undercut by specific classes of criminality. However, I remain open to be convinced of the wisdom of alternative approaches as we gather broader-based empirical data on criminal recidivism rates and experience under the revised federal rules.

I have argued at length elsewhere[1] that the rules of evidence are the product of centuries of refinement—judgments about the kind of evidence that is best designed to preserve and protect the judiciary's ability to provide a fair trial. While this Court should always be willing to reexamine these rules, I believe it should move cautiously in abandoning such bedrock principles as those that animate MRE 404. As interpreted by this Court, MRE 404 provides a number of reasonable exceptions whereby evidence of prior bad acts may properly be introduced against a criminal defendant. Consequently, until we conclude that a defendant's guilt should be decided as much on past conduct as on current charged conduct, I believe that MRE 404 serves a vital purpose protecting the interests of all concerned in the pursuit of justice.

CORRIGAN, C.J. (*dissenting*). I respectfully dissent from the majority's decision to close this administrative file without taking further action. We opened this file to

[1] *People v Katt*, 468 Mich 272, 297-301 (2003) (YOUNG, J., dissenting).

consider whether to allow evidence of prior acts of domestic violence to be admitted in domestic violence prosecutions. Our current rule, MRE 404(b), bars admission of evidence of prior bad acts to prove a defendant's character and action in conformity with that character. I recognize that this rule has ancient origins, but a trend has begun to emerge in some states treating evidence of prior acts of domestic violence as an exception to the general ban on propensity evidence. Domestic violence cases present unique challenges and obstacles to successful prosecutions. Therefore, before closing this administrative file, we should carefully consider the ramifications of failing to amend MRE 404 and draw guidance from the experiences of other states.

Domestic violence is a growing problem both in Michigan and nationwide. In Michigan, the growing scourge of domestic violence is reflected in part by the number of petitions for personal protection orders that were filed last year. Statewide there were 47,858 filings for PPOs in 2003. In Wayne County alone there were 14,285 filings, representing sixteen percent of the total filings and twenty-eight percent of the combined civil, domestic, and miscellaneous family filings in that circuit. Also, Wayne County judges last year heard more than 18,000 motions on personal protection cases.

The unique nature of domestic violence, and its troubling emergence as a growing problem, is summarized in a recent law review article, Kovach, *Prosecutorial use of other acts of domestic violence for propensity purposes: A brief look at its past, present and future*, 2003 U Ill L R 1115, 1116-1117:

> Domestic violence is a criminal justice and public policy epidemic of enormous proportions. There has only recently been reliable data on the prevalence of domestic violence in

> the United States. One out of every five U.S. women has been physically assaulted by an intimate partner. One survey analyzing data gathered from 1993 through 1998 found that women experienced about 900,000 violent offenses at the hands of an intimate in 1998, down from a staggering 1.1 million in 1993. During the same time period, only about half the domestic violence against women was reported to the police. Even when domestic violence cases enter the criminal justice system, prosecution of domestic violence is difficult because, among other reasons, there is typically a lack of documented physical evidence or witnesses; the victim is often noncooperative; and there is jury bias against victims of domestic violence. As a result, many prosecutors' offices have changed their strategy, so that a domestic violence case is not centered on the victim's testimony but rather consists of other evidence. One form of this "other evidence" can be the defendant's other domestic violence acts, which, if admitted, often have a dispositive effect on the outcome of the case. For instance, evidence of the defendant's other acts of domestic violence could serve to corroborate the victim's testimony, the physical evidence, or another witness's testimony. [Citations omitted.]

The cyclical nature of this crime is important to note. Domestic violence defendants have a high rate of recidivism and, over time, domestic violence often becomes more frequent and severe. *Id*., p 1131. Forty-seven percent of those who beat their spouses do so at least three times a year. Thirty-two percent of victims are victimized again within six months of the initial episode. Also, domestic violence often goes unreported and may lead to more serious crimes, including murder. See the attached February 5, 2004, letter from the Honorable Amy Krause, Chair of the Michigan Domestic Violence Prevention and Treatment Board, and citations therein.

Moreover, the difficulty in proving domestic violence makes the problem that much worse:

> Domestic violence cases contain unique factors that frequently hinder successful prosecutions. Often, the victim does not want the case to proceed, or the victim may refuse to testify for the prosecution, or may even testify on behalf of the defendant. The victim's reluctance may be due to a number of factors such as intimidation by the defendant, including threats of retaliation, susceptibility to the batterer's promises to cease abuse, cultural or family pressures, or uncertainty whether she will be believed or that her batterer will be held accountable. Domestic violence often occurs behind closed doors or away from witnesses who could testify on the prosecution's behalf. Victims of domestic violence may suffer from Battered Women's Syndrome or from Post Traumatic Stress Disorder as a result of the frequent abuse, which often causes victims to be unable to remember violent events. Finally, juror and judicial bias against domestic violence victims often hinders prosecution. [Kovach, *supra*, p 1126 (citations omitted).]

To overcome these unique hurdles, two states—California and Alaska—have authorized admission of evidence of prior acts of domestic violence for propensity purposes. Other states, such as Kansas, Minnesota, and Colorado, have expanded the availability of nonpropensity theories for admitting evidence of prior acts of domestic violence. The experiences in these states offer guidance on whether and how we should amend our own rules.

Since 1997, California Evidence Code (CEC) § 1109 has provided for admission of evidence of other acts of domestic violence for propensity purposes where the defendant is charged with domestic violence. The trial court has discretion, however, to exclude such evidence if its probative value is substantially outweighed by undue prejudice. CEC § 352. See Kovach, *supra*, pp 1132-1134.

The Alaska legislature took a similar step in 1997. Alaska Rule of Evidence 404(b)(4) provides that in "a prosecution for a crime involving domestic violence . . . evidence of other crimes involving domestic violence by the defendant against the same or another person . . . is admissible." "The public policy considerations behind this evidence rule include the lack of witnesses in domestic violence cases and thus the need for corroboration, frequent victim reluctance to testify due to fear of the defendant, and the cyclical nature of domestic violence: the ongoing pattern of abuse escalates in frequency and severity over time." Kovach, *supra*, p 1141.

Like California, Alaska provides procedural safeguards in the use of propensity evidence. In addition to the required balancing of probative value and prejudice, the other acts evidence must be less than ten years old, it must be similar to the charged offense, and it must have been committed upon persons similar to the victim in the charged case. ARE 404(b)(2); Kovach, *supra*, p 1141.

Both the California and Alaska rules have withstood constitutional challenge. California courts have rejected both due process and equal protection challenges to CEC § 1109. See *People v Hoover*, 77 Cal App 4th 1020 (2000); *People v Jennings*, 81 Cal App 4th 1301 (2000); Kovach, *supra*, pp 1134-1136. Alaska courts have similarly held that ARE 404(b)(4) does not violate the due process or equal protection clauses. See *Fuzzard v Alaska*, 13 P3d 1163, 1167 (Alas App, 2000). In rejecting a due process challenge to the Alaska rule, a central consideration was that the trial court retains discretion to exclude evidence that is more prejudicial than probative. *Id.*; *Allen v Alaska*, 945 P2d 1233 (Alas App, 1997) (involving a due process challenge to a different

provision); Kovach, *supra*, p 1142. Also, the Alaska Court of Appeals in *Fuzzard* rejected an equal protection challenge to the use of propensity evidence "in light of the state's interest in addressing proof problems posed by domestic violence." Kovach, *supra*, p 1142.

Finally, Colorado, Minnesota, and Kansas have expanded the nonpropensity theories under which evidence of other acts of domestic violence may be admitted. Kovach, *supra*, pp 1143-1148. Minnesota's statute has been interpreted to allow evidence of the history of the relationship between the victim and the defendant to explain the context in which the charged assault occurred. *Id*. at 1147.

I believe that our Court should more fully consider the experiences in these other states before closing our administrative file on this subject. This Court has already published for comment two proposed amendments to MRE 404 that would allow evidence of other acts of domestic violence for propensity purposes. Our first proposal synthesized the Alaska, California, and Minnesota rules, and would have provided:

> In the prosecution of an offense involving domestic violence or interference with a report of an offense involving domestic violence, evidence of other acts involving domestic violence by the defendant against the same or another person or interference with a report of an offense involving domestic violence is admissible, unless found inadmissible under MRE 403. For purposes of this subrule, "domestic violence" has the meaning given in MCL 400.1501, and an "offense involving domestic violence" includes, but is not limited to, those crimes proscribed by MCL 750.81(2) and MCL 750.81a(2). [469 Mich 1204-1205.]

The second proposal that we published would have provided: "In the prosecution of an offense involving domestic violence, evidence of other acts of domestic violence is admissible and may be considered for its

bearing on any matter to which it is relevant." 469 Mich 1205. This language was based on Rules 413 and 414 of the Federal Rules of Evidence, which allow propensity evidence to be admitted in federal sexual assault cases.

The majority has now decided to close this file, apparently concluding that it does not favor either of the two published proposals. I would suggest, however, that in light of the growing problem of domestic violence both in Michigan and nationwide, we should at the very least consider other possible alternatives before closing this file. For example, we could consider adding more procedural safeguards to the proposed rules similar to the safeguards that exist in other states. Specifically, we could (1) require notice of the proposed admission of other acts evidence, (2) require a degree of similarity between the other acts and the charged offense, or (3) require that the prior act have occurred no more than ten years before the charged offense. These safeguards, along with the requirement in our first proposal that the court balance the probative value and prejudice, would conform our rule to those that have withstood constitutional challenge in other states.

In the alternative, if these safeguards would not alleviate the majority's concerns regarding the use of propensity evidence, we could consider the less drastic alternative of simply expanding the nonpropensity theories under which evidence of prior acts of domestic violence may be admitted. The approaches followed in Minnesota, Colorado, and Kansas are worthy of our consideration. For example, as the Minnesota experience suggests, a reasonable theory of relevance may exist that does not constitute a propensity theory, but which at the same time does not fit neatly within the framework of our existing rule. A juror might not

understand how a discrete act of domestic violence occurred without knowing the history of the relationship between the victim and the defendant. Thus, evidence of prior acts of domestic violence may be probative on nonpropensity grounds if it provides a contextual explanation for how or why an individual act of abuse occurred.

For these reasons, I would not close this administrative file, but would publish additional proposals and invite comments from the public, both in writing and at a public hearing. The unique and troubling difficulties in proving domestic violence cases warrant our careful consideration.

WEAVER, J. (*dissenting*). I respectfully dissent from the order closing the administrative file and declining to modify MRE 404 to allow evidence of prior acts of domestic violence in domestic-violence cases. Various proposals concerning this issue have been before the Court for over a year, since June 2003. For the many and persuasive reasons that Chief Justice CORRIGAN states in her dissent for not closing the file, I would adopt proposal A, as published for public comment on July 16, 2003.

Proposal A, which is a synthesis of provisions from other states, including Rule 404(b)(4) of the Alaska Rules of Evidence, Section 404(b) of the Minnesota Rules of Evidence, and Section 1109 of the California Evidence Code, would modify MRE 404(b) as follows:

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

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES.

(a) [Unchanged.]

(b) Other crimes, wrongs, or acts.

(1) [Unchanged.]

(2) In the prosecution of an offense involving domestic violence or interference with a report of an offense involving domestic violence, evidence of other acts involving domestic violence by the defendant against the same or another person or interference with a report of an offense involving domestic violence is admissible, unless found inadmissible under MRE 403. For purposes of this subrule, "domestic violence" has the meaning given in MCL 400.1501, and an "offense involving domestic violence" includes, but is not limited to, those crimes proscribed by MCL 750.81(2) and 750.81a(2).

(3) [Renumbered but otherwise unchanged.]

MARKMAN, J. (*dissenting*). I concur with the dissenting statement of Chief Justice CORRIGAN. I too would not yet close this administrative file and would continue our consideration of this matter. The proposed amendments to MRE 404(b), or some variation, in my judgment, have the potential to strengthen the truth-seeking function of the criminal justice process with regard to domestic violence prosecutions without undermining constitutional protections for defendants. In these regards, I offer the following thoughts:

(1) Domestic violence cases are different in terms of their ongoing character, the position of control of abusers over their victims and the reluctance of victims to testify, the potential for the intimidation of victims by their abusers and the incidence of recantations by victims, the lack of neutral witnesses, the ambiguities of what differentiate consensual and nonconsensual relationships between the victim and the abuser, and the demonstrated propensity toward recidivism on the part

of abusers.[1] As a result, the public interest in admitting all relevant evidence that will assist the fact-finder in ascertaining the truth of criminal charges becomes correspondingly greater.[2]

(2) Similar rules have proved workable and effective in a growing number of states, while analogous rules in criminal prosecutions for sexual assault have proved workable and effective both in other states and in the federal justice system.[3]

(3) Nothing in the proposed amendment would un-

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[1] Concerning Justice YOUNG's view that there is no evidence of greater levels of recidivism among domestic violence offenders than any other criminal offenders, see, for example, Hotatling and Buzawa (2003) "Foregoing Criminal Justice Assistance: The Non-Reporting of New Incidents of Abuse in a Court Sample of Domestic Violence Victims." Final Report to the National Institute of Justice, Washington DC: National Institute of Justice (half of all domestic violence victims were revictimized within a year); Sandra Adams (1999), "Serial Batterers." Probation Research Bulletin. Boston, MA: Massachusetts Office of the Commissioner of Probation (91% of domestic violence offenders who were under restraining orders in Massachusetts had victimized different victims); New York State Unified Court System, October 24, 2001 ("recidivism rate for domestic violence crimes two and a half times that of crimes between strangers").

[2] The general rule in criminal cases is well settled, that the commission of other, though similar offenses, by the defendant, can not be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial . . . . But the courts in several of the states have shown a disposition to relax the rule in cases where the offense consists of illicit intercourse between the sexes . . . .

* * *

We think there is much good sense in these decisions, and that a crime consisting of illicit sexual intercourse, like the present [incest case], involves different principles in this respect, and should be governed by different rules from those which apply to offenses generally, or perhaps to any other class of offenses. [*People v Jenness*, 5 Mich 305, 320-321 (1858) (CHRISTIANCY, J., for the Court).]

[3] The courts in these states have consistently held such rules to be constitutional. See, e.g., *People v Jennings*, 81 Cal App 4th 1301, 1309-1313 (2000), and the cases cited therein.

dermine current protections in Michigan rules afforded defendants in domestic violence cases concerning hearsay evidence, irrelevant evidence, and prejudicial evidence. Further, defendants would have the same right to respond to evidence of past misconduct, including the assistance of counsel, cross-examination, and the opportunity for rebuttal. They would, of course, have to be convicted of the *charged* offense by a unanimous jury on the basis of guilt beyond a reasonable doubt.[4]

(4) Additionally, like Chief Justice CORRIGAN, I would also favor the additional protections of pretrial notice of propensity evidence, limitations on the age of such evidence, and threshold requirements of similarity in nature between the past and the present conduct, and between the victims of the past and the present conduct. In addition, I would favor limitations on the use of evidence drawn from personal protection orders granted absent a hearing.

(5) The proposed amendment addresses the problem of domestic violence more honestly than the present system in which exceptions to the rule against character evidence are often stretched excessively in order to permit the introduction of clearly relevant evidence of past misconduct.[5] Such stretching of the rules comes eventually to affect not only the law pertaining to

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[4] Contrary to the assertion of Justice YOUNG, the purpose of the proposed amendment is not to create "more expeditious trial processes . . . ." Rather, by allowing the fact-finder to consider more, rather than less, relevant evidence, it is to create a more "thorough" and a more "accurate" trial process.

[5] Cf. IA Wigmore, Evidence, § 62.2, pp 1334-1336:

> [T]here is a strong tendency in prosecutions for sex offenses to admit evidence of the accused's sexual proclivities. Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so.

domestic violence prosecutions, but the law pertaining to *all* criminal prosecutions, and inevitably results in a wider range of variation in the manner in which different defendants are treated in the courtroom.

(6) A reasonable juror, I believe, would have an interest in knowing the full relevant history of misconduct by a defendant in a domestic violence case, not because such history would be dispositive of the charged case, but because such history might be helpful in placing the charged case within an appropriate context. The current irrebuttable presumption against this juror having access to such evidence is inconsistent with the premise of the jury system, in which the ordinary citizen brings his common sense and judgment to bear on the credibility of witnesses and the disputed facts of a criminal case.[6]

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* * *

. . . [J]urisdictions that do not expressly recognize a lustful disposition exception may effectively recognize such an exception by expansively interpreting in prosecutions for sex offenses various well-established exceptions to the character evidence rule.

[6] [W]here a witness has testified to a fact or transaction which, standing alone and entirely unconnected with anything which led to or brought it about, would appear in any degree unnatural or improbable in itself, without reference to the facts preceding and inducing the principal transaction, and which, if proved, would render it more natural or probable; *such* previous facts are not only admissible and relevant, but they constitute a necessary part of such principal transaction—a link in the chain of testimony, without which it would be impossible for the jury properly to appreciate the testimony in reference to such principal transaction. And such previous facts should therefore be elicited by the examination of the party producing the witness. Any other rule, in such a case, would be grossly unfair towards the witness; render a trial a process for suppressing, rather than eliciting, the truth, and defeat the very objects for which courts of justice are instituted.

(7) A reasonable juror might also understandably desire access to evidence relevant to a criminal defendant's "dispositions and inclinations, about the presence or absence of effective inhibitions against engaging in serious violence or other criminality, about his willingness to hazard the practical risks of criminal conduct, and about the probability or improbability that he has been falsely or mistakenly implicated."[7] Such a juror would also recognize—and be so instructed by the trial court—that the defendant must ultimately be proved guilty beyond a reasonable doubt of the *charged* offense.

(8) The starting principle of our criminal justice system should be that, consistent with the constitution and due process of law, a complete picture of the available evidence will be presented to the jury.[8] Be-

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* * *

> To permit the evidence, therefore, of an isolated transaction, which could only be made to appear probable by exhibiting the antecedent facts which induced it, and yet to exclude from the investigation all such antecedent facts, would be to set at defiance the order of nature, and the laws of truth which God has stamped upon the human mind. [*Jenness*, n 2 *supra*, pp 323-324.]

[7] Karp, *Evidence of propensity and probability in sex offense cases and other cases*, 70 Chi-Kent L Rev 15, 26-27 (1994).

[8] Without this evidence [of past misconduct in a criminal incest case,] the jury could not properly appreciate [the witness's] evidence in relation to the particular transaction in question, nor render a verdict not based upon a partial, and, to some extent, a false, estimate of the evidence. We think, therefore, this evidence was properly admitted. It tended to explain what might otherwise have appeared improbable or unnatural . . . .

> We do not think the evidence in reference to such previous acts can be said to operate unfairly upon the defendant in such case; as

cause the proposed reform has operated well elsewhere, and because the majority has not demonstrated why a juror should be deprived of evidence that might assist him in rendering a better-informed decision concerning the truth of a serious criminal charge, I would not yet close this file and would continue our consideration of this matter.[9]

> he is not exposed to the risk of a conviction upon them, and every such previous fact stated by the witness, opens a wider field, and gives more ample facilities for contradiction if the testimony be false. If the evidence were confined to a single transaction, a designing witness might more easily contrive a fictitious case, which should appear consistent with surrounding circumstances, and which, therefore, might be difficult of contradiction. But by admitting evidence of such previous transactions, the difficulties in the way of such fabrication are increased, as every additional transaction testified to multiplies the chances of detection and contradiction if the transactions be not real. [*Jenness*, n 2 *supra*, pp 325-326.]

[9] The allegedly momentary "zeal," by which Justice TAYLOR explains the position of the dissenters in favor of supplying the jury with some context for assessing a type of criminal conduct particularly in need of context, was apparently too much even for Justice CHRISTIANCY and this Court to withstand in 1858. See ns 2, 6, and 8.

Further, in setting forth the historical pedigree of their positions, both Justice TAYLOR ("hundreds of years") and Justice YOUNG ("centuries") considerably overstate matters. For a more balanced statement of what prevailed throughout much of the nineteenth century in the United States, see, generally, Karp, n 7 *supra*, pp 26-35; *Jenness*, n 2 *supra*.

ATTACHMENT

February 5, 2004

STATE OF MICHIGAN
Family Independence Agency

www.michigan.gov

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Michigan Supreme Court
Michigan Hall of Justice
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Lansing, MI 48909

Re: Proposed Amendment of MRE 404(b), File No. 2001-51

Honorable Justices of the Michigan Supreme Court:

Thank you for the invitation during the hearing on January 29, 2004 to submit additional information supporting adoption of a domestic violence exception to MRE 404(b).

Enclosed is an additional copy of the article I provided to the Court during the January 29 hearing: Andrea M. Kovach, "Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present and Future," 4 *University of Illinois Law Review*, 1115 (2003). The article presents well-researched arguments for adoption of a rule admitting other acts of domestic violence for propensity purposes in domestic violence criminal prosecutions. It addresses the public policy considerations supporting adoption of such a rule. The article identifies unique aspects of domestic violence crimes, prosecutions, perpetrators and victims that distinguish them from their non-domestic violence counterparts, and that warrant admissibility of propensity evidence. The article examines the federal rules for admissibility of propensity evidence in federal prosecutions for sexual assault and child molestation, FRE 413 and FRE 414, as precedent for admissibility of propensity evidence in domestic violence prosecutions. The article also discusses the legislative history and prosecution experiences in the two states (California and Alaska) in which legislatures have enacted rules permitting propensity evidence in domestic violence prosecutions. Finally, the article cites and discusses case law upholding the federal rules and these state rules against several constitutional challenges. I respectfully request that the Court consider the information and arguments presented in the article.

During the January 29 hearing, the Court specifically requested information supporting the conclusion that perpetrators of domestic violence engage in repeated acts of violence, and that an act of violence in the context of domestic violence is part of a pattern of violence perpetrated by the abuser against one or more intimate partners. The following is offered in support of those conclusions.

- "...[S]tudies have shown that batterers will continue the abuse unless there is some intervention: domestic violence defendants have a high rate of recidivism..."...[S]tudies have also shown that, over time, domestic violence escalates in frequency and severity." Andrea M. Kovach, "Prosecutorial Use of Other Acts of Domestic Violence for Propensity Purposes: A Brief Look at its Past, Present and Future," 4 *University of Illinois Law Review*, 1115, 1131 (2003), citing Linell A. Letrendre, "Beating Again and Again: Why Washington Needs a New Rule of Evidence Admitting Prior Acts of Domestic Violence," 75 *Wash. L. Rev.* 973, 991, 998 (2000); Lisa Marie De Sanctis, "Bridging the Gap Between the Rules of Evidence and Justice for Victims of Domestic Violence," 8 *Yale J. Law & Feminism* 359, 388 (1996); *U.S. Dept of Justice, Special Report, Intimate Partner Violence* (2000) at 6; Cheryl Hanna, "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions," 109 *Harvard L. Rev.* 1849, 1889 (1996).

- The American Bar Association Commission on Domestic Violence reports that battering tends to be a pattern of violence rather than a one-time occurrence, citing the following statistics:

  - During the six months following an episode of domestic violence, 32% of victims of domestic violence are victimized again. (Bureau of Justice Statistics: Preventing Domestic Violence Against Women, 1986).

  - 47% of those who beat their spouses do so at least 3 times per year. (AMA Diagnostic & Treatment Guidelines on Domestic Violence, SEC: 94-677:3M:9/94 (1994)).

  See http://www.abanet.org/domviol/stats.html.

- "The Chicago Women's Health Risk Study (in which researchers screened more than 2,500 Chicago women during 1995–1996 and examined the Chicago Homicide Dataset, medical examiner's office and court records, newspapers, and other sources) identified several factors that signal potential danger of death or life-threatening injury.

  - In the great majority of female homicides, the woman had experienced violence at the hands of her partner in the past year. Also, most of the abused women had experienced other incidents in the past. But three particular aspects of past violence are the highest risk factors for future violence: (1) the type of past violence; (2) the number of days since the last incident; and (3) the frequency, or increasing frequency, of violence in the past.

  - Frequency of violence was also an important risk factor. The violence against them was becoming increasingly frequent for almost three-fourths of women who murdered their abusive partners and for over two-fifths of the murdered women.

  - No matter how severe the most recent incident of abuse, if it happened recently the woman faces a higher risk. The number of days since the last act of violence was an important risk

factor. Half the women killed, and three-fourths of the women who killed, had experienced violence within 30 days of the homicide, some within 1 or 2 days.

- Almost half of the abused women in the study had experienced at least one "severe or life threatening" incident in the past year (permanent injury, being severely "beaten up," being choked or burned, internal injury, head injury, broken bones, or a threat or attack with a weapon). These women were more likely to have sought help.

- Any past attempt to strangle or choke her is a risk factor for severe or fatal violence. In a fourth of the homicides of a woman by a man, he strangled or smothered her to death. Violent incidents involving choking were more likely to prove fatal.

See Block, *How Can Practitioners Help an Abused Woman Lower Her Risk of Death?* in National Institutes of Justice Journal (No. 250, Nov. 2003) at pp 5-6. (On-line at http://www.ncjrs.org/pdffiles1/jr000250.pdf or http://www.ojp.usdoj.gov/nij.)

- "Our own research and that of others indicates that numerous violent incidents occur prior to the first report to any formal agency and only a few incidents are ever reported." R. Emerson Dobash, et al, *Changing Violent Men*, (2000), at 11, citing: L. H. Bowker, *Beating Wife Beating* (1983); R.E. Dobash & R.P. Dobash, *Violence Against Wives* (1979), at 161-122; S. Grace, *Policing Domestic Violence in the 1990s* (Home Office Research Study, No. 139, Her Majesty's Stationery Office, London, 1979); A. Mullender *Rethinking Domestic Violence* (1996); A. Worrall & K. Pease, "Personal Crime Against Women: Evidence from the 1982 British Crime Survey," *Howard Journal*, 25(2), (1986) at 118-124.

- "Informal studies indicate as many as 25 percent of men in treatment for their violence will re-offend during the course of that treatment." Daniel J. Sonkin, Ed., *Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence* (1987), at 223, citing M. Halpern, *The Male Batterer: The BWA Program*, paper presented at the 91st Annual Convention of the American Psychological Association, Anaheim, CA (August, 1983).

- "...Most men who abuse their current partners previously abused their former partners. 93 percent of men in treatment for battering and who have had prior relationships are known to have abused their former partners. Most will go on to beat any successive partners. Over half of the men 'successfully' treated for battering are known to continue their physical violence against any new partners, and virtually all 'successfully' treated abusers continue using psychological violence." Joan Zorza, "Protecting the Children in Custody Disputes When One Parent Abuses the Other" *Clearinghouse Review*, Vol. 29, No. 12 (April, 1996), at 1114, citing Daniel J. Sonkin et al, *The Male Batterer: A Treatment Approach* (1985) at 35.

- "Abuser's tactics have been compared to the brainwashing tactics used against prisoners of war, which include isolation, threats, occasional indulgences, demonstrations of power, degradation, and enforcement of trivial demands. Abusers may employ similar patterns of physical, sexual, financial and emotional coercion to control their intimate partners." Mary Lovik, *Domestic Violence: A Guide to Criminal and Civil Proceedings*, 2d ed., Michigan Judicial Institute (2001) at 12, citing: Walker, *The Battered Women Syndrome* (1984) at 27-28; Graham & Rawlings, "Bonding with Abusive Dating Partners: Dynamics of Stockholm Syndrome," in *Dating Violence: Young Women in Danger*, (1991) at 121-122.

The Michigan Domestic Violence Prevention and Treatment Board (MDVPTB) thanks the Court for the opportunity to present this additional information in support of the proposed amendment to MRE 404(b). MDVPTB strongly supports adoption of this rule which will provide a much-needed tool enabling the criminal justice system to more effectively respond to domestic violence. Victims of domestic violence and their children have few viable options for protection, and rely on the criminal justice system to provide safety, stability and justice.

Respectfully submitted,

Amy Krause/D.C.

Hon. Amy Krause, Chair
Michigan Domestic Violence Prevention and Treatment Board

cc: Michigan Domestic Violence Prevention & Treatment Board
Debi Cain, Executive Director

AMENDMENTS OF LOCAL COURT RULES

THIRTY-SIXTH JUDICIAL DISTRICT

Approved November 3, 2004, effective immediately (File No. 2004-51) —REPORTER.

On order of the Court, Rule 2.603 of the Local Court Rules of the 36th Judicial District Court is rescinded, effective immediately.

SUPREME COURT CASES

PEOPLE v HOLTSCHLAG
PEOPLE v COLE
PEOPLE v BRAYMAN
PEOPLE v LIMMER

Docket Nos. 123553-123556. Argued March 9, 2004 (Calendar No. 3). Decided July 23, 2004. In lieu of granting rehearing, *Holtschlag*, *Cole*, and *Brayman* are remanded to the Court of Appeals. See *post*, 1202.

Nicholas E. Holtschlag, Joshua M. Cole, and Daniel Brayman were each convicted by a jury in the Wayne Circuit Court, Maggie W. Drake, J., of involuntary manslaughter and two counts of mixing a harmful substance in a drink, which is a felony; Erick Limmer was convicted by a jury in the same court of various offenses, including accessory after the fact to manslaughter and mixing a harmful substance in a drink. The men had been together socially with three fourteen-year-old girls and at least one of the defendants put a schedule I drug known as GHB in the drinks of the girls, resulting in the death of one. The Court of Appeals, COOPER, P.J., and BANDSTRA and TALBOT, JJ., in an unpublished opinion per curiam, vacated the defendants' convictions of involuntary manslaughter and accessory after the fact to manslaughter on the basis that, under a gross negligence theory, involuntary manslaughter could only be established by a showing that the defendants had performed a lawful act in a grossly negligent manner, which cannot be established in this case because mixing a harmful substance in a drink is a felony (Docket Nos. 226715, 227941, 227942, 241661). The prosecution appealed.

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

The defendants, by their purposeful, willful, reckless, and unlawful behavior, unintentionally caused the death of another person, thus committing involuntary manslaughter. The relevant question in determining whether a homicide is murder or involuntary manslaughter is whether it occurred with malice, not whether the death occurred during the commission of a felonious or non-felonious act. The defendants in this case committed a malum in se unlawful act with intent to injure or in a grossly negligent manner that proximately caused death, making convic-

tions of involuntary manslaughter appropriate for Holtschlag, Cole, and Brayman, and the conviction of accessory after the fact to involuntary manslaughter appropriate for Limmer.

1. A person can be convicted of involuntary manslaughter when he commits an unlawful act even though that act is a felony.

2. An involuntary manslaughter conviction may be proper if defendant caused the death of another without malice and unintentionally, but in doing, with intent to injure or in a grossly negligent manner, some unlawful act that may or may not be a felony, or in doing, with intent to injure or in a grossly negligent manner, some act lawful in itself, or by the negligent omission to perform a legal duty. In this case, the underlying act was a felony, i.e., a schedule I controlled substance being mixed into the drinks of the girls.

3. The difference between murder and manslaughter is malice. Precluding conviction of involuntary manslaughter for an unintentional homicide resulting from the commission of a felony would require the prosecutor to prove malice to gain a conviction of murder or else allow the defendant to go free. The defendants may not rely on an earlier common-law definition of the catch-all crime of involuntary manslaughter to argue that, because the homicide at issue occurred during the commission of a felony, they cannot be guilty of manslaughter.

4. The decision that a homicide that occurs during the commission of a felony may constitute manslaughter may be applied in this case without violating the constitutional prohibition against ex post facto laws. US Const, art I, § 10, cl 1. The decision does not criminalize that which was innocent before the decision.

Justice CAVANAGH, joined by Justice KELLY, concurring in result only, stated that a defendant can be convicted of involuntary manslaughter when the committed act is a felony, but only when the felony does not naturally tend to cause death or great bodily harm.

The manslaughter statute, MCL 750.321, does not define manslaughter, leaving that definition to the common law. Michigan common law has defined it to mean that a person cannot be convicted of involuntary manslaughter when he commits a felony that naturally tends to cause death or great bodily harm, but can be convicted of involuntary manslaughter when he commits a felony that does not naturally tend to cause death or great bodily harm.

The majority also erred in concluding that the placing of a harmful substance in a drink was a malum in se unlawful act.

There are numerous harmful substances that could be mixed into a drink that would not naturally lead to death or great bodily harm.

Because the underlying felony was not one that naturally tends to cause death or great bodily harm, the defendants can be convicted of involuntary manslaughter under the Michigan common-law definition of manslaughter. The convictions should be reinstated.

Reversed; circuit court convictions reinstated.

HOMICIDE — INVOLUNTARY MANSLAUGHTER — DEATH RESULTING FROM COMMISSION OF FELONY.

A person may be convicted of involuntary manslaughter when he commits a felony with intent to injure or in a grossly negligent manner and thereby unintentionally kills another.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *Michael E. Duggan*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Olga Agnello*, Principal Attorney, Appeals, for the people.

David R. Cripps for Nicholas Holtschlag.

Richard B. Ginsberg for Joshua Cole.

State Appellate Defender (by *Gary L. Rogers*) for Daniel Brayman.

MARKMAN, J. We granted leave to determine if a defendant may be convicted of involuntary manslaughter for a homicide that occurred during the commission of a felony and for which the prosecutor proceeded under a "gross negligence" mens rea theory. We hold in the affirmative and, accordingly, we reverse the decision of the Court of Appeals and reinstate defendant Limmer's conviction of accessory after the fact to involuntary manslaughter and the remaining defendants' involuntary manslaughter convictions.

I. FACTS

On January 16, 1999, a get-together took place at the home of defendant Erick Limmer. Along with Limmer, the other defendants, Joshua Cole, Daniel Brayman, and Nicholas Holtschlag, were watching television, drinking alcohol, and smoking marijuana with three fourteen-year-old girls. At least one of the defendants put gamma hydroxybutrate or gamma hydroxybutyric acid (both known as GHB) in the girls' drinks.[1] Two of the girls became sick and, after several hours, were taken to the hospital. One of the girls, Samantha Reid, died. The other slipped into a coma but eventually recovered.

Defendants Brayman, Holtschlag, and Cole were convicted of involuntary manslaughter and two counts each of mixing a harmful substance in a drink, which is a felony. Defendant Limmer was convicted of accessory after the fact to manslaughter, mixing a harmful substance in a drink, delivery or manufacture of marijuana, and possession of GHB.

Defendants appealed, the appeals were consolidated, and the Court of Appeals stated that to support an involuntary manslaughter conviction under a gross negligence theory, the prosecutor had to establish that defendants performed a *lawful* act in a grossly negligent manner.[2] Because mixing a harmful substance in the girls' drinks was an unlawful act that is a felony, the Court vacated the involuntary manslaughter convictions and accessory after the fact conviction.

II. STANDARD OF REVIEW

Determining the elements of common-law involuntary manslaughter is a question of law. We review

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[1] GHB is sometimes known as the "date rape drug."

[2] Unpublished opinion per curiam, issued March 27, 2003 (Docket Nos. 226715, 227941, 227942, and 241661).

questions of law de novo. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

III. ANALYSIS

There are primarily two issues to address in this case. The first concerns the defendants' contention that they cannot be convicted of involuntary manslaughter because the homicide at issue occurred during the commission of a felony and involuntary manslaughter, defendants argue, is, in part, defined by this Court as the killing of another during the commission of an unlawful act that is *not* a felony. The second issue concerns defendants' contention that to be convicted of involuntary manslaughter under a gross negligence theory, which was the theory under which the prosecutor proceeded at trial, the homicide must have occurred during the commission of a *lawful* act, and in this case it occurred during the commission of an unlawful (felonious) act.

A. IS MANSLAUGHTER PRECLUDED BECAUSE OF A "FELONY"?

Regarding the first issue, some insight into the early common-law history of the crime of manslaughter and, particularly, its development alongside the felony-murder doctrine, is necessary. Under Lord Coke's traditional "felony-murder" doctrine, a homicide that occurred during the commission of an unlawful act was "murder" punishable by death. See *People v Aaron*, 409 Mich 672, 692; 299 NW2d 304 (1980), in which this Court thoroughly articulated the elusive history of the felony-murder doctrine. The premise behind the traditional felony-murder doctrine was the idea that the intention to perpetrate the unlawful act sufficiently showed the existence of malice aforethought—the req-

uisite mens rea for murder.[3] *Id.* at 717. This was considered true whatever the nature of the underlying crime may have been. *Id.* at 692. Lord Coke's traditional doctrine was heavily criticized for the harsh results it engendered, and it was severely limited even in early common-law history. *Id.* at 693-699. One of the earliest limitations on the traditional doctrine was limiting its application to those homicides that occurred during the commission of a felony or during the commission of an act that was intended to inflict great bodily injury. *Id.* at 696-697.

Additionally, in the early days of the English common law, the crime of "manslaughter" was developed. The crime of manslaughter in Michigan is adopted from that early common-law crime. See *People v Datema,* 448 Mich 585, 594; 533 NW2d 272 (1995): " 'The law of manslaughter as it exists today has been adopted from the old English common law.' " (Citation omitted.) Whereas, as noted above, malice is the mens rea required for murder, manslaughter requires a less culpable mens rea. " 'Manslaughter is the unlawful and felonious killing of another without malice, either express or implied.' " *People v Austin,* 221 Mich 635, 643; 192 NW 590 (1923) (citation omitted). Involuntary manslaughter has, first and foremost, always been

[3] "Mens rea" is a term of art referring to the "state of mind that the prosecutor, to secure a conviction, must prove that a defendant had when committing a crime." Black's Law Dictionary (7th ed). "Malice" is defined as: "1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. 3. Ill will; wickedness of heart." *Id.* "Malice aforethought," which is the type of malice specifically related to the crime of murder, is defined as "encompassing any one of the following: (1) the intent to kill, (2) the intent to inflict grievous bodily harm, (3) extremely reckless indifference to the value of human life (the so-called 'abandoned and malignant heart'), or (4) the intent to commit a felony (which leads to culpability under the felony-murder rule)." *Id.*

considered the "catch-all" homicide crime. Thus, in *Datema, supra* at 594-595, we explained, quoting Perkins & Boyce, Criminal Law (3d ed), p 105, that "[i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.' " Thus, the catch-all crime of involuntary manslaughter is typically characterized in terms of what it is *not*, and ascertaining whether a homicide is involuntary manslaughter requires essentially questioning first whether it is murder, voluntary manslaughter, or a justified or excused homicide. If it is none of those, then the homicide, generally, is involuntary manslaughter.

In attempting to describe the catch-all crime of involuntary manslaughter in terms of what it *is,* as opposed to what it is *not,* it made sense, starting in the days of early common law, to refer to those homicides that occurred during the commission of an unlawful act that was not intended to cause great bodily injury. This is because, as already explained, under traditional common law, a homicide that occurred during the commission of an unlawful act that was intended to cause great bodily injury constituted murder. Thus, as early as 1886, this Court elucidated the difference between murder and manslaughter in the following manner:

> If an act is unlawful, or is such as duty does not demand, and of a tendency directly dangerous to life, however unintended, it will be murder. But if the act, though dangerous, is not directly so [i.e., is not directly dangerous to life], yet sufficiently dangerous to come under condemnation of the law [i.e., yet it is unlawful], and death unintended results from it, the offense is manslaughter; or if it is one of a nature to be lawful properly performed, and

> it is performed improperly, and death comes from it unexpectedly, the offense still is manslaughter. [*People v Stubenvoll,* 62 Mich 329, 340; 28 NW 883 (1886) (quoting 2 Bishop, Criminal Law, § 689).][4]

In 1923, in recognition of the felony-murder doctrine, which was by then widely accepted, this Court presented a somewhat modified version of *Stubenvoll's* manslaughter characterization, stating that manslaughter is " 'the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.' " *People v Ryczek,* 224 Mich 106, 110; 194 NW 609 (1923) (citation omitted).

Until this Court issued *Aaron, Ryczek's* description of the catch-all crime of involuntary manslaughter as consisting of those homicides occurring without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, was more or less apt. This is because, generally, a homicide that occurred with malice or intentionally or in committing a felony or in committing an unlawful act naturally tending to cause

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[4] In *Stubenvoll,* the distinction between murder and manslaughter was premised on the nature of the danger posed by the unlawful act rather than the categorization of the unlawful act as being a felony or non felony. This is likely because it was before the "felony-murder" doctrine had gained widespread acceptance. In any case, the Court in *Stubenvoll* recognized the necessity to prove malice in order to convict of murder. *Stubenvoll, supra* at 332. Thus, it is apparent that by holding that a homicide occurring during the commission of an unlawful act that directly tends to cause death is murder, the Court was, in effect, acknowledging that the existence of malice is sufficiently demonstrated if the defendant commits an unlawful act that tends to directly cause danger to human life. As already noted, this is the same premise underlying the "felony-murder" doctrine.

death constituted murder. However, in *Aaron,* we formally abolished the traditional felony-murder doctrine in Michigan and held that a homicide that occurred during the commission of any crime, including a felony, constitutes murder only if the prosecutor specifically proves the existence of malice. *Aaron, supra* at 727-728. In other words, we held that the intent to commit the underlying felony by itself no longer sufficiently shows the existence of malice. *Id.*

Since this Court's 1980 abrogation of the common-law felony-murder rule in *Aaron,* it is no longer the case that a homicide that occurs during the commission of a felony is, generally, murder per se and, thus, it is no longer apt to describe the catch-all crime of involuntary manslaughter as encompassing crimes that occur during the commission of an unlawful act that is not a felony. However, the premise of the *Aaron* decision was the rule that a crime is only murder if the prosecutor proves malice. We stated in *Aaron, supra* at 726-727, " 'Both murder and manslaughter deal with the wrongful killing of another person. . . . To hold that in all cases it is murder if a killing occurs in the commission of any felony would take from the jury the essential question of malice.' " (Citation omitted.) "*If* the jury concludes that malice existed, they can find murder . . . ." *Id.* at 730 (emphasis added). Thus, *Aaron* relied on the long-standing principle that the distinguishing characteristic between murder and manslaughter is malice. This point was made by this Court as long ago as 1923, when we stated, "[h]omicide is the killing of a human being by a human being. It . . . is either murder or manslaughter . . . . To constitute murder, the killing must have been perpetrated with malice aforethought, either express or implied." *Austen, supra* at 644. " 'Manslaughter is the unlawful and felonious killing of another without malice, either express or

implied.' " *Id.* at 643 (citation omitted).[5] This point was recently reiterated by this Court in *People v Mendoza,* 468 Mich 527, 536; 664 NW2d 685 (2003), in which we stated, "the *sole element* distinguishing manslaughter and murder is malice." (Emphasis added.)

Thus, it becomes clear that any post-*Aaron* deficiency in *Ryczek's* description of involuntary manslaughter is not that the description fails now to expressly reference unlawful acts that *are* felonies, but rather that the description continues to reference unlawful acts that are *not* felonies. This is because the relevant question in determining whether a homicide is murder or involuntary manslaughter is whether it occurred with malice, and not whether it occurred during the commission of an unlawful act—felony or not. For this reason, defendants cannot opportunistically rely on *Ryczek's* pre-*Aaron* description of the catch-all crime of involuntary manslaughter to argue that, because the homicide at issue occurred during the commission of a felony, they cannot be guilty of manslaughter. That a "felony" has been committed is simply not dispositive in determining whether either "murder" or "manslaughter" has been committed and, thus, the "felony" language in *Ryczek's* manslaughter description is essentially irrelevant.[6]

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[5] See also *People v Potter,* 5 Mich 1, 6-9 (1858): "Murder is where a person of sound memory and discretion unlawfully kills [another] with malice prepense or aforethought, either express or implied. . . . [M]alice aforethought is as much an essential ingredient of murder in the second degree, as in that of the first. Without this, the killing would be only manslaughter, if criminal at all."

[6] We note, however, that while the commission of a felony is not dispositive in determining whether a "murder" has been committed because, pursuant to *Aaron,* evidence of a felony is no longer sufficient proof in itself of malice, the fact that the defendant committed a felony may still be *relevant,* even if not dispositive, evidence that the defendant acted with malice. See *Aaron, supra* at 729-730.

Defendants argue that, if we hold that a homicide that occurs during the commission of a felony may constitute manslaughter, we nonetheless may not apply the holding in this case because to do so would violate the constitutional provision against ex post facto laws. See US Const, art I, § 10, cl 1: "No State shall . . . pass any . . . ex post facto Law . . . ." In *Bouie v Columbia,* 378 US 347, 353; 84 S Ct 1697; 12 L Ed 2d 894 (1964), the United States Supreme Court explained that an ex post facto law is one " 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action . . . .' " (Citation omitted.) We disagree with defendants because a homicide committed during the course of a felony could never have been considered an "innocent" homicide merely because it occurred during the commission of a felony. On the contrary, espousing the defendants' argument in this case—that a homicide that occurs during the course of a felony cannot, as a matter of law, be manslaughter—leads to the conclusion then that the homicide (unless justified or excused) is instead murder. It *does not* lead to a conclusion that the homicide is innocent, i.e., a non offense. Thus, our decision in this case does not criminalize that which was, before this decision, "innocent."

Moreover, *Ryczek's* description of involuntary manslaughter was never meant to define the *elements* of the crime of manslaughter. Rather, it was meant to provide guidance to the courts in understanding the circumstances under which the catch-all crime of manslaughter may occur. Therefore, it has never been held by this Court that the prosecutor must specifically prove that the homicide occurred during the commission of an unlawful act that was *not* a felony in order to prove a manslaughter charge. On the contrary, this Court has implicitly and expressly recognized in a number of

cases, some decided even before *Aaron,* that while a homicide occurring during the commission of a felony could (pursuant to the felony-murder doctrine) constitute murder, the homicide also could constitute manslaughter—this despite the "felony" language in *Ryczek's* manslaughter description that, during the pre-*Aaron* days, actually had significance.

In *People v Pavlic,* 227 Mich 562; 199 NW 373 (1924), this Court considered whether a defendant could be convicted of manslaughter for a homicide that resulted from the commission of a felony. In *Pavlic*, a man died after drinking liquor sold by the defendant. At the time, selling intoxicating liquor was a felony. Notwithstanding the description of involuntary manslaughter given by this Court in *Ryczek* just one year before—which description, as noted, refers to manslaughter as " 'the killing of another . . . in doing some unlawful act not amounting to a felony,' " *Ryczek, supra* at 110 (citation omitted)—*Pavlic* held that the homicide at issue could "constitute manslaughter if performed under such circumstances as to supply the intent to do wrong and inflict some bodily injury." *Pavlic, supra* at 566. The reason the *Pavlic* Court so held was because selling intoxicating liquor is only a "malum prohibitum" felony and not a "malum in se" felony.[7] *Id.* at 566-567. This may appear to be grounds to distinguish *Pavlic* from this case, but the essential point is that *Pavlic* recognized that a homicide occurring during the commission of a "felony" could be manslaughter.

Moreover, in so holding, the *Pavlic* Court noted that the important consideration in determining whether a

[7] A "malum prohibitum" act is one that "is a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." Black's Law Dictionary, *supra*. A "malum in se" act is a crime "that is inherently immoral . . . ." *Id.*

homicide is murder or simply manslaughter in "felony" cases is whether the felony is one that is "in itself directly and naturally dangerous to life." *Id.* at 565. The implication is that the *Pavlic* Court understood that the important question is whether the defendant acted with malice. If the defendant committed a felony that is directly and naturally dangerous to life, then he acted with malice and, therefore, could be convicted of murder. If not, then a manslaughter conviction might be proper. Thus, even in 1924, one year after *Ryczek* and fifty-six years before *Aaron,* this Court impliedly acknowledged that, despite the commission of a felony and the "felony" language in *Ryczek,* the distinguishing element between murder and manslaughter is malice and, therefore, the killing of another in doing some unlawful act that amounts to a felony *may* constitute manslaughter rather than murder, depending on the facts of the case.

In *People v Treichel,* 229 Mich 303; 200 NW 950 (1924), an elderly gentleman was tied to a bed during the commission of a robbery. He was eventually found dead, and the suspects were charged with first- and second-degree murder and manslaughter and were convicted of manslaughter. The defendants appealed, arguing that they should have been charged only with first-degree murder because the death "was occasioned by act committed in the perpetration of a burglary . . . ." *Id.* at 308. The defendants contended that they should have been either convicted of first-degree murder or acquitted, much as the instant defendants seem to be arguing. The *Treichel* Court, in affirming the defendants' manslaughter convictions, stated:

> Conceding the verdict might have been for murder in the first degree, because death was occasioned by act committed in the perpetration of a burglary, was such a verdict the only one permissible? We cannot so hold. We

> think the evidence left the question of degree and the included crime of manslaughter to the jury and the court avoided instead of committed error in so submitting it. [*Id*].

Thus, in *Treichel*, again just one year after *Ryczek,* this Court affirmed a manslaughter conviction for a homicide that occurred during the commission of a felony despite the "felony" language in *Ryczek*. Presumably, if the Court intended to preclude such convictions by virtue of *Ryczek's* "felony" language, it would not have affirmed the convictions in *Treichel*, but, instead, would have agreed with the defendants that they should have been either convicted of first-degree murder or acquitted.

In *People v Andrus,* 331 Mich 535; 50 NW2d 310 (1951), the defendants burglarized a store and, while doing so, inflicted severe wounds on the owner of the store, who eventually died. As in *Treichel,* the defendants were charged with first- and second-degree murder and manslaughter and were convicted of manslaughter. The defendants appealed, arguing that the manslaughter charge and convictions constituted error. Again, despite the "felony" language of *Ryczek* and the felony-murder doctrine, this Court affirmed the manslaughter convictions in *Andrus.* In doing so, the Court acknowledged that the pivotal issue is the existence of malice: "[W]here there is testimony from which the jury might find the absence of such a felonious intent as is necessary to constitute murder [i.e., malice], an instruction that they might convict of manslaughter should be given." *Id.* at 546.

In *People v Carter,* 387 Mich 397; 197 NW2d 57 (1972), the defendants stole a car in order to rob a bank and, in doing so, put the owner of the car in its trunk. The victim died as a result, and all three defendants were convicted of first-degree murder. In that case, the

defendants appealed, arguing that the jury should have been instructed on manslaughter as well as murder. This Court, notwithstanding the "felony" language in *Ryczek,* agreed, vacated the defendants' convictions, and remanded for a new trial.

Simply put, case law demonstrates that the "felony" language in *Ryczek's* description of manslaughter does not have the meaning ascribed to it that defendants would like to have. That is, this language does not mean, as was impliedly acknowledged as long ago as 1924 and was impliedly reaffirmed as recently as 2003, that a defendant may not be convicted of manslaughter if the homicide occurred during the commission of a felony. The pertinent question in distinguishing manslaughter from murder is, as was made absolutely clear in *Mendoza,* whether the defendant acted with malice. If not, then a manslaughter conviction may be proper despite the fact that the death resulted from the commission of an underlying felony. We believe that, in light of the long history of relevant case law and the fact that the homicide in question would never have been an "innocent" homicide, there is no ex post facto violation in affirming Limmer's conviction of accessory after the fact to involuntary manslaughter and the remaining defendants' involuntary manslaughter convictions.[8]

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[8] We note that this Court's order in *People v Rode*, 449 Mich 912 (1995), in which we affirmed the defendant's convictions of second-degree murder and denied the defendant an instruction on manslaughter because the deaths occurred during the commission of a felony, has already been impliedly overruled by *Mendoza,* in which we held that manslaughter is a necessarily included lesser offense of murder. *Mendoza, supra* at 548. Thus, we held in *Mendoza* that if a defendant is charged with murder, the jury, upon the defendant's request, must also be instructed on manslaughter if a rational view of the evidence supports such an instruction. *Id.* Defendants attempt to explain their position under *Mendoza* by arguing that, because *Ryczek* refers to unlawful acts that are not felonies, a rational view of the evidence will never support an

B. UNLAWFUL-ACT MANSLAUGHTER AND GROSS NEGLIGENCE

Defendants likewise argue that their convictions of manslaughter cannot be sustained because "gross negligence" manslaughter, which is the mens rea that the prosecutor in this case argued that defendants possessed, requires that a lawful act have been committed, whereas the act committed in this case, pouring GHB into Samantha Reid's drink, was clearly unlawful. In support of this contention, defendants again refer to *Ryczek,* wherein this Court described manslaughter as

> [the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, *or in negligently doing some act lawful in itself*, or by the negligent omission to perform a legal duty. [*Ryczek, supra* at 110, citation omitted, emphasis added).]

Defendants' argument has no merit. In *Datema, supra* at 596, this Court explained that *Ryczek* "sets forth three different theories giving rise to involuntary manslaughter liability. These theories are not mutually exclusive, and, under the proper circumstances, multiple theories may be appropriate." Thus, it is possible to determine, on the basis of the specific facts at issue, that the act committed by the defendant that resulted

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instruction on manslaughter in a case based on the commission of a felony. However, the "rational view of the evidence" proviso in *Mendoza* concerns whether the facts of the specific case rationally fit within the legal purview of manslaughter—the language is not meant to nullify *Mendoza's* statement concerning the legal elements of manslaughter: i.e., that "the sole element distinguishing manslaughter and murder is malice" and that manslaughter is an unintended homicide with a diminished mens rea. *Mendoza, supra* at 536, 541. Accordingly, as clearly explained in *Mendoza,* determining whether a rational view of the evidence may support a manslaughter conviction requires considering whether a rational jury could conclude that the defendant did not act with malice, and not whether death resulted from the commission of a felony.

in death was, for instance, not only unlawful, but also committed with a mens rea of gross negligence.

In *People v Townsend,* 214 Mich 267, 273-274; 183 NW 177 (1921), this Court provided some early guidance regarding the proofs necessary to demonstrate the "unlawful-act" theory of involuntary manslaughter and the "lawful-act" theory. *Townsend* provides:

> The distinction between involuntary manslaughter committed while perpetrating an unlawful act not amounting to a felony and the offense arising out of some negligence or fault in doing a lawful act in a grossly negligent manner and from which death results must be kept in mind upon the question of pleading. In the former case it is sufficient to allege the unlawful act with sufficient particularity to identify it and then to charge that as a consequence the defendant caused the death of the deceased, and there is no need to aver in detail the specific acts of the accused; but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged as well as the acts of the accused constituting failure to perform or improper performance. [*Id.* at 273-274.]

This statement in *Townsend* essentially means that if the defendant committed an *unlawful* act that resulted in death, it is sufficient to allege the commission of the unlawful act and the resulting death; whereas, if the defendant committed a lawful act resulting in death, the prosecutor must specifically allege the manner in which the defendant's actions were grossly or culpably negligent. That is, under *Townsend,* lawful-act manslaughter requires that the defendant acted with a mens rea of culpable negligence; whereas unlawful-act manslaughter does not require that the defendant acted with a specific mens rea—all that is required is that the defendant committed the unlawful act.

In *Pavlic,* this Court considered, as noted above, whether a defendant can be convicted of involuntary manslaughter for a death resulting after the defendant committed the unlawful act of selling intoxicating liquor. The Court explained that a manslaughter conviction may be appropriate, but that, because this unlawful act is only malum prohibitum rather than malum in se, it is only appropriate if the prosecutor specifically proves that the defendant acted with a culpable mens rea. The Court essentially equated malum prohibitum unlawful acts with lawful acts, stating:

> The act of selling or furnishing intoxicating liquor in violation of the statute is what the law terms an act *malum prohibitum,* a crime existing only by reason of statutory prohibition. An unlawful act of this character which unintentionally causes the death of another, is not in itself a sufficient basis for a charge of involuntary manslaughter.[9] But the commission of such an [malum prohibitum] unlawful act will constitute manslaughter if performed under such circumstances as to supply the intent to do wrong and inflict some bodily injury. . . . The rule is well stated in *Thiede v. State,* 106 Neb 48 (182 N.W. 570 [1921]), as follows: "We believe the rule to be that though the act made unlawful by statute is an act merely *malum prohibitum* and is ordinarily insufficient, still when such an act is accompanied by negligence or further wrong so as to be in its nature, dangerous, or as to manifest a reckless disregard for the safety of others, then it may be sufficient to supply the wrongful intent essential to criminal homicide [and] when such an act results in the death of another, may constitute involuntary manslaughter." [*Pavlic, supra* at 566.]

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[9] The corollary of this assertion is that an unlawful act which is not malum prohibitum, but is rather malum in se, is "in itself" a sufficient basis for a charge of involuntary manslaughter. This is essentially the position taken in *Townsend, supra*, that (malum in se) unlawful-act manslaughter does not require that defendant acted with a specific mens rea—all that is required is that defendant committed the (malum in se) unlawful act and that death resulted therefrom.

Thus, similar to *Townsend,* what may be gleaned from *Pavlic* is that, traditionally, commission of a malum in se unlawful act that results in an unintended death is sufficient in itself to constitute manslaughter; whereas an unintended death resulting from either a lawful act or a malum prohibitum unlawful act requires specific proof of a culpable mens rea, which may consist of an intent to inflict bodily injury or of gross negligence showing a reckless disregard for the safety of another.

In a more recent case, *Datema,* this Court again addressed the mens rea necessary to sustain a manslaughter conviction. Citing *Pavlic*, we held that where an act is malum prohibitum unlawful or lawful, a mens rea of "criminal negligence" is required to prove manslaughter, and this requirement is met if the defendant *either* intended to inflict some bodily injury on another *or* if the defendant acted carelessly in such a manner that manifests a reckless disregard for another's life-that is, if the defendant acted with gross negligence. *Datema, supra* at 598-599. "Gross negligence is only necessary if an intent to injure cannot be established." *Id.* at 605.[10]

Regarding malum in se unlawful-act manslaughter, *Datema* first noted that under traditional common law (as expressed in *Townsend* and *Pavlic*), "[w]hen an unintentional killing occurred during the commission of [a malum in se unlawful] act . . , the commission of the underlying malum in se [act] supplied the mens rea for involuntary manslaughter." *Id.* at 599-600. Further, *Datema* noted that "[u]nlike the second and third theories of involuntary manslaughter liability, the [unlawful act] rule does not require negligence." *Id.* at 600.

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[10] Thus, in fact, *Datema* makes clear that it is not the case, as defendants seem to assert, that lawful-act manslaughter *requires* that the prosecutor prove that the defendant acted with "gross negligence." The prosecutor may prove lawful-act manslaughter by demonstrating that the defendant acted with either gross negligence or with an intent to injure.

The defendant in *Datema* argued that, just as *Aaron* held that proof that a defendant committed the underlying felony is no longer sufficient to show malice and thus constitute murder, proof that the defendant committed the underlying malum in se unlawful act should no longer "in itself" be sufficient to constitute manslaughter. We declined to address this issue in *Datema* because the unlawful act that the defendant committed, assault and battery, itself showed that the defendant acted with a specific intent to injure and, thus, the defendant acted with a culpable manslaughter mens rea. Thus, *Datema* concluded that the defendant was properly convicted of involuntary manslaughter because "[a]n unlawful act committed with the intent to injure or in a grossly negligent manner that proximately causes death is involuntary manslaughter." *Id.* at 606.

We, too, need not consider whether the prosecutor was *required* in this case to specifically prove that defendants acted with a culpable mens rea or whether proof that defendants committed the malum in se unlawful act itself furnishes a sufficient mens rea for involuntary manslaughter[11] because, in either case, the prosecutor did prove that defendants acted with a culpable mens rea of gross negligence. Pursuant to *Datema,* if the prosecutor proves that defendants committed "[a]n unlawful act . . . with the intent to injure *or in a grossly negligent manner* that proximately cause[d] death," *id.,* an involuntary manslaughter conviction may be appropriate. Therefore, the prosecutor did not err in proceeding under a gross negligence theory. Moreover, it is apparent that, at the very least, the prosecutor sufficiently proved its case. Defendants

[11] We note, however, that were we to hold that the prosecutor was not required to specifically prove a mens rea, defendants would not be entitled to relief on the basis that the prosecutor, in proving a mens rea of gross negligence, proved more than was required.

may not seek relief on the basis that the prosecutor may have "over-proved" its case by demonstrating that defendants acted with a mens rea of gross negligence.

IV. CONCLUSION

To summarize, the language in *Ryczek* regarding the commission of an "unlawful act not amounting to a felony" does not mean that a defendant may not be convicted of involuntary manslaughter for an unintentional death resulting from the commission of a felony. Disregarding the reference to an "unlawful act not amounting to a felony," *Ryczek's* description of involuntary manslaughter remains a useful tool in discerning the circumstances under which involuntary manslaughter may occur. However, we emphasize that *Ryczek's* description is just that—a useful tool, and not a definitive statement regarding the elements of involuntary manslaughter. More importantly, it must be kept in mind that "the sole element distinguishing manslaughter and murder is malice," *Mendoza* at 536, and that "[i]nvoluntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary: 'Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some recognized justification or excuse.' " *Datema, supra* at 594-595. (Citation omitted.) If a homicide is not voluntary manslaughter or excused or justified, it is, generally, either murder or involuntary manslaughter.[12] If the homicide was committed with malice, it is murder.[13] If it was committed with a lesser mens rea of gross negligence

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[12] Statutory exceptions to the common-law catch-all crime of manslaughter exist. For instance, see MCL 750.324 and 750.325, regarding the crime of "negligent homicide."

[13] Of course, if a defendant commits murder, he has essentially also committed manslaughter because manslaughter is a necessarily included lesser offense of murder. *Mendoza, supra* at 548.

or an intent to injure, and not malice, it is not murder, but only involuntary manslaughter.

Defendants in this case purposefully committed a malum in se unlawful act when they poured GHB into Samantha Reid's drink and, in doing so, caused her death. Her death was not voluntary manslaughter or excused or justified. Whether or not defendants acted with malice, the jury found, in either case, that they acted with a diminished mens rea of gross negligence sufficient to sustain a conviction of manslaughter. In short, defendants, by their purposeful, willful, reckless, and unlawful behavior, unintentionally killed another person, and this is exactly the type of homicide that fits within the parameters of involuntary manslaughter. Therefore, we overrule the judgment of the Court of Appeals and reinstate defendant Limmer's conviction of accessory after the fact to involuntary manslaughter and the remaining defendants' involuntary manslaughter convictions.

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

CAVANAGH, J. (*concurring in result only*). I concur in the result reached by the majority; however, I write separately because I disagree with the majority's rationale. Unlike the majority, I believe that a defendant can be convicted of involuntary manslaughter when the committed act is a felony, but only when the felony does not naturally tend to cause death or great bodily harm.[1]

[1] Although I still believe that "[g]ross negligence should be recognized as the mens rea standard for all common-law forms of involuntary manslaughter," as expressed in my dissent in *People v Datema*, 448 Mich 585, 609; 533 NW2d 272 (1995), this interpretation of the law was not shared by a majority of this Court.

The manslaughter statute, MCL 750.321, provides the following: "Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than 7,500 dollars, or both, at the discretion of the court." No distinction is made in the statute between voluntary manslaughter and involuntary manslaughter.[2]

Because the statute at issue, MCL 750.321, does not define manslaughter, the common-law definition must be used. *People v Townes*, 391 Mich 578, 588; 218 NW2d 136 (1974). Involuntary manslaughter is defined as " 'the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.' " *People v Herron*, 464 Mich 593, 604; 628 NW2d 528 (2001), quoting *People v Ryczek*, 224 Mich 106, 110; 194 NW 609 (1923).

I disagree with the majority's claim that this Court did not provide a definition in *Ryczek* but merely offered "guidance" and "a useful tool." *Ante* at 11, 21. I find this claim to be disingenuous. This Court in *Ryczek*, *supra* at 109, stated that the term "involuntary manslaughter" is "well defined" and then went on to provide the definition. This Court in *Herron*, *supra* at 604, stated that "the *definition* [of involuntary manslaughter] is left to the common law. . . . This Court has *defined* the common-law offense of involuntary manslaughter as . . . ." (Emphasis added.) Further, in *Townes*, *supra* at 590, this Court similarly stated that in *Ryczek*, "the Court approved the following *definition* of involuntary

[2] "There is but one offense of manslaughter in this State." *People v Rogulski*, 181 Mich 481, 494; 148 NW 189 (1914).

manslaughter . . . .” (Emphasis added.) While the majority now chooses to characterize the definition as a descriptive tool, I believe it is clear that the *Ryczek* definition is, in fact, a definition.

I believe a proper reading of the definition of involuntary manslaughter dictates that a person cannot be convicted of involuntary manslaughter when he commits a felony that naturally tends to cause death or great bodily harm. If the defendant commits a felony that does not naturally tend to cause death or great bodily harm, such as larceny of an ornamental tree, MCL 750.367, he can be convicted of involuntary manslaughter if death to a person results. This conclusion is consistent with this Court's prior decisions.

This Court has previously rejected the argument that a defendant cannot be convicted of involuntary manslaughter merely because the act committed was a felony. See, e.g., *People v Carter*, 387 Mich 397, 422; 197 NW2d 57 (1972); *People v Pavlic*, 227 Mich 562, 565-567; 199 NW 373 (1924). In *Pavlic*, a man died after drinking liquor sold by the defendant. At the time, selling intoxicating liquor was a felony. This Court stated that violating the liquor law is only criminal because it is prohibited by statute; it is a malum prohibitum act.[3] “It is not inherently criminal. Notwithstanding the fact that the statute has declared it to be a felony it is an act not in itself directly and naturally dangerous to life.” *Id.* at 565. The commission of a malum prohibitum act “will constitute manslaughter if performed under such circumstances as to supply the intent to do wrong and inflict some bodily injury.” *Id*. at

[3] “An act is malum prohibitum if it is an ‘act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law . . . .’ ” *Datema*, *supra* at 597 n 13, quoting Black's Law Dictionary (6th ed).

566. Selling intoxicating liquor was insufficient to support the manslaughter conviction in *Pavlic* because the defendant did not possess an intent to inflict injury or a reckless disregard for the safety of the victim. However, if the circumstances had been different, for example, if the liquor had contained certain poisonous ingredients that the defendant had known about, the defendant would have been guilty of involuntary manslaughter. *Id*. at 567.

My reasoning is consistent with past opinions and orders of this Court, and does not require a finding, as the majority now does, that this Court's order in *People v Rode*, 449 Mich 912 (1995), was impliedly overruled by this Court's opinion in *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). In *Rode*, this Court's order peremptorily reinstated the defendant's convictions of second-degree murder and felony-firearm possession on the basis of the reasoning of the dissenting judge in the Court of Appeals. The dissenting judge argued:

> Because shooting at the other vehicle full of people was "an unlawful act" amounting to "a felony and would naturally tend to cause death or great bodily harm," it was not conduct within the definition of involuntary manslaughter for a killing committed "in doing some unlawful act *not amounting to a felony nor naturally tending to cause death or great bodily harm* . . . ." [*Rode, supra* at 914 (LEVIN, J., dissenting, citing JANSEN, J., concurring in part and dissenting in part, unpublished opinion per curiam, issued March 3, 1995 [Docket No. 179942]).]

In essence, this Court adopted the dissenting judge's statement that shooting at a car full of people is not involuntary manslaughter because that act constitutes a felony that would naturally tend to cause death or great bodily harm. Further, in *Datema*, *supra* at 597, this Court stated, "where a defendant commits an unlawful act that is malum prohibitum or a lawful act

executed negligently that causes death, involuntary manslaughter may be premised on criminal negligence." While this Court was considering the misdemeanor-manslaughter rule in *Datema*, the general principles articulated are relevant to the issue at hand.

Finally, the underlying felony in this case—mixing a harmful substance in a drink—does not naturally tend to cause death or great bodily harm.[4] There are numerous harmful substances that could be mixed into a drink that would not naturally lead to death or great bodily harm. Unfortunately, GHB (gamma hydroxybutrate) was mixed in the girls' drinks in amounts that led to one girl's death, but that does not mean that defendants' underlying felony is one that naturally tends to cause death or great bodily harm.[5] Therefore, I believe that the prosecutor had to specifically allege and prove, as he did, that defendants were grossly negligent.

Therefore, while I agree with the result reached by the majority, I disagree with the majority's rationale. Accordingly, I concur in the result only.

KELLY, J., concurred with CAVANAGH, J.

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[4] MCL 750.436(1) states, in pertinent part, "A person shall not . . . (a) [w]illfully mingle a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product . . . knowing or having reason to know that the food, drink, nonprescription medicine, pharmaceutical product, or water may be ingested or used by a person to his or her injury."

[5] GHB can have a range of effects from memory loss to death. In low doses, the drug can reduce inhibitions, which is presumably why the drug was mixed in the girls' drinks. See United States Drug Enforcement Administration, <www.dea.gov> (accessed July 7, 2004); Executive Office of the President, Office of National Drug Control Policy, <www.whitehousedrugpolicy.gov> (accessed July 7, 2004).

I also note that there may certainly be cases in which the act of mixing GHB into a person's drink is proven to be with malice; however, in this case, the prosecutor did not seek to prove malice.

DESHAMBO v ANDERSON

Docket Nos. 122939-122940. Argued March 10, 2004 (Calendar No. 9). Decided July 23, 2004.

Robert F. DeShambo brought an action in the Leelanau Circuit Court against Norman R. and Pauline Nielsen and Charles W. Anderson, seeking damages for personal injury. DeShambo was injured while working for Anderson, who was hired by the Nielsens as an independent contractor to clear trees from their land. The court, Thomas G. Power, J., granted summary disposition for the Nielsens, determining that logging is not an inherently dangerous activity and that the Nielsens were not sophisticated landowners knowledgeable of the risks inherent in cutting timber, thus preventing the application of the inherently dangerous activity doctrinal exception to the general rule that a landowner is not liable for injuries that an independent contractor negligently causes. The Court of Appeals, FITZGERALD, P.J., and HOLBROOK, JR., and CAVANAGH, JJ., in an unpublished opinion per curiam, reversed and remanded, concluding that a question of fact existed regarding whether the Nielsens reasonably anticipated the risks inherent in logging and that the determination whether logging is inherently dangerous is a jury question (Docket Nos. 233853, 233854). The Nielsens appealed.

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

The purpose of the inherently dangerous activity doctrine is to eliminate nonliability of landowners for injuries to innocent third parties occasioned by inherently dangerous activity by independent contractors on the landowners' land. Because the plaintiff was an employee of an independent contractor involved in the performance of the inherently dangerous activity, and not a third party, the doctrine does not apply to create liability for the landowners in this case.

Justice KELLY, concurring in result only, stated that a landowner retaining control over the performance of inherently dangerous work should be liable for an injury to an independent contractor's employee, but that the decision in this case and in *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004), could be

interpreted to hold that such a landowner, if negligent, may escape all liability for injury caused to the employee of a contractor. That interpretation would be inconsistent with principles underlying the common law and with the tort reform statutes.

Reversed.

NEGLIGENCE — LANDOWNERS' LIABILITY — EMPLOYEES OF INDEPENDENT CONTRACTORS — INHERENTLY DANGEROUS ACTIVITIES.

The inherently dangerous activity doctrine eliminates nonliability of landowners for injuries to innocent third parties caused by inherently dangerous activity undertaken by an independent contractor on the land of the landowner; the doctrine does not apply to injuries of an employee of an independent contractor performing the dangerous work.

Theodore F. Fulsher for DeShambo.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Joel D. McGormley*, Assistant Attorney General, for the intervening plaintiff Department of Community Health.

Bensinger, Cotant & Menkes, PC (by *Dale L. Arndt*), for defendants Nielsen.

CORRIGAN, C.J. In this case, we consider whether the inherently dangerous activity doctrine has been properly extended to impose liability on landowners for injuries to employees of independent contractors performing dangerous work. We hold that the Court of Appeals has improperly extended the doctrine, contrary to its original purpose, to include injuries to those involved in the performance of dangerous work. The purpose of the doctrine is to protect innocent third parties injured as a result of an inherently dangerous undertaking. Because plaintiff was an employee of an independent contractor rather than a third party, the doctrine does not apply in this case. We thus reverse the judgment of the Court of Appeals.

I. UNDERLYING FACTS AND PROCEDURAL HISTORY

Defendants Norman and Pauline Nielsen[1] own and reside on a 130-acre farm in Leelanau County, Michigan. The land is used primarily to farm corn and operate a cherry orchard. A neighbor manages the cherry tree operation, and defendants are not involved in pruning or cutting the trees. Defendants hired an independent contractor, Charles Anderson, to fell and delimb small poplar trees and to clean up the tops of trees that a previous logger had left on the property. Anderson, an experienced timber cutter, had previously performed woodcutting for defendants. Under the arrangement between defendants and Anderson, Anderson would keep the tree tops for firewood and pay defendants for the poplar that he cut. The parties did not discuss how the felling and delimbing was to be performed.

Anderson hired plaintiff Robert DeShambo to help him with the work on defendants' property. On plaintiff's first day of work, he was delimbing trees when he heard someone yelling. Plaintiff turned around and saw a tree falling toward him as Anderson felled it. The tree hit plaintiff on the shoulder and then struck some logs on the ground, causing one log to spin, strike him in the back, and pin him between the log and the fallen tree. The incident has left plaintiff paralyzed.

Plaintiff filed a negligence action against defendants and Anderson, but subsequently dismissed his claims against Anderson.[2] Plaintiff alleged, inter alia, that defendants were liable for Anderson's negligence be-

[1] Plaintiff voluntarily dismissed his claims against defendant Charles W. Anderson. Because Anderson is not a party to this appeal, the term "defendants" refers only to the Nielsens.

[2] The state of Michigan also intervened to recover funds paid through Medicaid for plaintiff's medical treatment.

cause timber cutting was an inherently dangerous activity. Defendants moved for summary disposition, arguing that plaintiff could not establish liability under any recognized exception to the general rule precluding the liability of a landowner for injuries that an independent contractor negligently causes.

The trial court granted summary disposition for defendants, ruling that logging was not an inherently dangerous activity and that defendants were not sophisticated landowners knowledgeable of the risks inherent in cutting timber. The Court of Appeals reversed, concluding that a question of fact existed regarding whether defendants reasonably anticipated the risks inherent in logging.[3] The Court reasoned that defendants had previously hired logging companies to conduct tree removals on their property and that defendant Norman Nielsen had admitted that logging was risky. The Court further stated that because plaintiff presented evidence of the hazardous elements of logging, the determination whether logging is inherently dangerous is a jury question.

We granted defendants' application for leave to appeal, directing the parties to address "whether the 'inherently dangerous activity' doctrine has been appropriately extended beyond its original application to only third parties to extend liability to landowners and general contractors for injuries to *employees* of independent contractors doing dangerous work."[4]

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[3] Unpublished opinion per curiam, issued October 22, 2002 (Docket Nos. 233853, 233854).

[4] 469 Mich 947 (2003). We ordered that this case be submitted together with *Ormsby v Capital Welding, Inc*, 471 Mich 45 ; 684 NW2d 320 (2004), which involves the relationship between the "common work area" and "retained control" doctrines and the effect of those doctrines on the general rule of nonliability for owners and independent contractors.

II. STANDARD OF REVIEW

Whether the "inherently dangerous activity" doctrine has been properly extended to include injuries to employees of independent contractors who are injured while performing dangerous work is a question of law that this Court reviews de novo. Likewise, we review de novo a lower court's decision on a summary disposition motion. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003).

III. ANALYSIS

It has been long established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes. *Lake Superior Iron Co v Erickson*, 39 Mich 492, 496 (1878); *DeForrest v Wright*, 2 Mich 368, 370 (1852). Over time, exceptions to this general rule have developed, including the "inherently dangerous activity" doctrine. The class of persons protected under the doctrine has undergone a transformation since the doctrine's inception.

A. APPLICATION OF THE *INHERENTLY DANGEROUS ACTIVITY DOCTRINE* TO THIRD PARTIES

Early cases giving rise to the inherently dangerous activity doctrine limited the exception to injuries to third parties. In *Rogers v Parker*, 159 Mich 278; 123 NW 1109 (1909), this Court first discussed an exception to the general rule of nonliability for damages caused to a third party by an independent contractor's performance of an act likely to do harm to that third party. The question before this Court was whether a landowner who employed an independent contractor to clear farmland was liable for damages to neighboring property

resulting when a fire that the contractor had set spread to neighboring land. This Court resolved the issue on statutory grounds, but discussed in obiter dictum the common-law principles that would have applied, stating:

> [T]he rule relieving the employer where the work has been committed to an independent contractor is subject to the well-established exceptions that:
>
> "If the thing to be done is in itself unlawful, or if it is *per se* a nuisance, or if it cannot be done without doing damage, he who causes it to be done by another, be the latter servant, agent, or independent contractor, is as much liable for injuries which may happen *to third persons* from the act done as though he had done the act in person. So it is the duty of every person who does in person, or causes to be done by another, an act which from its nature is liable, *unless precautions are taken, to do injury to others, to see to it that those precautions are taken, and he cannot escape this duty by turning the whole performance over to a contractor*." [*Id*. at 282-283 (citation omitted; some emphases added).]

In *Inglis v Millersburg Driving Ass'n*, 169 Mich 311; 136 NW 443 (1912), this Court elaborated on the above common-law exception. In that case, agents of the defendant association had set fires on fairgrounds property in the defendant's possession to clear it, and the fires spread to the plaintiff's adjoining land, causing damage. This Court held that the defendant was estopped to argue that independent contractors, rather than the unincorporated association itself, were responsible for the damage, because it had not pleaded that defense or argued it at trial. *Id*. at 317-318. This Court opined in obiter dictum, however, that an exception would have applied to the general rule of nonliability of landowners for the actions of independent contractors. While this Court cited its decision in *Rogers* and various

other formulations of the rule, perhaps the best articulation of the principle was as follows:

> "The doctrine of independent contractor, whereby one who lets work to be done by another, reserving no control over the performance of the work, is not liable to third persons for injuries resulting from negligence of the contractor or his servants, is subject to several important exceptions. One of these . . . is where the employer is, from the nature and character of the work, under a duty to others to see that it is carefully performed. It cannot be better stated than in the language used by Cockburn, C.J., in *Bower v. Peate*, 1 Q.B. Div. 321, 326, a leading and well-considered case. It is, 'that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences *to his neighbor* must be expected to arise, unless means are adopted by which such consequences may be averted, is bound to see the doing of that which is necessary to prevent mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—or to do what is necessary to prevent the act he has ordered done from becoming unlawful.' . . . This does not abrogate the law as to independent contractor. It still leaves abundant room for its proper application. 'There is,' as stated by Cockburn, 'an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless precautionary measures are adopted.'
>
> "The weight of reason and authority is to the effect that, where a party is under a duty *to the public, or third person*, to see that work he is about to do, or have done, is carefully performed, so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another." *Covington, etc., Bridge Co. v. Steinbrock & Patrick*, 61 Ohio St. 215 (55 N.E. 618 [1899], and cases cited. [*Inglis* at 320-321 (citations omitted; emphasis added).]

Thus, the above rule, which has come to be known as the "inherently dangerous activity exception," is founded on the existence of a duty on behalf of the landowner, or employer of an independent contractor, and the duty must be of the type that is nondelegable. The employer or landowner must also be aware that the danger exists and that it necessarily involves danger to others. Notably, the type of danger contemplated by the *Inglis* Court was danger to *third parties* and not to those involved in the dangerous activity.

Over the next several decades, this Court reaffirmed that, under this doctrine, the landowner must itself owe some duty to the specific third party, that the negligent act that causes the injury cannot be collateral to the work contracted for, and that the injury that occurs must be reasonably expected by the landowner. See *Cary v Thomas*, 345 Mich 616; 76 NW2d 817 (1956); *Barlow v Kreighoff Co*, 310 Mich 195; 16 NW2d 715 (1944); *Grinnell v Carbide & Carbon Chemicals Corp*, 282 Mich 509; 276 NW 535 (1937); *Tillson v Consumers Power Co*, 269 Mich 53; 256 NW 801 (1934); *Watkins v Gabriel Steel Co*, 260 Mich 692; 245 NW 801 (1932); *Wight v H G Christman Co*, 244 Mich 208; 221 NW 314 (1928). Notably, under this Court's precedent, the doctrine applied only to third parties.

B. EXPANSION OF THE *INHERENTLY DANGEROUS ACTIVITY DOCTRINE* TO A CONTRACTOR'S EMPLOYEES

In *Vannoy v City of Warren,* 15 Mich App 158; 166 NW2d 486 (1968), the Court of Appeals purported to expand the scope of the inherently dangerous activity doctrine to hold a landowner liable not to a third party, but to the estate of a deceased employee of an independent contractor. The Court expressly rejected the landowner's argument that the doctrine applied only to

third parties and not to the employees of an independent contractor engaged in the inherently dangerous activity. *Id*. at 164-165. The Court stated that limiting the exception to third persons "violate[d] the absolute character of the duty . . . ." *Id.* at 164.

In *McDonough v Gen Motors Corp,* 388 Mich 430; 201 NW2d 609 (1972), a plurality of this Court reversed a directed verdict for the defendant landowner, concluding that the inherently dangerous activity exception could be applied to impose liability on the owner for injuries to a subcontractor's employee. The plurality quoted Justice COOLEY's formulation of the rule that this Court cited in *Inglis*:

> " 'If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible, * * * for I cause acts to be done which naturally expose others to injury.' " [*McDonough* at 438, quoting *Inglis, supra* at 319, quoting 2 Cooley Torts (3d ed), p 109.]

Without explanation, the plurality assumed that the "others" quoted above included the contractor's employees and not only third parties.

Justice BRENNAN dissented,[5] contending that the inherently dangerous activity exception protects "strangers" and does not apply to "a plaintiff who was himself actively engaged in the inherently dangerous activity." *McDonough* at 453. His dissent stated:

> The application of this well settled exception is clear in cases where the injured person is a *stranger* to the inherently dangerous activity. In *Inglis* [*supra*], the inherently dangerous activity was burning, and the plaintiff was a neighboring landowner; in *Grinnell* [*supra*], the danger was explosion, the plaintiff a purchaser of a stove; in

[5] Justice T. G. KAVANAGH joined Justice BRENNAN's dissent.

Watkins [*supra*], the dangerous activity was elevated steel construction, the plaintiff a mason contractor; in *Olah v Katz*, 234 Mich 112 [207 NW 892] (1926), the danger was an open pit, the plaintiff a neighboring child; in *Detroit v Corey*, 9 Mich 165 (1861), the danger was an open ditch, the plaintiff a passer-by; in *Darmstaetter v Moynahan*, 27 Mich 188 (1873), the danger was a wall of ice in the roadway, the plaintiff a sleigh rider; in *McWilliams v Detroit Central Mills Co*, 31 Mich 274 (1875), the danger was a railroad switching operation, the plaintiff a passer-by. . . .

Indeed, there are almost no cases which have come to notice in which the suit is brought by or on behalf of a plaintiff who was himself actively engaged in the inherently dangerous activity.

Those few precedents which are cited seem to be founded upon other grounds.

* * *

[T]he rule of liability is designed to protect innocent third parties injured by the execution of an inherently dangerous undertaking. The rule is not designed, nor was it ever intended to benefit the contractor who undertakes the dangerous work, or his employees.

Thus, if I employ a contractor to remove a tree stump from my yard by use of explosives, I am liable to my neighbor whose garage is damaged by the concussion. This is because it is I who have set the project in motion; it is I who have created the unusual peril; it is for my benefit that the explosives were used. As between myself and my neighbor, I ought not to be permitted to plead that it was the contractor's negligence and not my own which damaged his property.

But if the contractor should blow up his own truck, I should not be liable. He is the expert in explosives and not me [sic]. I had neither the legal right nor the capability to supervise his work. The same would be true if the contractor's workman had injured himself, or been injured by the carelessness of a fellow workman or the negligence of his employer. Neither the contractor nor his employees are

> "others", as contemplated in Cooley's statement of the rule. Indeed, they are privy to the contract which creates the peril.
>
> The mischief of today's decision is not its result, but its logic. One assumes that a company like General Motors has no want of access to expertise. It may well have safety engineers on its payroll far more knowledgeable about structural steel than the decedent's employer. But to predicate liability here on the *Inglis, Olah, Wight and Watkins* line of cases is to impose upon many, many other, less sophisticated defendants the same burden to attend to the safety of the employees of independent contractors. [*McDonough, supra* at 453-456.]

In *Bosak v Hutchinson*, 422 Mich 712, 724; 375 NW2d 333 (1985), this Court relied on *Vannoy* and *McDonough* for the proposition that the inherently dangerous activity exception has, on occasion, been applied to employees of contractors performing dangerous work. This Court did not provide further analysis of this issue, however, given its holding that assembling a crane after hours, the activity involved in that case, did not constitute a dangerous activity, but a routine construction activity. *Id.* at 728.

Further, in *Justus v Swope*, 184 Mich App 91; 457 NW2d 103 (1990), on which the trial court in the instant case relied, the Court of Appeals stated, "The inherently dangerous activity doctrine has, thus far, been found to impose liability in cases involving owners fully capable of recognizing the potential danger." *Id*. at 96, citing *McDonough, Vannoy,* and others. The Court declined to impose liability on "mere homeowners," *id*. at 96, for injuries that an employee of an independent contractor sustained while removing a dead tree from the homeowners' yard. The Court stated that it was unreasonable to expect the homeowners to be cognizant of the particular risks inherent in tree removal. *Id*. at

97-98. Thus, the Court seemingly would have imposed liability if the homeowners had been aware of such risks. The Court opined that imposing liability in that case, however, was exactly the fear that Justice BRENNAN expressed in his dissent in *McDonough*.

C. ANALYSIS

The analysis in Justice BRENNAN's *McDonough* dissent is persuasive and consistent with the longstanding common-law principles discussed in our case law. When a landowner hires an independent contractor to perform work that poses a peculiar danger or risk of harm, it is reasonable to hold the landowner liable for harm *to third parties* that results from the activity. If an employee of the contractor, however, negligently injures himself or is injured by the negligence of a fellow employee, it is not reasonable to hold the landowner liable merely because the activity involved is inherently dangerous. As Justice BRENNAN recognized, the inherently dangerous activity doctrine was designed to protect third parties, not those actively involved in the dangerous activity.

The Restatement of Torts echoes the above principle. 2 Restatement of Torts, 2d, § 416 provides:

> One who employs an independent contractor to do work which the employer should recognize as likely to create during its progress a peculiar risk of physical harm *to others* unless special precautions are taken, is subject to liability for physical harm caused to them by the failure of the contractor to exercise reasonable care to take such precautions, even though the employer has provided for such precautions in the contract or otherwise. [Emphasis added.]

Similarly, 2 Restatement of Torts, 2d, § 427 states:

> One who employs an independent contractor to do work involving a special danger *to others* which the employer knows or has reason to know to be inherent in or normal to the work, or which he contemplates or has reason to contemplate when making the contract, is subject to liability for physical harm caused *to such others* by the contractor's failure to take reasonable precautions against such danger. [Emphasis added.]

The text of the above provisions applies to "others." The term "others" necessarily refers to persons other than those directly involved in the dangerous activity.

Moreover, all the illustrations in the Restatement pertaining to §§ 416 and 427 involve injuries to innocent third parties and not to those directly involved in the activity. For example, the first illustration under § 416 provides:

> 1. A employs B, an independent contractor, to erect a building upon land abutting upon a public highway. The contract entrusts the whole work of erection to B, and contains a clause requiring the contractor to erect a sufficient fence around the excavations necessary for the erection of the building. It contains also a clause by which the contractor assumes all liability for any harm caused by his work. B digs the excavation but fails to erect a fence. In consequence, C, while walking along the highway at night, falls into the cellar and is hurt. A is subject to liability to C.

In the above illustration, C is an innocent third party and is not directly involved in the dangerous activity. Similarly, C in the following illustration under § 427 is an innocent third party:

> 3. A employs B, an independent contractor, to excavate a sewer in the street. B leaves the trench unguarded, without warning lights, and C drives his automobile into it in the dark. The danger is inherent in the work, and A is subject to liability to C.

Although a plurality of this Court in *McDonough* cited §§ 416 and 427 of the Restatement when discussing the inherently dangerous activity exception, the plurality failed to recognize that the term "others" refers to third parties, and not to those persons involved in the dangerous activity.

The Court of Appeals in *Vannoy* improperly extended the inherently dangerous activity doctrine to include employees of independent contractors. We thus overrule the Court of Appeals holding in *Vannoy*. We also reject this Court's obiter dictum in *Bosak* to the extent that it approved of *Vannoy*'s extension of the doctrine. As our longstanding precedent, before *McDonough,* and the Restatement make clear, the inherently dangerous activity exception is limited to third parties.[6]

Further, as Justice BRENNAN recognized in *McDonough*, allowing liability to be imposed on landowners for injuries resulting to an independent contractor's employees will necessarily result in liability imposed not only on large corporations fully capable of assessing and providing safety precautions, but also on "less sophisticated" landowners who may be unaware of such dangers or unable to provide precautionary measures to avoid the inherent risk. Indeed, in many situations it may be the risk itself that prompts a landowner to hire an independent contractor in the first instance. A contractor who may specialize and routinely engage in the activity would likely be better able to perform the activity in a safe manner. Likewise, the contractor is

[6] Our concurring colleague opines that an exception to this rule exists where a landowner retains control over the work performed and is in a position to ensure that the independent contractor takes adequate safety precautions. *Post* at 42. Because these circumstances are not presented in this case, we express no opinion regarding whether a landowner who has retained control over the dangerous work may be subject to liability for injuries to a contractor's employee caused by the contractor's negligence.

probably better able to implement reasonable safety precautions for the protection of its employees who perform the dangerous work, and this duty accordingly lies with the contractor. We thus adhere to the established common-law principle that this Court had consistently followed before *McDonough*.

Because the inherently dangerous activity exception does not apply when the injured party is an employee of an independent contractor rather than a third party, the exception does not apply in the instant case. Accordingly, the trial court properly granted summary disposition for defendants.

IV. CONCLUSION

We conclude that the inherently dangerous activity exception is limited to third parties and does not apply to employees of independent contractors injured while performing dangerous work. Because plaintiff was an employee of an independent contractor rather than a third party, the doctrine is inapplicable in this case. Accordingly, we reverse the judgment of the Court of Appeals.

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

KELLY, J. (*concurring in result only*). I agree with the result reached by the majority in this case. However, I write separately to point out that the majority takes no cognizance of the effect of its analysis when read together with its decision in *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004). I believe that our jurisprudence requires that a landowner retaining control over the performance of inherently dangerous work should be liable for an injury to an independent

contractor's employee. The decision in this case, when read with the decision in *Ormsby,* suggests otherwise.[1]

A landowner is generally not liable to the employee of a contractor for injuries caused by the contractor's negligence. *Ante* at 31. An exception has been made where the landowner retained control of the job site and inherently hazardous activities were undertaken.

The Court holds today that a landowner is not liable for a contractor's negligence that injures the contractor's employee engaged in an inherently dangerous activity. *Ante* at 38. The Court adopts Justice BRENNAN's dissenting analysis in *McDonough v Gen Motors*[2] and holds that the landowner has " 'neither the legal right nor the capability to supervise [the independent contractor's] work.' " *Ante* at 36, quoting *McDonough* at 456. The landowner here is not alleged to have retained control of the job site.

As previously indicated, a landowner is liable to a contractor's employee if he retained control over hazardous work and was positioned to ensure that the contractor took adequate precautions. *Funk v General Motors Corp*, 392 Mich 91, 105; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

The retained control doctrine is a distinct theory of liability. It applies where the entity engaging the services of the independent contractor has the legal right and the capability to supervise the work. *Plummer v Bechtel Constr Co*, 440 Mich 646, 659; 489 NW2d 66

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[1] I dissented from the decision in *Ormsby* on the ground that the inherently dangerous activity doctrine and the retained control doctrine are distinct theories of tort liability.

[2] *McDonough v Gen Motors Corp*, 388 Mich 430; 201 NW2d 609 (1972).

(1992) (opinion by LEVIN, J.). The doctrine is applicable regardless of whether the employer is a landowner or a general contractor.

This case was argued and submitted together with *Ormsby v Capital Welding, Inc.* The Court in *Ormsby* holds that the retained control doctrine, applied to general contractors who utilize subcontractors, is merely an element of the common work area doctrine. It is not an independent theory of liability. *Ormsby* at 55-56.

If *Ormsby* is held to apply to landowners, the decisions here and in *Ormsby,* read together, could have unfortunate unintended results in future cases. The inference to be drawn from them is this: a landowner who retains control of inherently dangerous work on a job site will not be liable for injuries to a contractor's employee unless the injury occurred in a common work area. The majority denies the validity of this inference. *Id.* at 60 n 13. However, the opinion's language strongly belies that denial.

Under the tort-reform statutes, liability is almost always several only and not joint. MCL 600.2956. Legal liability is distinct from fault, although it is based on fault. Fault is determined by the trier of fact[3] who assigns it, regardless of whether a party can be held legally liable. MCL 600.6304(1). However, an injured party can recover only from a party that can be held legally liable.

Under the preceding tort-reform statutes, the trier of fact can assign fault to a landowner who has directed the actions of an independent contractor engaged in an inherently dangerous activity. The Court's opinions in *DeShambo* and *Ormsby* could be interpreted to hold

[3] MCL 600.2957(1).

that such a negligent landowner could escape all liability for injury caused to the employee of his contractor. The landowner cannot be held liable under the inherently dangerous activity doctrine. *DeShambo*. Neither can he be held liable under the retained control doctrine. *Ormsby*.

I believe that this result would be inconsistent with principles underlying the common law. Moreover, it would be inconsistent with the intent of the tort-reform statutes. A negligent actor is intended to be legally liable for his actions. The majority potentially undermines this principle with the holdings in these two cases. Absent language correcting this problem, the analysis in the majority opinion is unacceptable to me and I concur only in the result reached by the majority.

ORMSBY v CAPITAL WELDING, INC

Docket Nos. 123287, 123289. Argued March 10, 2004 (Calendar No. 10). Decided July 23, 2004.

Ralph Ormsby and his wife, derivatively, brought an action in the Oakland Circuit Court against Monarch Building Services, Inc., a construction general contractor, and Capital Welding, Inc., a subcontractor that supervised his employer, Capital's subcontractor, and against others, seeking damages for injuries he suffered on the job site. The court, Alice L. Gilbert, J., granted summary disposition for Capital and Monarch, ruling that the plaintiffs failed to meet the four-part test of *Funk v Gen Motors Corp*, 392 Mich 91 (1974), for liability for injuries of a subcontractor's employee in a common work area. The court denied the plaintiff's motion to amend his complaint, ruling that amendment would be futile. The Court of Appeals, KELLY, P.J., and JANSEN and DONOFRIO, JJ., affirmed in part on the basis that Capital was not contractually obligated to indemnify Monarch, and reversed in part, concluding that Capital could be liable for the injuries under the retained control theory, and that both Monarch and Capital could be liable under the common work area claim. 255 Mich App 165 (2003). Capital and Monarch both appealed. 469 Mich 954 (2003).

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

The common work area doctrine is an exception to the general rule of nonliability for acts of independent subcontractors and the employees of those subcontractors The retained control doctrine is merely a subordinate doctrine to the common work area doctrine applied by the *Funk* Court to an owner defendant and has no application to general contractors. Summary disposition for Capital and Monarch was appropriate under the common work area doctrine.

1. The elements delineated in *Funk* for liability under the common work area exception to the nonliability of a general contractor for the acts of an independent subcontractor are: (1) the defendant, a general contractor or a property owner who assumes the role of a general contractor by retaining control, failed to take

reasonable steps (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workers (4) in a common work area. For liability under the common work area doctrine, all four elements must be found.

2. In this case, because Capital was not an owner or general contractor, it cannot be liable pursuant to *Funk*. Summary disposition for Capital was appropriate.

3. In this case, because the plaintiffs failed to demonstrate, pursuant to the *Funk* test, that there was a danger that created a high degree of risk to a significant number of workers in a common area, summary disposition for Monarch, the general contractor, was appropriate.

Justice CAVANAGH, concurring in result only, stated that the result reached by the majority is correct. It is unnecessary for the Court to determine the relationship or separateness of the doctrines of retained control and common work area. The doctrine of retained control applies only to the owner of property, and neither Capital Welding nor Monarch Building Services is the owner of the property. Because the common work area doctrine does not apply to subcontractors, Capital is exempt from that claim as well. With respect to Monarch's motion for summary disposition regarding the common work area doctrine, the plaintiff failed to show that a genuine issue of material fact existed about whether there was danger creating a high degree of risk to a significant number of workers and Monarch was entitled to judgment as a matter of law.

Justice KELLY, concurring in part and dissenting in part, stated that the retained control doctrine and the common work area doctrine are distinct theories of liability. The retained control doctrine applies to one who engages an independent contractor but retains actual control over the manner in which the work is performed. It imposes a duty to ensure that the contractor exercises due care for the safety of others. The common work area doctrine arises from the characteristics of common work areas and the efficiency of imposing responsibility on the entity that has responsibility over the entire area. Whether either of these doctrines applies in a given case is a question of fact.

In this case, the plaintiff's testimony is sufficient to create a genuine issue of material fact regarding whether a significant number of workers were exposed to the danger. Moreover, the plaintiff presented evidence that defendant Capital Welding retained control over the manner in which the work of Capital

Welding's subcontractor, Abray, was performed. Thus, Capital Welding retained its responsibility to ensure that the work was performed safely, and it was not entitled to summary disposition. With respect to defendant Monarch, however, the plaintiff failed to establish that Monarch had anything more than general oversight of the construction. This is insufficient to establish liability under either the common work area doctrine or the retained control doctrine. Thus, Monarch was entitled to summary disposition.

Under the decisions in this case and in *DeShambo v Anderson*, 471 Mich 27 (2004), one who engages an independent contractor and then negligently directs the actions of that contractor may not be held liable unless an injury occurs in a common work area. That result is not consistent with the principles underlying the common law or with the intent of the tort reform statutes.

Affirmed in part and reversed in part.

1. NEGLIGENCE — GENERAL CONTRACTORS — SUBCONTRACTORS — COMMON WORK AREA DOCTRINE.

The elements necessary for liability by a general contractor under the common work area doctrine exception to the general rule of nonliability of a general contractor for the negligent acts of an independent subcontractor are the (1) general contractor failed to take reasonable steps (2) to guard against readily observable and avoidable dangers (3) that create a high degree of risk to a significant number of workers (4) in a common work area.

2. NEGLIGENCE — GENERAL CONTRACTORS — SUBCONTRACTORS — PROPERTY OWNERS — RETAINED CONTROL DOCTRINE.

The retained control doctrine is a doctrine subordinate to the common work area doctrine and applies when the owner assumes the unique duties and obligations of a general contractor by assuming the role of the general contractor.

Miller & Padilla, P.C. (by *Neil A. Miller*) *(Sommers, Schwartz, Silver & Schwartz, P.C.*, by *Patrick Burkett*, of counsel), for the plaintiffs.

Rutledge, Manion, Rabaut, Terry & Thomas, P.C. (by *Joseph J. Wright*), for defendant Capital Welding, Inc.

Pedersen, Keenan, King, Wachsberg & Andrzejak, P.C. (by *Michael M. Wachsberg*), for defendant Monarch Building Services, Inc.

Amici Curiae:

Clark Hill PLC (by *Kevin S. Hendrick* and *Paul C. Smith*) for the Michigan Chapter and the Greater Detroit Chapter of the Associated General Contractors.

Novara, Tesija & McGuire, P.L.L.C. (by *Nicholas R. Nahat*), for the Michigan Regional Council of Carpenters.

Richard L. Steinberg, P.C. (by *Richard L. Steinberg* and *Donald C. Wheaton, Jr.*), for the International Association of Bridge, Structural, Ornamental, & Reinforcing Iron Workers.

Clark Hill PLC (by *F.R. Damm* and *Paul C. Smith*) for the Michigan Manufacturers Association.

TAYLOR, J. We granted leave to appeal in this case to consider the relationship between the "common work area doctrine" and the "retained control doctrine," and to address the scope of each doctrine. At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees. In *Funk v Gen Motors Corp,* 392 Mich 91, 104-105; 220 NW2d 641 (1974),[1] however, this Court set forth a new exception to this general rule of nonliability, holding that, under certain circumstances, a general contractor could be held liable under the "common work area doctrine" and, further, that a property owner could be held equally liable under the "retained control doctrine."

In this case, the Court of Appeals reversed the trial court's grant of summary disposition for both defen-

[1] Overruled in part on other grounds *Hardy v Monsanto Enviro-Chem Sys, Inc,* 414 Mich 29; 323 NW2d 270 (1982).

dants, holding that these doctrines are two distinct and separate exceptions to the general rule of nonliability of property owners and general contractors concerning the negligence of independent subcontractors and their employees. We disagree with the Court of Appeals and clarify today that these two doctrines are not two distinct and separate exceptions, rather only one—the "common work area doctrine"—is an exception to the general rule of nonliability for the negligent acts of independent subcontractors and their employees. Thus, only when the *Funk* four-part "common work area" test is satisfied may an injured employee of an independent subcontractor sue the general contractor for that contractor's alleged negligence.

Further, the "retained control doctrine" is a doctrine subordinate to the "common work area doctrine" and is not itself an exception to the general rule of nonliability. Rather, it simply stands for the proposition that when the *Funk* "common work area doctrine" would apply, and the property owner has sufficiently "retained control" over the construction project, that owner steps into the shoes of the general contractor and is held to the same degree of care as the general contractor. Thus, the "retained control doctrine," in this context, means that if a property owner assumes the role of a general contractor, such owner assumes the unique duties and obligations of a general contractor. Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's grant of summary disposition for both defendants.

I. FACTS AND PROCEEDINGS BELOW

This case arose out of a construction accident that occurred during the construction of a Rite Aid store in Troy, Michigan. Property owner Rite Aid hired defen-

dant Monarch Building Services, Inc. (Monarch), as the general contractor for the project. Monarch subcontracted the steel fabrication and steel erection work to defendant Capital Welding, Inc. (Capital), which then subcontracted the steel erection work to Abray Steel Erectors (Abray). Plaintiff Ralph Ormsby was employed by Abray as a journeyman ironworker on the site.

Capital delivered the steel for the project, at which time a crew from Abray began erecting the building using the steel. During the unloading process, Abray personnel allegedly disregarded an express warning that Capital had attached to the steel beams that stated, "Under no circumstances are deck bundles or construction loads of any other description to be placed on unbridged joists." The warning also cautioned against loading bundles of steel decking, weighing between two and three tons each, onto the unsecured erected steel structure.

Plaintiff began working on the unsecured joists to properly align the joists into position. To do so, he would strike the unsecured joist with a hammer. While performing this task, there was a sudden shift in an unsecured joist that, coupled with the fact that the joist was loaded with decking, allegedly caused the collapse of the structure, resulting in plaintiff's fifteen foot fall and subsequent injuries.

Plaintiff filed suit against Capital, alleging, among other things, that Capital retained control of and negligently supervised the project, and acquiesced to unsafe construction activities, including loading unwelded bar joists.[2] Plaintiff later amended his complaint and added the same claims against Monarch.

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[2] Although both Ormsby and his wife filed complaints, his wife's suit is wholly derivative. Therefore, we use "plaintiff" in the singular.

Capital filed a motion for summary disposition contending that there was no genuine issue of material fact regarding whether it retained control over the project because plaintiff failed to present any evidence that he was injured in a common work area. Plaintiff opposed the motion, contending instead that the two doctrines were separate and distinct, and thus Capital could be held liable under the "retained control doctrine" even if he failed to satisfy the elements of the "common work area doctrine."

The trial court agreed with Capital and granted its motion. Combining the doctrines of "common work area" and "retained control," the trial court determined that "the retained control theory applies only in situations involving 'common work areas.' " The trial court further stated, "This Court finds that there was no common work area that created a high degree of risk to a significant number of workers" and "there is no evidence that other subcontractors would work on the erection of the steel structure." That is, the trial court found that plaintiff had failed to satisfy two elements of the "common work area doctrine," and thus no genuine issue of material fact existed regarding whether either doctrine applied to Capital.

Following Capital's successful motion, Monarch filed its own motion for summary disposition under MCR 2.116(C)(10), contending that plaintiff had failed to provide any evidence to satisfy each of the four elements of the "common work area doctrine." In response, plaintiff moved for leave to amend his complaint to assert that plaintiff was in fact injured in a "common work area" as defined in *Funk*. The trial court granted Monarch's motion for the same reasons that it had granted the earlier Capital motion and denied plaintiff's motion to amend his complaint, ruling

that the amendment would be futile in light of its ruling that there was no genuine issue of material fact regarding the existence of a common work area.

The Court of Appeals reversed in part, holding (1) that the "common work area doctrine" and "retained control doctrine" are two distinct and separate exceptions and (2) that evidence that "employees of other subcontractors would be or had been working in the same area where plaintiff's injury occurred . . . create[d] a genuine issue of material fact regarding whether plaintiff's injury occurred in a common work area." 255 Mich App 165, 188; 660 NW2d 730 (2003). Accordingly, the Court permitted plaintiff's "retained control" claim to proceed against Capital,[3] and permitted plaintiff's "common work area" claim to proceed against both Capital and Monarch. Further, the Court held that the trial court had erred in denying plaintiff's motion to amend his complaint concerning his allegations that he had been injured in a "common work area." Both defendants filed applications for leave to appeal with this Court, which we granted.[4]

II. STANDARD OF REVIEW

Summary disposition under either MCR 2.116(C)(8) or (C)(10) presents an issue of law for our determination and, thus, "[w]e review a trial court's ruling on a motion for summary disposition de novo." *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999).

When a trial court grants summary disposition pursuant to MCR 2.116(C)(8), or (C)(10), the opportunity

[3] Regarding Monarch, the Court of Appeals concluded that the trial court's order granting Monarch summary disposition on plaintiff's retained control theory was proper because no genuine issue of material fact existed that Monarch had not retained control over plaintiff's work.

[4] 469 Mich 947 (2003).

for the nonprevailing party to amend its pleadings pursuant to MCR 2.118 should be freely granted, unless the amendment would not be justified. MCR 2.116(I)(5). An amendment, however, would not be justified if it would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). We will not reverse a trial court's decision to deny leave to amend pleadings unless it constituted an abuse of discretion. *Id.* at 654.

III. ANALYSIS

As discussed briefly above, at common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees. However, in *Funk*, this Court set forth an exception to this general rule of nonliability. There, property owner General Motors (GM) hired general contractor Darin & Armstrong (Darin) to expand one of its plants. The general contractor, in turn, subcontracted a portion of the work to Funk's employer, Ben Agree Company. Funk was injured in a fall from a platform and sued GM and Darin, alleging that each owed him a duty to implement reasonable safety precautions and to ensure that workers on the project used adequate safety equipment to protect against falls. GM and Darin defended on the basis that, under the common law, neither had a duty to protect plaintiff from these types of dangers. Departing from established law, this Court set forth an exception in circumstances involving construction projects and affirmed the verdict against Darin:

> We regard it to be part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common

> work areas which create a high degree of risk to a significant number of workmen. [*Funk*, *supra* at 104.]

That is, for a general contractor to be held liable under the "common work area doctrine," a plaintiff must show that (1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.

Having established that a general contractor could be held liable for negligence regarding job safety, the Court then addressed the potential liability of a property owner. The Court held that, under the new rule, a property owner could itself be liable if it had "retained control" in such a way that it had effectively stepped into the shoes of the general contractor and been acting as such. The Court first stated:

> This analysis [i.e., the "common work area" test quoted above in reference to the general contractor] would not *ordinarily* render a "mere" owner liable. In contrast with a general contractor, the owner typically is not a professional builder. Most owners visit the construction site only casually and are not knowledgeable concerning safety measures. . . . Supervising job safety, providing safeguards, is not part of the business of a typical owner. [*Id*. at 104-105 (emphasis added).]

Then it continued by outlining the circumstances in which the ordinary rule would not control, saying:

> [T]he law does not . . . absolve an owner who acts in a superintending capacity and has knowledge of high degrees of risk faced by construction workers from responsibility for failing to require observance of reasonable safety precautions. [*Id*. at 106-107.]

The Court's use of the word "ordinarily," italicized above, considered in conjunction with its statement that a property owner cannot escape liability if that owner acts in a "superintending capacity and has knowledge of high degrees of risk faced by construction workers," necessarily implies that, under certain circumstances, the "common work area" doctrine *would* render a property owner liable.[5] Thus, it is clear that this Court was applying the identical "common work area" analysis to GM, as property owner, on the basis that it "retained control."

Applying these new doctrines to the facts in *Funk*, the Court noted that Funk had largely created his own circumstances because he essentially "dug a hole and . . . [he] fell into it," *id*. at 100. The general contractor, Darin, was fully knowledgeable of the subcontractor's failure to implement reasonable safety precautions for a readily apparent danger where such precautions likely would have prevented Funk's fall. Further, the Court held that GM had exercised "an unusually high degree of control over the construction project," and thus was also liable for Funk's injuries. *Id*. at 101. Thus, this Court stated that the evidence supported a finding of GM's tacit, if not actual, control of safety measures or the lack thereof "*in the highly visible common work areas*." *Id*. at 107.

Accordingly, we conclude that, on the basis of this Court's analysis in *Funk*, the "common work area doctrine" and the "retained control doctrine" are not two distinct and separate exceptions. Rather, the former doctrine is an exception to the general rule of

[5] The Court also stated that "[a]n *owner* is responsible if he does not truly delegate—if he retains 'control' of the work—or if, by rule of law or statute, the duty to guard against the risk is made 'nondelegable.' " *Id*. at 101 (emphasis added).

nonliability of property owners and general contractors for injuries resulting from the negligent conduct of independent subcontractors or their employees. Thus, only when the *Funk* four-part "common work area" test is satisfied may a general contractor be held liable for alleged negligence of the employees of independent subcontractors regarding job safety. The "retained control" doctrine is merely a *subordinate* doctrine, applied by the *Funk* Court to the owner defendant, that has no application to general contractors.[6]

In her dissent in *Funk*, Justice COLEMAN was concerned that the "common work area doctrine" would devolve in practice into a strict liability regime where general contractors would be responsible for any common work area injury that an employee of an independent subcontractor suffers. *Id.* at 116. Although Justice COLEMAN's concerns have not come to fruition,[7] *Funk* has morphed from a straightforward doctrine conferring liability, under certain circumstances, on property owners or general contractors for the negligence of independent subcontractors, into a "two exception" creation. Indeed, the instant opinion by the Court of Appeals outlined that progression[8] and proceeded to erroneously

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[6] The *Funk* Court applied the "retained control" doctrine to the property owner defendant in that case. The owner of the subject property in this case, Rite Aid, was dismissed early in the litigation, and its liability is not at issue. It is therefore unnecessary to address owner liability, and we express no opinion regarding the *Funk* "retained control" doctrine as it applies to property owners.

[7] Neither defendant nor any brief amicus curiae has urged the Court to overrule *Funk,* but only to clarify the nature of the *Funk* holding.

[8] As the Court of Appeals read the cases, *Erickson v Pure Oil Corp*, 72 Mich App 330, 335-336; 249 NW2d 411 (1976), distinguished the doctrines of "retained control" and "common work area" and applied them separately; *Signs v Detroit Edison Co*, 93 Mich App 626, 632; 287 NW2d 292 (1979), addressed general contractor liability based on "retained control" even though it found that the plaintiff was not injured in a

conclude that even an entity that is neither a property owner nor a general contractor (subcontractor Capital) can be liable under *Funk*.

IV. APPLICATION

To establish the liability of a general contractor under *Funk*, a plaintiff must prove four elements: (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area.[9] *Id*. at 104.

"common work area"; *Samhoun v Greenfield Constr Co*, Inc, 163 Mich App 34, 45; 413 NW2d 723 (1987), blended the doctrines of "retained control" and "common work area"; *Johnson v Turner Constr Co*, 198 Mich App 478, 480; 499 NW2d 27 (1993), separately addressed the two doctrines; *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 408; 516 NW2d 502 (1994), addressed the doctrines of "retained control" and "common work area" separately; *Hughes v PMG Building*, 227 Mich App 1, 8; 574 NW2d 691 (1997), discussed the "common work area doctrine" without reference to the "retained control doctrine"; *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 636; 601 NW2d 160 (1999), discussed the "retained control doctrine" as a "second main exception" to the general rule of nonliability for the negligence of an independent contractor without mentioning the four-part test in *Funk* or addressing whether the plaintiff's injury occurred in a "common work area"; *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 74; 600 NW2d 348 (1999), stated that the "retained control doctrine" applies only in those situations involving "common work areas."

Unfortunately, our post-*Funk* decisions that have addressed the "retained control" and "common work area" doctrines have been plurality opinions, and, as explained in *Dean v Chrysler Corp*, 434 Mich 655, 661 n 7; 455 NW2d 699 (1990), are not binding authority. See *Beals v Walker*, 416 Mich 469; 331 NW2d 700 (1982), *Plummer v Bechtel Corp*, 440 Mich 646; 489 NW2d 66 (1992), and *Groncki v Detroit Edison*, 453 Mich 644; 557 NW2d 289 (1996).

[9] With reference to element four—a common work area—we agree with the following statement from *Hughes, supra* at 8-9, in which the court concluded that an overhang on a porch did not constitute a common work area:

Funk is simply inapplicable to Capital in this case because Capital was neither the property owner nor the general contractor. Thus, the trial court's order granting it summary disposition was proper. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition for Capital.[10]

Because Monarch was the general contractor, the "common work area doctrine" may be applicable. The trial court determined that plaintiff had failed to satisfy element three, danger creating a high degree of risk to a significant number of workmen, and element four, a

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> If the top of the overhang or even the overhang in its entirety were considered to be a "common work area" for purposes of subjecting the general contractor to liability for injuries incurred by employees of subcontractors, then virtually no place or object located on the construction premises could be considered not to be a common work area. We do not believe that this is the result the Supreme Court intended. This Court has previously suggested that the Court's use of the phrase "common work area" in *Funk, supra*, suggests that the Court desired to limit the scope of a general contractor's supervisory duties and liability. We thus read the common work area formulation as an effort to distinguish between a situation where employees of a subcontractor were working on a unique project in isolation from other workers and a situation where employees of a number of subcontractors were all subject to the same risk or hazard. In the first instance, each subcontractor is generally held responsible for the safe operation of its part of the work. In the latter case, where a substantial number of employees of multiple subcontractors may be exposed to a risk of danger, economic considerations suggest that placing ultimate responsibility on the general contractor for job safety in common work areas will "render it more likely that the various subcontractors . . . will implement or that the general contractor will himself implement the necessary precautions and provide the necessary safety equipment in those areas." *Funk, supra* at 104 (citations omitted).

[10] Justice KELLY has concluded in her partial dissent that plaintiffs' lawsuit against Capital should be allowed under *Funk*. This deviates from *Funk* because *Funk* only authorized claims against owners and general contractors. Capital is neither.

common work area, and thus granted summary disposition for Monarch. This approach is consistent with *Funk* and reflects the understanding that a plaintiff's failure to satisfy *any* one of the four elements of the "common work area doctrine" is fatal to a *Funk* claim.[11]

The Court of Appeals, misapprehending the merit of the trial court's approach, reversed the decision of the trial court on the basis that it erred in finding that no genuine issue of material fact existed regarding element four—a "common work area." Regardless of whether a genuine issue of material fact existed with respect to element four, reversal was erroneous because the Court of Appeals overlooked the fact that the trial court's order was premised not just on a deficiency of evidence regarding element four, but also on the fact that no genuine issue of material fact existed regarding element three—danger creating a high degree of risk to a significant number of workmen.[12] Inasmuch as *Funk*

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[11] It is potentially confusing and, indeed, may have misled some courts, that a test with four elements has been referred to by only one of its elements—the "common work area." What is commonly referred to as the "common work area doctrine," however, has four separate elements, *all* of which must be satisfied before that doctrine may apply.

[12] Justice KELLY asserts in her dissent that the Court of Appeals disagreed with the trial court's conclusion that plaintiff had failed to establish a genuine issue of material fact that a high degree of risk to a significant number of workers existed. This is incorrect. The Court of Appeals specifically stated that it limited its discussion and decision to the question whether plaintiff was injured in a common work area. 255 Mich App at 188. Justice KELLY goes on to indicate that she would find a genuine issue of material fact whether a significant number of workers were exposed to danger on the basis that a mason was right below plaintiff when he fell, and because any worker at the site would be working in, around and under the steel structure after it was erected and all such workers would be exposed to an extremely dangerous condition if the structure was not competently constructed. We disagree. The fact that one worker was below plaintiff when he fell certainly does not establish a genuine issue of material fact regarding whether a high degree of risk to a *significant* number of workers existed. Justice KELLY's

requires a plaintiff to establish all four elements of the "common work area doctrine" to prevail, the trial court ruling should have been affirmed. Thus, the trial court did not abuse its discretion by refusing to allow plaintiff to amend his complaint concerning the existence of a "common work area," because such an amendment would have been futile. Accordingly, we reverse the judgment of the Court of Appeals and reinstate the trial court's grant of summary disposition for Monarch.

V. CONCLUSION

The doctrines of "common work area" and "retained control" are not two distinct and separate exceptions. Rather, under the "common work area doctrine," a general contractor may be held liable for the negligence of its independent subcontractors only if all the elements of the four-part "common work area" test set forth in *Funk* have been satisfied. Further, the "retained control doctrine" is subordinate to the "common work area doctrine" and simply stands for the proposition that when the "common work area doctrine" would apply, and the property owner has stepped into the shoes of the general contractor, thereby "retaining control" over the construction project, that owner may likewise be held liable for the negligence of its independent subcontractors.[13] Because neither Capital nor Monarch satisfies all four elements of the "common work area" doctrine, we reverse the judgment of the

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vague reference to "any worker" being exposed to danger if the structure was not competently constructed is likewise insufficient to create a genuine issue of material fact. The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed.

[13] We reiterate that we are merely clarifying *Funk* and we express no opinion concerning whether the *Funk* Court properly imposed liability on an owner under the "retained control" doctrine.

Court of Appeals and reinstate the trial court's grant of summary disposition for both defendants.

CAVANAGH, J. (*concurring in result only*). I concur in the result reached by the majority. However, I write separately because I would reach that result regardless of whether the doctrines of retained control and common work area are separate doctrines. I agree with the majority that the trial court's grant of summary disposition to both defendants should be reinstated because the dispositive issues in this case are not affected by whether the doctrines are separate or one is subordinate to the other. I, however, cannot join the majority because this Court has routinely treated the doctrines of retained control and common work area as two separate and distinct doctrines. See *Plummer v Bechtel Constr Co*, 440 Mich 646; 489 NW2d 66 (1992); *Groncki v Detroit Edison Co*, 453 Mich 644; 557 NW2d 289 (1996).

Regardless of whether the doctrine of retained control is subordinate to or separate from the common work area doctrine, it is only applicable to property owners, and because neither defendant Capital nor defendant Monarch is the property owner, the trial court was correct to grant each defendant's motion for summary disposition with respect to the doctrine of retained control.

Further, the common work area doctrine does not apply to subcontractors, thus the trial court was correct to grant defendant Capital's motion for summary disposition with respect to common work area liability. See *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974). The trial court was also correct to grant defendant Monarch's motion for summary disposition with respect to the common work area doctrine. Re-

gardless of when the danger to a significant number of workers must exist, plaintiff failed to show that a genuine issue of material fact existed about whether there was danger creating a high degree of risk to a significant number of workers. Because plaintiff failed to establish a genuine issue of material fact and because defendant Monarch was entitled to judgment as a matter of law, the trial court was correct to grant defendant Monarch's motion for summary disposition. Thus, I concur in the result only.

KELLY, J. (*concurring in part and dissenting in part*). This Court granted leave limited to whether the retained control doctrine and the common work area doctrine are separate and to a discussion of the scope of each doctrine. 469 Mich 947 (2003). The majority holds that the doctrines are not separate as applied to general contractors who utilize subcontractors. *Ante* at 49.

I respectfully dissent. I believe that the retained control doctrine and the common work area doctrine are distinct theories of liability. They are founded on different premises. Like all common-law tort theories, they reinforce distinct social norms.[1]

The retained control doctrine applies to one who engages an independent contractor but retains actual control over the manner in which the work is performed. It imposes a duty to ensure that the contractor exercises due care for the safety of others. See 2 Restatement of Torts, 2d, § 414, p 387. It deters undesirable conduct.

The common work area doctrine arises from the characteristics of common work areas and the efficiency of imposing responsibility on the entity that has respon-

[1] See, generally, 1 Dobbs, The Law of Torts, Aims, Policies and Methods of Tort Law, Ch 1, Topic B, p 12 ff.

sibility over the entire area. *Funk v Gen Motors Corporation*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds by *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982).

Whether either of these doctrines applies in a given case is a question of fact. The majority affirms the trial court's determination that plaintiff failed to create a genuine issue of material fact on the third element of the common work area doctrine. The trial court held that plaintiff failed to establish that there was a danger creating a high degree of risk to a significant number of workers.[2] *Ante* at 60. The Court of Appeals held that plaintiff presented evidence that other workers "would be or had been working in the same area where plaintiff's injury occurred." 255 Mich App 165, 188; 660 NW2d 730 (2003).

Plaintiff testified that a mason was working "right below" him when the steel structure collapsed. This is evidence that other workers were in, around, and under the structure while it was being erected. It is reasonable to infer that other workers would continue to be in, on, and around it as construction continued. If the structure were not built competently, an extremely dangerous condition would exist that the structure would collapse. It is of no moment that there happened to be only one worker in the area at the time of the accident.

THE COURT OF APPEALS DECISION IS CORRECT

I agree with the Court of Appeals. Plaintiff's testimony is sufficient to create a genuine issue of material

[2] See *Groncki v Detroit Edison Co*, 453 Mich 644, 662; 557 NW2d 289 (1996) (BRICKLEY, C.J.), citing *Funk, supra* at 104.

fact regarding whether a significant number of workers in addition to the mason were exposed to the danger.

Moreover, plaintiff presented evidence that defendant Capital Welding retained control over the manner in which the work of Capital's subcontractor, Abray, was performed. Capital's field superintendent stated that he instructed Abray's ironworkers on proper erection. Plaintiff, Abray's employee, testified that Capital's superintendent instructed him on particular aspects of the job.[3]

The contract between Capital and Monarch obligated Capital to undertake safety precautions for the steel erection work. Capital's field superintendent stated that he had the authority to remove a contractor from the site for safety violations. Therefore, Capital retained its responsibility to ensure that the steel was erected safely after subcontracting the work to Abray, plaintiff's employer.

An analogy between *Funk* and this case is appropriate. *Funk* did not explicitly limit its reasoning to landowners and general contractors. The landowner there was liable to its contractor's employee because it retained control over the safety precautions implemented on the site. See *Funk* at 107-108. In this case, plaintiff presented evidence that Capital retained control over the methods and safety procedures for Abray's erection of the steel. Capital stands in the identical position to plaintiff as the landowner in *Funk* did as to Funk. Accordingly, it was not entitled to summary disposition on the proposition that it could not be liable to its contractor's employee.

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[3] Plaintiff was told to fabricate lugs that would be welded to the structure's columns.

However, with respect to Monarch, plaintiff failed to establish that Monarch had anything more than general oversight of the construction. This is insufficient to establish liability under either the common work area doctrine or the retained control doctrine. *Johnson v Turner Constr Co,* 198 Mich App 478, 480; 499 NW2d 27 (1993). Monarch was entitled to summary disposition.

POSSIBLE UNINTENDED RESULTS OF THE *DESHAMBO* AND *ORMSBY* DECISIONS

DeShambo[4] and *Ormsby* read together could have unfortunate unintended results in future cases. Under the tort reform statutes, with few exceptions, liability is no longer joint but only several. MCL 600.2956. It is based on fault. MCL 600.2957(1). The fault of a party is determined by the trier of fact regardless of whether the party can be held legally liable. MCL 600.6304(1).

However, an injured individual can recover only from a party that can be held legally liable. The trier of fact may assign fault to one who engages an independent contractor and then negligently directs the actions of that contractor. But under today's decisions in *Ormsby* and *DeShambo*, such an employer, landowner or otherwise, could not be held liable unless an injury occurs in a common work area. Hence, employers now can conceivably escape all liability for their own negligence in a given accident.

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[4] This case was argued and submitted together with *DeShambo v Anderson,* 471 Mich 27; 684 NW2d 332 (2004). *DeShambo* holds that a landowner is not liable for an independent contractor's negligence that injures an employee of that contractor who is engaged in an inherently dangerous activity. *Id*. at 41. The analysis in *Ormsby* could logically be extended to preclude liability of a landowner under the combined common work area/retained control doctrine as well.

I believe that this result is not consistent with the principles underlying the common law. It is inconsistent, also, with the intent of the tort reform statutes. A negligent actor should be legally liable for his actions. Because the majority's decision undermines this principle, I disagree and would affirm the decision of the Court of Appeals.

CRAIG v OAKWOOD HOSPITAL

Docket Nos. 121405, 121407-121409, 121419. Argued March 10, 2004 (Calendar No. 5). Decided July 23, 2004. Rehearing denied *post*, 1201.

Antonio Craig, by his next friend, Kimberly Craig, brought a malpractice action in the Wayne Circuit Court against Oakwood Hospital, Henry Ford Hospital, Associated Health System, Associated Physicians, P.C., and Elias G. Gennaoui, M.D., seeking damages for his neurological and physical ailments, which were allegedly caused by defendants' negligence in treating his mother during her labor leading to his delivery. A jury returned a verdict for the plaintiff. The court, Carole F. Youngblood, J., determined that defendant Henry Ford Health System (Henry Ford) was liable as a successor corporation to defendant Associated Physicians, P.C., and denied the defendants' motions for judgment notwithstanding the verdict and for a new trial. The Court of Appeals, SAWYER and OWENS, JJ. (COOPER, P.J., concurring in part and dissenting in part), affirmed in part, including Henry Ford's successor liability, and reversed the trial court's denial of remittitur of damages for lost earning capacity. 249 Mich App 534 (2002). The defendants appealed.

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

The trial court erred in denying defendant Oakwood Hospital's motion for an evidentiary hearing on the admissibility of the theories propounded by one of the plaintiff's expert witnesses. The defendants are entitled to judgment notwithstanding the verdict because, although the plaintiff adduced evidence from which the jury could conclude that the defendants had breached the appropriate standard of care, the jury had no basis in the record to conclude that this breach caused plaintiff's cerebral palsy, mental retardation, and other neurological conditions. Henry Ford was not liable under a successor liability theory because it had purchased only the administrative portion of Associated Physicians, P.C., rather than its medical practice.

1. In this case, defendant Oakwood Hospital sought an evidentiary hearing regarding the qualifications and theories of

one of the plaintiff's expert witnesses. MRE 702 permitted the admission of the expert witness's testimony only if the court determined that it was based on recognized scientific, technical, or other specialized knowledge. When the defendant challenged the plaintiff's expert's theory as novel and not generally accepted within the medical community, the trial court erroneously concluded that the court was required to review the testimony for admissibility only if the defendant made a preliminary showing that the testimony was inadmissible. However, the proponent of expert opinion testimony bears the burden of proving that the contested opinion is based on generally accepted methodology. *People v Young* (*After Remand*), 425 Mich 470, 475 (1986). Therefore, the trial court abused its discretion by denying the motion for an evidentiary hearing relating to the plaintiff's expert witness's theory.

2. To establish a cause of action for medical malpractice, a plaintiff must demonstrate (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care. *Weymers v Khera*, 454 Mich 639, 655 (1997); MCL 600.2912a. In order to prove proximate causation, a plaintiff must adduce a valid theory of causation based on facts in evidence. This theory of causation may not rest on a possibility or a plausible explanation, but must exclude with a fair amount of certainty any other reasonable hypotheses. The plaintiff failed to present evidence of a causal relationship between his present neurological conditions and the repeated, Pitocin-induced pounding of the fetal head against the maternal anatomy described by his expert witness. Therefore, there was no evidence from which the jury could infer that plaintiff's present neurological disabilities were caused by a breach of the applicable standard of care. Given the absence of any evidence that plaintiff's injuries are attributable to defendant's conduct, the trial court erred in denying the defendants' motions for a judgment notwithstanding the verdict and the Court of Appeals erred in affirming that denial.

3. The trial court erroneously imposed successor liability on Henry Ford. A successor corporation that purchases a predecessor corporation's assets for cash assumes the predecessor's liabilities only where, among other circumstances, the transaction was a consolidation or merger, or the transferee corporation is a mere continuation or reincarnation of the old corporation. *Foster v Cone-Blanchard Machine Co*, 460 Mich 696, 702 (1999). Only the

medical practice portion of Associated Physicians, P.C. is potentially liable in this malpractice action. Henry Ford purchased for cash only the administrative portion of the bifurcated Associated Physicians, P.C. Because these entities did not consolidate or merge and because Henry Ford is not a continuation of the medical practice of Associated Physicians, P.C., Henry Ford is not liable as a successor.

Justice CAVANAGH, concurring, stated his agreement with the majority except for some of the rationale regarding successor liability. He concurred in result only with respect to the issue of successor liability.

Justice KELLY, concurring in part and dissenting in part, stated that the failure to hold a *Davis-Frye* hearing was not an abuse of discretion under the facts of this case. Defendant Oakwood Hospital failed to meet its obligation to provide support for its claim that the testimony of the plaintiff's causation expert regarding traumatic injury was not accepted within the scientific community. The plaintiff did present sufficient evidence to establish the element of causation. Justice KELLY concurred with the conclusion of the majority that Henry Ford Hospital is not liable under the theory of successor liability. Therefore, she would affirm the decisions of both lower courts in favor of the plaintiff, except with respect to Henry Ford Hospital and agrees with the majority that that part of the decisions should be reversed.

Reversed and remanded for entry of judgment in the defendants' favor.

EVIDENCE — EXPERT WITNESS'S THEORY — GENERAL SCIENTIFIC ACCEPTANCE — *DAVIS-FRYE* HEARING.

Once an opposing party in a medical malpractice case has moved to exclude the other party's expert testimony and theory as novel and not generally scientifically accepted, the proponent of the expert opinion testimony bears the burden of proving that the contested opinion is based on generally accepted methodology.

Mark L. Silverman, M.D., J.D., P.C. (by *Mark L. Silverman, M.D.*), for the plaintiff.

Dickinson Wright PLLC (by *Barbara H. Erard* and *Phillip J. DeRosier*) for Oakwood Hospital.

Kallas & Henk, P.C. (by *Leonard A. Henk*), and *Kitch Drutchas Wagner Denardis & Valitutti* (by *Susan Healy Zitterman*) for Henry Ford Health System.

John P. Jacobs, P.C. (by *John P. Jacobs*), for Elias G. Gennaoui, M.D., and Associated Physicians, P.C.

Amici Curiae:

Honigman Miller Schwartz and Cohn LLP (by *Chris E. Rossman* and *Jason Schian Conti*) for the Michigan Health and Hospital Association.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), for The Defense Research Institute.

Foster, Swift, Collins & Smith, P.C. (by *Thomas R. Meagher*), for the Michigan Defense Trial Counsel.

Stinnett Thiebaud & Remington L.L.P. (by *Mark A. Stinnett* and *Philipa M. Remington*) and *Plunkett & Cooney, P.C.* (by *Robert G. Kamenec*), for the American College of Obstetricians and Gynecologists.

YOUNG, J. Plaintiff, now an adult, suffers from cerebral palsy, mental retardation, and a number of other neurological and physical ailments. He argues, through his mother as next friend, that these conditions are the proximate results of defendants' negligence in treating his mother during her labor leading to his delivery. Specifically, plaintiff maintains that defendants administered an excessive amount of a contraction-inducing medication to his mother and were unable to detect signs of fetal distress because they failed to make appropriate use of fetal monitoring devices. The trial court denied defendants' request to hold a *Davis-Frye* hearing on expert testimony that purported to draw a causal connection between these breaches of the standard of care and plaintiff's present neurological and physiological condition.

Following a five week trial, the jury returned a verdict in plaintiff's favor. The trial court thereafter determined that defendant Henry Ford Health System

was liable as a successor corporation to defendant Associated Physicians, P.C. The trial court denied the defendants' motions for judgment notwithstanding the verdict or for a new trial. The Court of Appeals affirmed the judgment of liability, but ordered remittitur on lost wage earning capacity.[1] We reverse and remand the matter for entry of judgment in defendants' favor.

I. FACTS AND PROCEDURAL HISTORY

This appeal arises out of the events surrounding plaintiff's birth on July 16, 1980. Plaintiff's mother, Kimberly Craig, received prenatal care from defendant Associated Physicians, P.C. Associated Physicians employed four obstetricians, including defendants Dr. Elias Gennaoui and Dr. Ajit Kittur.[2] Ms. Craig met with each obstetrician at some point before plaintiff's birth, but was primarily attended to by Dr. Gennaoui during plaintiff's delivery.

Ms. Craig's amniotic and chorionic membranes ruptured at approximately 5:30 A.M. on July 16, 1980, and she was admitted to defendant Oakwood Hospital within a half hour. The resident doctor on call at the time noted that plaintiff's fetal heart tones were within a normal range. Dr. Kittur, who was the attending physician on staff when Ms. Craig was admitted, requested that Ms. Craig be given an intravenous (IV) "keep open" line to maintain hydration and to establish a channel for the intravenous administration of medication, should the need arise. Nurses applied an external fetal-uterine monitor to Ms. Craig at approximately 9:30 A.M., at which time she still had not experienced

[1] 249 Mich App 534; 643 NW2d 580 (2002).

[2] Dr. Kittur is not a party to this appeal because the jury determined that he was not negligent.

contractions. At 10:00, Ms. Craig began to receive 1000 cc of a 5% Ringer's lactate solution through the "keep open" IV line.

Dr. Gennaoui, who had taken over for Dr. Kittur sometime after Ms. Craig was admitted, met with Ms. Craig at approximately 11:00 A.M. He was concerned that Ms. Craig and her child had been exposed to infection since her membranes burst earlier that morning,[3] and concluded that Ms. Craig should be given ten units of Pitocin[4] in order to induce labor.[5] From 11:30 A.M. to 6:00 P.M., Ms. Craig was given doses of Pitocin in increasing amounts.

One of the central issues at trial was the precise amount of Pitocin administered to Ms. Craig and whether, as plaintiff argued, she had mistakenly received a double dosage. Plaintiff's standard of care expert, Paul Gatewood, M.D., testified that Ms. Craig's medical records reveal that she was inadvertently given two doses of Pitocin. The first was administered shortly after 11:00 A.M. upon Dr. Gennaoui's order. Nurse Quinlan wrote a check on Dr. Gennaoui's order for Pitocin to indicate, according to Dr. Gatewood, that she had performed Dr. Gennaoui's request and had administered Pitocin through the 5% Ringer's lactate solution.

Dr. Gatewood noted, however, that another nurse, Tyra, had written in Ms. Craig's records that she had administered Pitocin through D5W,[6] a solution other

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[3] Dr. Gennaoui testified that amniotic fluid, which was discharged when plaintiff's amniotic and chorionic membranes burst, protected the fetus from infection.

[4] "Pitocin" is a brand name for synthetic oxytocin.

[5] Plaintiff contends that records from a fetal uterine monitor show that Ms. Craig was, in fact, experiencing contractions before Dr. Gennaoui's decision to administer Pitocin.

[6] Dr. Gatewood described this solution as a mix of dextrose and water.

than the 5% Ringer's lactate Ms. Craig was already receiving intravenously. Thus, according to Dr. Gatewood's testimony, Dr. Gennaoui had given a single order for Pitocin that had been filled twice—once by Nurse Quinlan through the 5% Ringer's lactate solution, and once by Nurse Tyra through the D5W solution.

Also contested at trial was whether Ms. Craig's labor presented any complications. Medical records compiled after plaintiff's birth show that Ms. Craig began experiencing contractions of "moderate" strength after receiving Pitocin and that "moderate" contractions continued until plaintiff's delivery.

Plaintiff contends, however, that the records from a fetal uterine monitor tell a different story. These records, according to Dr. Gatewood, show that plaintiff experienced recurrent decelerations of his heart rate, or bradycardia, after Ms. Craig began to receive Pitocin. Dr. Gatewood explained at trial that the decelerations occurred because the Pitocin administered to Ms. Craig caused contractions of excessive intensity and duration. Plaintiff's umbilical cord became compressed because of these contractions, thereby decreasing the amount of blood flowing to plaintiff. The result was the pattern of decelerations in heart rate shown by the fetal uterine monitor and a decrease in the amount of oxygen flowing to plaintiff's brain, or "hypoxia" in medical parlance.

Plaintiff was born shortly before 7:00 P.M. that day. His Apgar scores, 8 and 9 (on a one to ten scale), were well within the typical range,[7] indicating that plaintiff appeared to be a normal, healthy baby. Plaintiff also contests this Apgar assessment, maintaining that a

[7] An Apgar score represents an evaluation of a newborn infant's physical condition immediately after birth. An infant is evaluated at one and five minutes after birth on five criteria: heart rate, respiratory effort, muscle tone, skin color, and response to stimuli. Each criterion is

picture of plaintiff taken shortly after his birth depicts an infant who had recently suffered head trauma. Specifically, plaintiff points to a "large ridge" across his forehead as evidence of "facial or brow molding," and argues that the photograph clearly reveals bruising and edema,[8] both sure signs of trauma. In addition, plaintiff contends that the postdelivery picture shows him "gazing" to the right while holding his left hand in a cortical position and that these "are indicative of acute brain injury."

Two days after his birth, plaintiff was examined by pediatrician Dr. Carolyn Johnson, who concluded that plaintiff seemed to be healthy and displayed normal cognitive functions. Plaintiff received a vastly different diagnosis approximately one year later. On June 6, 1981, Ms. Craig had plaintiff examined by Dr. Michael Nigro, a pediatric neurologist, after noticing that plaintiff began to seem developmentally slow after his third month. Dr. Nigro diagnosed plaintiff with nonprogressive encephalopathy[9] with global developmental delay and mild spasticity. He concluded at the time and maintained throughout this trial that the etiology or cause of plaintiff's condition was unclear.[10]

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assigned a value between zero and two, with a score of ten indicating the best condition. Attorney's Dictionary of Medicine Illustrated, vol 1, p A-475.

[8] An "edema" is an "effusion of serious fluid into the interstices of cells in tissue spaces or into body cavities." *Random House Webster's Unabridged Dictionary* (2d ed, 2001).

[9] "Encephalopathy" is a general term for any disease of the brain. *Random House Webster's Unabridged Dictionary* (2d ed, 2001).

[10] Dr. Nigro gave a slightly different diagnosis later, on October 30, 1981, when he opined that plaintiff had chronic, nonspecific encephalopathy with retardation or psychomotor delay, cerebral palsy, and epilepsy. When plaintiff was in his early teens, Dr. Nigro diagnosed him with profound encephalopathy, spastic quadriplegia, mental retardation, and aphasia. "Aphasia" is "the loss of a previously held ability to speak or

Plaintiff initiated the present lawsuit in 1994 through his mother, Kimberly Craig, as next friend. He alleged that Drs. Gennaoui and Kittur committed medical malpractice in failing to monitor plaintiff's heartbeat with an internal uterine catheter until 2:30 P.M. on July 16, 1980. Further, he alleged that Dr. Gennaoui and his colleagues negligently administered Pitocin to Ms. Craig despite the fact that she presented physical symptoms indicating that Pitocin was unnecessary and potentially harmful. As a result, plaintiff alleged, plaintiff sustained brain damage either through hypoxia or through the pounding of plaintiff's head against his mother's "pelvic rim" before birth.

Plaintiff also named Associated Physicians, P.C., the employer of Drs. Kittur and Gennaoui, under a theory of vicarious liability. In addition, plaintiff named Oakwood Hospital, where plaintiff was delivered, and named Henry Ford Hospital under a successor liability theory.[11]

On January 21, 1997, defendant asked the Court to exclude the testimony of Dr. Ronald Gabriel, plaintiff's proposed causation expert, or, in the alternative, to conduct a *Davis-Frye* hearing.[12] This motion was denied.

Henry Ford filed a successful motion to sever. However, the trial court found after conducting a bench trial that Henry Ford was liable to plaintiff as a successor to Associated Physicians, P.C.

After the jury found in plaintiff's favor, the court entered judgment of $21 million, reflecting the present

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understand spoken or written language, due to injury of the brain." *Random House Webster's Unabridged Dictionary* (2d ed, 2001).

[11] Henry Ford had purchased the administrative portion of Associated Physicians Medical Center, Inc., a business corporation created from the professional corporation that had employed defendants Dr. Gennaoui and Dr. Kittur at the time of the alleged malpractice. The relationships between the corporate entities are discussed in greater detail below.

[12] See *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

value of the $36 million awarded by the jury. The trial court denied defendants' motion for judgment notwithstanding the verdict or a new trial.

On February 1, 2002, the Court of Appeals affirmed the jury verdict in plaintiff's favor, but ordered remittitur because of the jury's overestimation of plaintiff's lost wage earning capacity.[13] The panel also affirmed the trial court's conclusion that Henry Ford was liable to plaintiff as a successor corporation.

We granted defendants' applications for leave to appeal on September 12, 2003, limiting the parties to the following issues: "(1) Whether the witnesses' testimony was based on facts not in evidence and whether the trial court erred in permitting the testimony of plaintiff's expert witnesses; (2) Whether the trial court erred in finding defendant Henry Ford Hospital liable on a successor liability theory."[14] We denied plaintiff's application for leave to appeal the decision of the Court of Appeals.

II. STANDARD OF REVIEW

We review a trial court's decision to admit or exclude evidence for an abuse of discretion.[15] A court necessarily abuses its discretion when it "admits evidence that is inadmissible as a matter of law."[16] However, any error in the admission or exclusion of evidence will not warrant appellate relief "unless refusal to take this action appears . . . inconsistent with substantial justice,"[17] or affects "a substantial right of the [opposing] party."[18]

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[13] 249 Mich App 534, 544.

[14] 469 Mich 880 (2003) (citations omitted).

[15] *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[16] *Id.*

[17] MCR 2.613(A).

[18] MRE 103(a).

We review de novo a trial court's decision to grant or deny a motion for judgment notwithstanding the verdict.[19] In conducting this review de novo, we " 'review the evidence and all legitimate inferences in the light most favorable to the nonmoving party.' "[20] Only when "the evidence viewed in this light fails to establish a claim as a matter of law" is the moving party entitled to judgment notwithstanding the verdict (JNOV).[21]

The doctrine of successor liability is " 'derived from equitable principles.' "[22] Its application is therefore subject to review de novo.[23]

III. IMPROPER ADMISSION OF EXPERT TESTIMONY

We turn, first, to the trial court's erroneous conclusion that defendant Oakwood Hospital was not entitled to a *Davis-Frye* hearing before the admission of Dr. Ronald Gabriel's expert testimony. Defendant contends that the trial court erred when it denied its motion to exclude the expert opinion testimony of Dr. Gabriel or, in the alternative, to hold a *Davis-Frye* hearing. We agree.

A. MRE 702 AND *DAVIS-FRYE* ANALYSIS

Expert testimony is admitted pursuant to MRE 702, which provided, at the pertinent times:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of

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[19] *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 131; 666 NW2d 186 (2003).

[20] *Id.,* quoting *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).

[21] *Id.*

[22] *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 376; 446 NW2d 95 (1989), quoting *Musikiwamba v ESSI*, Inc, 760 F2d 740, 750 (CA 7, 1985).

[23] *Stachnik v Winkel*, 394 Mich 375, 383; 230 NW2d 529 (1975).

> 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 . . . .

In construing this rule of evidence, we must apply " 'the legal principles that govern the construction and application of statutes.' "[24] When the language of an evidentiary rule is unambiguous, we apply the plain meaning of the text " 'without further judicial construction or interpretation.' "[25]

The plain language of MRE 702 establishes three broad preconditions to the admission of expert testimony.[26] First, the proposed expert witness must be "qualified" to render the proposed testimony.[27] Generally, the expert may be qualified by virtue of "knowledge, skill, experience, training, or education."[28] In a medical malpractice action such as this one, the court's assessment of an expert's "qualifications" are now guided by MCL 600.2169(2):

> In determining the qualifications of an expert witness in an action alleging medical malpractice, the court shall, at a minimum, evaluate all of the following:
>
> (a) The educational and professional training of the expert witness.
>
> (b) The area of specialization of the expert witness.
>
> (c) The length of time the expert witness has been engaged in the active clinical practice or instruction of the health profession or the specialty.

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[24] *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 554; 640 NW2d 256 (2002), quoting *Grievance Administrator v Underwood*, 462 Mich 188, 193; 612 NW2d 116 (2000).

[25] *Id.*

[26] *People v Beckley*, 434 Mich 691, 710-711; 456 NW2d 391 (1990) (opinion of BRICKLEY, J.).

[27] MRE 702.

[28] *Id.*

(d) The relevancy of the expert witness's testimony.

Second, the proposed testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ."[29] In other words, the expert opinion testimony "must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue."[30]

Finally, under MRE 702 as it read when this matter was tried, expert testimony must have been based on a "recognized" form of "scientific, technical, or other specialized knowledge."[31] The Court of Appeals properly construed this language in *Nelson v American Sterilizer Co (On Remand)*:

> The word "recognized" connotes a general acknowledgement of the existence, validity, authority, or genuineness of a fact, claim or concept. The adjective "scientific" connotes a grounding in the principles, procedures, and methods of science. Finally, the word "knowledge" connotes more than subjective belief or unsupported speculation. The word applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.[32]

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[29] MRE 702.

[30] *Beckley*, supra at 711 (opinion of BRICKLEY, J.).

[31] MRE 702. This rule was amended effective January 1, 2004, and now provides:

> 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.

[32] 223 Mich App 485, 491; 566 NW2d 671 (1997) (citations and quotation marks omitted).

Continuing along these lines, the word "technical" signifies grounding in a specialized field of knowledge, or a particular "art, science, or the like."[33] Similarly, "specialized" suggests a foundation in a specific field of study or expertise.[34]

When this case was tried, the admission of expert testimony was subject not only to the threshold requirements of MRE 702, but also to the standard articulated in *People v Davis,*[35]now generally known in Michigan as the *Davis-Frye* test.[36] In *Davis,* we held that expert opinion based on novel scientific techniques is admissible only if the underlying methodology is generally accepted within the scientific community.[37] Thus, in determining whether the proposed expert opinion was grounded in a "recognized" field of scientific, technical, or other specialized knowledge as was required by MRE 702, a trial court was obligated to ensure that the expert opinion was based on accurate and generally accepted methodologies.[38] The proponent of expert testimony bears the burden of proving general acceptance under this standard.[39]

B. THE TRIAL COURT'S FAILURE TO PERFORM ITS GATEKEEPING ROLE UNDER MRE 702

In this case, defendant Oakwood Hospital moved in limine to exclude the testimony of Dr. Ronald Gabriel

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[33] *Random House Webster's Unabridged Dictionary* (2d ed, 2001).

[34] *Id*.

[35] 343 Mich 348; 72 NW2d 269 (1955).

[36] See *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

[37] *Davis*, *supra* at 370.

[38] *Id.* at 372. See also *People v Young*, 418 Mich 1, 24; 340 NW2d 805 (1983) ("The *Davis-Frye* standard is the means by which the court can determine that the novel evidence offered for admission here enjoys such recognition.").

[39] *People v Young (After Remand),* 425 Mich 470, 475; 391 NW2d 270 (1986).

on the basis that Dr. Gabriel's theory of how plaintiff sustained brain damage was not generally accepted within the medical community, as required by *Davis-Frye*. Dr. Gabriel's etiological theory, as summarized by defendant in arguing its motion, was that "hyperstimulat[ion]" of the uterus caused the head of the fetus (plaintiff) to pound against his mother's pelvic anatomy, thereby producing permanent brain damage. This theory, according to defendant, was novel enough to be excluded and, at best, was admissible only once it passed through the crucible of *Davis-Frye* analysis.

In response to this motion, plaintiff's attorney produced several articles and authorities that were meant to demonstrate a link between the use of Pitocin and the type of injury sustained by plaintiff. But while some of these articles described a correlation between the use of Pitocin and generalized brain injury, none of these authorities supported the theory of causation actually put forth by Dr. Gabriel. That is, none supported a causal connection between Pitocin and brain injury incurred through repeated pounding of the fetal head against maternal anatomy.

However, the court did not rely on authorities proffered by plaintiff in denying defendant's motion for a *Davis-Frye* hearing. Instead of consulting plaintiff's proffered scientific and medical literature, the court erroneously assigned the burden of proof under *Davis-Frye* to defendant—the party *opposing* the admission of Dr. Gabriel's testimony—and held that defendant was not entitled to a hearing because it failed to prove that Dr. Gabriel's theory *lacked* "general acceptance."[40]

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[40] Indeed, the trial court was explicit in this regard:

> [Allocating the burden of proof to the proponent of novel scientific testimony] would mean that everybody can come in here

When the MRE 702 principles described above are properly applied, it is evident that the trial court abused its discretion in denying defendant's motion for a *Davis-Frye* hearing. This abuse of discretion was predicated on two fundamental legal errors.

First, the trial court erred in concluding that it had no obligation to review plaintiff's proposed expert testimony unless defendant introduced evidence that the expert testimony was "novel." Under MRE 702, the trial court had an independent obligation to review *all* expert opinion testimony in order to ensure that the opinion testimony satisfied the three *Beckley* preconditions noted above—that it was rendered by a "qualified expert," that the testimony would "assist the trier of fact," and, under the rules of evidence in effect during this trial, that the opinion testimony was rooted in "recognized" scientific or technical principles. These obligations applied irrespective of the type of expert opinion testimony offered by the parties.[41] While a party may waive any claim of error by failing to call this gatekeeping obligation to the court's attention, the court *must* evaluate expert testimony under MRE 702 once that issue is raised.

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and allege that whatever everybody's expert is saying is not supported by scientific data, and I would have to hold a *Davis-Frye* hearing in every single case where any expert had to testify. And that's not the standard. You have to submit some evidence to me that I need a *Davis-Frye* hearing, other than you just saying it.

The dissent makes the same error. See *post* 100-103. But compare *Young (After Remand), supra* at 475 (allocating the burden of proof under *Davis-Frye* to the proponent of novel scientific evidence).

> The position advocated by the trial court and the dissent is not only at odds with our *Davis-Frye* jurisprudence, but it also defies logic. The trial court's rule would require the party opposing expert testimony to prove a negative—that the expert's opinion is *not* generally accepted. This is an unreasonable and thoroughly impractical allocation of the burden of proof.

[41] See MRE 702.

Second, the trial court erred in concluding that there was no justification for a *Davis-Frye* hearing. At issue was Dr. Gabriel's opinion that Pitocin administered to Ms. Craig produced contractions of excessive duration and force, that these contractions caused plaintiff's head to be repeatedly ground against Ms. Craig's pelvic anatomy, and that the resulting head trauma caused plaintiff's cerebral palsy. This causal sequence, defendant argued, has "never been described in medical literature" and was at odds with the testimony of plaintiff's other expert witnesses.

Plaintiff failed to introduce a single authority that truly supported Dr. Gabriel's theory in response to defendant's motion. Instead, plaintiff repeatedly stressed that medical literature amply supported the proposition that Pitocin could cause brain damage—a proposition defendant did not contest—and supplied the court with literature to that effect. But this literature had little to do with Dr. Gabriel's causal theory and therefore did not counter the proposition that his expert opinion was based on novel science.

Therefore, a *Davis-Frye* hearing was more than justified in light of the information before the trial court when it ruled on defendant's motion in limine. The proponent of expert opinion testimony bears the burden of proving that the contested opinion is based on generally accepted methodology.[42] Because there was no evidence to indicate that Dr. Gabriel's theory was anything *but* novel, the trial court was required to conduct the *Davis-Frye* inquiry requested by defendant.

Had the trial court conducted the assessment required by MRE 702, it might well have determined that Dr. Gabriel's theory was not "recognized" as required by our rules of evidence. Indeed, the evidence

[42] *Young (After Remand), supra* at 475.

plaintiff offered in support of Dr. Gabriel should have provided sufficient notice to the trial court that his theory lacked general acceptance in the medical community. For one thing, Dr. Gabriel was unable to cite a single study supporting his traumatic injury theory during a voir dire conducted at trial. The only authorities he offered for the proposition that excessive amounts of Pitocin may cause cerebral palsy through the traumatic mechanism he described at trial were studies he cited in which Pitocin caused cerebral palsy in animals when given in excessive amounts. These studies did not involve the "bumping and grinding" mechanism on which Dr. Gabriel's expert testimony relied. In fact, Dr. Gabriel expressly distinguished the mechanism to which he attributed plaintiff's injuries from those at work in the animal studies. It would appear, then, that there was little evidence that Dr. Gabriel's theory was "recognized," much less generally accepted, within pediatric neurology.

Second, had the court conducted the MRE 702 inquiry requested by defendant, it might have discovered that Dr. Gabriel's theory lacked evidentiary support. Dr. Gabriel was unable to identify the specific part of Ms. Craig's anatomy with which, according to his theory, plaintiff's head repeatedly collided during labor. Indeed, Dr. Gabriel pointedly refused to identify this anatomical structure on a chart, contending that such testimony was beyond his expertise. This failure to root his causal theory in anything but his own hypothetical depiction of female anatomy indicates that Dr. Gabriel's testimony may have been too speculative under MRE 702 to assist the trier of fact.

Finally, a *Davis-Frye*/MRE 702 hearing should have alerted the court to the error described in part IV. At no point did Dr. Gabriel opine that the traumatic and

vascular mechanisms he described could cause cerebral palsy, or that those mechanisms might produce the asymmetrical development shown in plaintiff's MRI. Thus, Dr. Gabriel's testimony supported plaintiff's medical malpractice claim only if the jury was permitted to assume, without supporting evidence, that a causal connection existed between these elements. As shown in part IV, this is not a permissible inference. Consequently, the court again had reason to conclude that Dr. Gabriel's testimony could not have "assist[ed] the trier of fact" given the yawning gap between Dr. Gabriel's testimony and the conclusions plaintiff hoped the jury would draw from it.

Although the trial court clearly erred in declining to review Dr. Gabriel's testimony before its admission, we need not determine whether reversal on this basis alone is warranted under the "substantial justice" standard of our court rules.[43] For the reasons stated below, remand for a *Davis-Frye* hearing is unnecessary given plaintiff's failure to establish the causation element of his medical malpractice claim.

IV. JUDGMENT NOTWITHSTANDING THE VERDICT

Even if plaintiff were able to show upon remand that Dr. Gabriel's testimony was properly admitted, defendants would nevertheless be entitled to JNOV. The record reveals that the proofs submitted by plaintiff do not support the verdict rendered by the jury because of plaintiff's failure to establish that defendants' breach of the applicable standard of care proximately caused his cerebral palsy. We therefore reverse and remand for entry of judgment notwithstanding the verdict.

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[43] MCR 2.613(A).

A. STATUTORY AND COMMON LAW BACKGROUND

In order to establish a cause of action for medical malpractice, a plaintiff must establish four elements: (1) the appropriate standard of care governing the defendant's conduct at the time of the purported negligence, (2) that the defendant breached that standard of care, (3) that the plaintiff was injured, and (4) that the plaintiff's injuries were the proximate result of the defendant's breach of the applicable standard of care.[44] These common-law elements have been codified in MCL 600.2912a, which requires a plaintiff alleging medical malpractice to show that

> [t]he defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of defendant failing to provide that standard, the plaintiff suffered an injury.

Furthermore, the plaintiff in a medical malpractice case must establish the proximate causation prong of his prima facie case by a preponderance of the evidence.[45]

"Proximate cause" is a legal term of art that incorporates both cause in fact and legal (or "proximate") cause.[46] We defined these elements in *Skinner v Square D Co*:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury

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[44] *Weymers v Khera*, 454 Mich 639, 655; 563 NW2d 647 (1997).

[45] See MCL 600.2912a(2) (stating that "the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants").

[46] *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

> would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.[47]

As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries.[48]

Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission.[49] While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.[50]

It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation.[51] Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect."[52] A valid theory of causation, therefore, must be based on facts in evidence.[53] And while " '[t]he evidence need not negate all other possible causes,' " this Court

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[47] *Id.* at 163 (citations omitted).

[48] *Id.*

[49] *Id*. See also Prosser, Torts (4th ed, 1971), p 239.

[50] *Jordan v Whiting Corp*, 396 Mich 145, 151; 240 NW2d 468 (1976).

[51] *Skinner, supra* at 172-173.

[52] *Id.* at 174.

[53] *Id.* at 166.

has consistently required that the evidence " 'exclude other reasonable hypotheses with a fair amount of certainty.' "[54]

In *Skinner,* for example, we held that the plaintiff failed to show that the defendant's negligence caused the decedent's electrocution. *Skinner* was a product liability action in which the plaintiff claimed that the decedent was killed because an electrical switch manufactured by the defendant had malfunctioned.[55] The plaintiff's decedent had built a tumbling machine that was used to wash metal parts, and had used the defendant's switch to turn the machine on and off.[56] Wires from the defendant's switch were attached to the tumbling machine with alligator clips.[57] Immediately before his death, the plaintiff's decedent was found with both alligator clips in his hands while electricity coursed through his body.[58]

In order to find that a flaw in the defendant's product was a cause in fact of that electrocution, the jury would have had to conclude, in effect, that the decedent had disconnected the alligator clips and that the machine had somehow been activated again, despite being disconnected from its power source.[59] Not only was this scenario implausible, but there was no evidence to rule out the possibility that the decedent had been electrocuted because he had mistakenly touched wires he knew to be live. There was no evidence to support the

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[54] *Id.* at 166, quoting with approval 57A Am Jur 2d, Negligence, § 461, p 422.

[55] *Skinner, supra* at 157.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

plaintiff's theory of causation.[60] Consequently, we concluded that the trial court had properly granted summary disposition to the defendant.

Mulholland v DEC Int'l,[61] provides a useful factual counterpoint to *Skinner*. In *Mulholland,* the plaintiffs' herd of milking cows contracted mastitis, a bacterial infection of the udder, after the plaintiffs began to use a milking system built by the defendants.[62] Key expert testimony was provided by Sidney Beale, an expert in agriculture and dairy science. Mr. Beale had observed a milking at the plaintiffs' farm and deduced that the mastitis was related to the improper configuration of the milking system.[63] He suggested that the plaintiffs implement certain changes, and, indeed, once these were put into practice, the plaintiffs noticed "a decrease in mastitis and an increase in milk production in the herd."[64]

We held, on the basis of this expert testimony, that the trial court improperly granted a directed verdict to the defendant.[65] Because Mr. Beale's testimony was based on his direct observation of the milking machinery, its use on the plaintiffs' herd, and teat inflammation in the plaintiff's herd following milking, a jury could have reasonably concluded, on the basis of this testimony, that the milking machinery caused mastitis.[66] While Mr. Beale's testimony did not rule out every other potential cause of mastitis, this fact merely re-

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[60] *Id.*

[61] 432 Mich 395; 443 NW2d 340 (1989).

[62] *Id.* at 399.

[63] *Id.* at 400.

[64] *Id.*

[65] *Id.* at 398.

[66] *Id.* at 413.

lated to the credibility of his testimony; his opinion was nevertheless admissible and sufficient to support a finding of causation.[67]

B. PLAINTIFF'S FAILURE TO ESTABLISH CAUSATION

The statutory and common-law background provided above makes it clear that a plaintiff's prima facie case of medical malpractice must draw a causal connection between the defendant's breach of the applicable standard of care and the plaintiff's injuries. In this case, the evidence adduced at trial cannot support the jury's verdict because plaintiff has failed to make the necessary causal links. Even if plaintiff had shown that defendants breached the standard of care, the jury had no basis in the record to connect this breach to the cerebral palsy, mental retardation, and other injuries now presented by plaintiff.

At trial, plaintiff attempted to connect defendants' purported violations of the applicable standard of care to plaintiff's injuries through the expert testimony of Drs. Paul Gatewood and Ronald Gabriel. Dr. Gatewood testified principally as a standard of care witness, interpreting the medical records of plaintiff and Ms. Craig, and opining that defendants breached the applicable standard of care by administering excessive amounts of Pitocin and by failing to use an internal uterine pressure catheter. Dr. Gatewood also testified that records from fetal and uterine monitors indicated that Ms. Craig experienced excessive and severe contractions, and that these reduced the flow of oxygenated blood to plaintiff both by compressing the umbilical cord and by reducing the periods of oxygenation between contractions. Dr. Gatewood testified that, as a

[67] *Id.*

result, plaintiff suffered from hypoxia and correlated decelerations in his heart rate.

While Dr. Gatewood's testimony connected defendants' alleged breach of the standard of care to physiological symptoms displayed by plaintiff before his birth, he specifically declined to connect these prebirth conditions to the particular injuries for which plaintiff sought compensation. Indeed, Dr. Gatewood denied he had the requisite expertise to make the causal linkage and expressly refused to testify to a causal relationship between plaintiff's neurological diseases and his prenatal care. He insisted instead that "what happened to the baby's brain" was "[within] the purview of a neurologist."[68]

Plaintiff contended that the link between defendants' negligence and plaintiff's injuries was to be supplied instead by the expert testimony of Dr. Ronald Gabriel. Dr. Gabriel opined that plaintiff's injuries were attributable to two mechanisms that affected plaintiff's brain before delivery; he referred to these mechanisms as "traumatic" and "vascular." According to Dr. Gabriel's testimony, plaintiff sustained "traumatic" injuries when excessive uterine contractions induced by Pitocin caused plaintiff's head to be "pounded or grinded [sic] into [his mother's] pelvic rim" during her labor. Be-

[68] This is a critical fact; the dissent's analysis suffers for paying insufficient heed to Dr. Gatewood's disclaimer of expertise regarding the etiology of cerebral palsy. See *post* at 107.

Indeed, the dissent seems to conflate the testimony of plaintiff's two principal experts by concluding that Dr. Gabriel's "bumping and grinding" theory of causation was somehow supported by Dr. Gatewood's testimony about the dangers of excessive doses of Pitocin. In reality, there was a fundamental gap between the theories proffered by these experts. Dr. Gabriel testified that excessive doses of Pitocin caused plaintiff's head to be ground against his mother's pelvic anatomy and that this grinding, in turn, led to hypoxia. Dr. Gabriel did not testify that an excessive dosage of Pitocin *alone*—that is, without head compression injuries sustained from repeated contact with maternal anatomy—could have caused plaintiff's cerebral palsy.

cause of this pounding, plaintiff's brain sustained compression injuries, which resulted in elevated venous "pressures" and impeded "arter[ial] blood flow." Dr. Gabriel analogized this "venous component" to the distribution of water through a lawn sprinkler system, explaining that increased pressure in certain areas of the brain reduced the flow of oxygenated blood to outlying, "watershed" regions of the brain just as "the last sprinkler who [sic] gets the pressure is the least able to provide water for that area of the lawn." The crux of Dr. Gabriel's theory, then, was that plaintiff suffered traumatic head injury during labor and was detrimentally affected by that trauma and the accompanying vascular effects.

Even if we accept Dr. Gabriel's testimony in full, a fatal flaw remains in plaintiff's prima facie case: Dr. Gabriel never testified that the injuries stemming from this pounding and its accompanying vascular effects could cause cerebral palsy, mental retardation, or any of the other conditions now presented by plaintiff.

Dr. Gabriel began his testimony by explaining that an MRI image showed that plaintiff's brain tissue had developed asymmetrically. He failed, however, to trace this asymmetric development either back to the traumatic and vascular mechanisms he described or forward to the specific neurological conditions presently displayed by plaintiff. Thus, how exactly the mechanisms he described led to cerebral palsy (as opposed to any other neurological impairment) and how they were connected to the asymmetric brain development depicted in plaintiff's MRI was never explained.[69]

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[69] Compare *1st of America Bank, Mid-Michigan v United States*, 752 F Supp 764, 765 (ED Mich, 1990) (finding that the negligence of Air Force physicians proximately caused a child's cerebral palsy where the plaintiff and the defendant presented extensive testimony on the etiology of cerebral palsy); *Bradford v McGee*, 534 So 2d 1076 (Ala, 1988) (holding that the plaintiffs presented evidence sufficient for the jury to determine

It is axiomatic in logic and in science that correlation is not causation.[70] This adage counsels that it is error to infer that A causes B from the mere fact that A and B occur together. Given the absence of testimony on causation supplied by Dr. Gabriel, the jury could have found for plaintiff only if it indulged in this logical error—concluding, in effect, that evidence that plaintiff may have sustained a head injury, combined with evidence that plaintiff now has cerebral palsy, leads to the conclusion that the conduct that caused plaintiff's head injury also caused his cerebral palsy.

Such indulgence is prohibited by our jurisprudence on causation. We have long required the plaintiff to show "that *'but for'* the defendant's actions, the plaintiff's injury would not have occurred."[71] Where the connection between the defendant's negligent conduct and the plaintiff's injuries is entirely speculative, the plaintiff cannot establish a prima facie case of negligence.[72]

Here, any causal connection between plaintiff's cerebral palsy and the events described by Dr. Gabriel had to be supplied *ex nihilo* by the jury. Therefore, the trial court erred as a matter of law in denying defendants' motion for JNOV. We reverse the judgment of the Court of Appeals and remand for proceedings consistent with this opinion.

V. SUCCESSOR LIABILITY

Although we have established that plaintiff has failed to state a valid claim of medical malpractice, we must

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that the defendant's negligence proximately caused their son's cerebral palsy); *Dick v Lewis*, 506 F Supp 799 (D ND, 1980).

[70] *United States v O'Hagan*, 521 US 642, 691 n 7; 117 S Ct 2199; 138 L Ed 2d 724 (1997) (Thomas, J., concurring in part and dissenting in part).

[71] *Skinner*, *supra* at 163 (emphasis added).

[72] See *id*. at 174.

also correct an erroneous legal conclusion in the published opinion of the Court of Appeals.

The panel held that Henry Ford Health Care Corporation (Henry Ford)[73] was liable as a corporate successor to Associated Physicians, P.C. To the contrary, we conclude that the trial court erroneously imposed successor liability on Henry Ford.

At the time of the alleged malpractice in 1980, defendant Drs. Kittur and Gennaoui were employees of Associated Physicians, P.C., which was a medical professional corporation organized under the Professional Service Corporation Act.[74]

Six years after plaintiff's birth, Associated Physicians, P.C., began to consider the possibility that Henry Ford might take over its administrative and bookkeeping services. While Henry Ford was interested in pursuing this arrangement with Associated Physicians, the latter's corporate form posed an obstacle. As a professional corporation, Associated Physicians, P.C., could neither legally merge with nor sell its shares to Henry Ford, given that Henry Ford's shareholders were not physicians.[75]

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[73] Henry Ford Health Care Corporation became Henry Ford Heath System in 1989. For the sake of clarity, we refer to both as "Henry Ford."

[74] MCL 450.221 *et seq*.

[75] See, generally, Professional Services Corporation Act, MCL 450.221 *et seq*. The "shares" of a professional corporation may not be

> sold or transferred except to an individual who is eligible to be a shareholder of the corporation or to the personal representative or estate of a deceased or legally incompetent shareholder or to a trust or split interest trust, in which the trustee and the current income beneficiary are both licensed persons in a professional corporation. [MCL 450.230.]

An individual may not become a shareholder in a professional services corporation unless he or she is a "licensed person." MCL 450.224. A

Consequently, Associated Physicians, P.C., split into two entities. Its administrative portion was incorporated Associated Physicians Medical Center, Inc., a business corporation in which nonphysicians could legally share ownership and control. Its medical practice, however, became APMC, P.C., a new professional corporation.

Henry Ford purchased all the shares of Associated Physicians Medical Center, Inc., in accordance with the Business Corporation Act.[76] Henry Ford thereby became the parent corporation of Associated Physicians Medical Center, Inc. As the parties intended before the sale, APMC, P.C., entered into an agreement with Associated Physicians Medical Center, Inc., in which the latter controlled billing, record keeping, and other administrative aspects of the medical practice. This arrangement ended in 1993, when APMC, P.C., dissolved before the initiation of the present lawsuit.

Henry Ford argued that, because it assumed the ownership of only the administrative portion of Associated Physicians, P.C. (which was vicariously liable to plaintiff), the equitable concerns that justify the imposition of successor liability are not present in this case. The trial court severed the issue of Henry Ford's successor liability. After a one-hour bench trial, the trial court held that Henry Ford was liable as a successor corporation to Associated Physicians, P.C. The Court of Appeals agreed. Both courts relied in part on the factors

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"licensed person" is "an individual who is duly licensed or otherwise legally authorized to practice a professional service by a court, department, board, commission, an agency of this state or another jurisdiction, or any corporation all of whose shareholders are licensed persons." MCL 450.222(a).

[76] MCL 450.1101 *et seq*.

listed in *Turner v Bituminous Cas Co*[77] as supporting the imposition of successor liability.[78]

We recently described the scope of successor liability in *Foster v Cone-Blanchard Machine Co*.[79] There, we observed the "traditional rule" that successor liability requires an examination of "the nature of the transaction between predecessor and successor corporations."[80] In a merger in which stock is exchanged as consideration, the successor corporation "generally assumes all its predecessor's liabilities."[81] When the successor purchases assets for cash, however, the successor corporation assumes its predecessor's liabilities *only*

> (1) where there is an express or implied assumption of liability; (2) where the transaction amounts to a consolidation or merger;[82] (3) where the transaction was fraudulent; (4) where some of the elements of a purchase in good

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[77] 397 Mich 406, 430; 244 NW2d 873 (1976).

[78] See *Turner*, 397 Mich 430:

> (1) There was basic continuity of the enterprise of the seller corporation, including, apparently, a retention of key personnel, assets, general business operations, and even the [corporate] name.
>
> (2) The seller corporation ceased ordinary business operations, liquidated, and dissolved soon after distribution of consideration received from the buying corporation.
>
> (3) The purchasing corporation assumed those liabilities and obligations of the seller ordinarily necessary for the continuation of the normal business operations of the seller corporation.
>
> (4) The purchasing corporation held itself out to the world as the effective continuation of the seller corporation.

[79] 460 Mich 696; 597 NW2d 506 (1999).

[80] *Id.* at 702.

[81] *Id.*

[82] See *Turner*, *supra* at 419-420 ("It is the law in Michigan that if two corporations merge, the obligations of each become the obligations of the resulting corporation.").

> faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation.[83]

Plaintiff has not alleged that the sale of Associated Physicians Medical Center, Inc., was fraudulent, in bad faith, or lacking in consideration. Likewise, plaintiff has adduced no evidence that Henry Ford expressly or impliedly assumed the liabilities of Associated Physicians Medical Center, Inc. Our inquiry therefore must focus on whether (1) the transaction was a consolidation or merger (either de jure or de facto), and (2) whether Henry Ford is a "mere continuation"[84] of Associated Physicians.

Plaintiff's claim fails on both accounts. First, plaintiff does not allege that a de jure merger took place, and he has not demonstrated that a de facto merger occurred. A de facto merger exists when each of the following requirements is met:

> (1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.
>
> (2) There is a continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock, this stock ultimately coming to be held by the shareholders of the seller corporation so that they become a constituent part of the purchasing corporation.
>
> (3) The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.
>
> (4) The purchasing corporation assumes those liabilities

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[83] *Id.* at 702 (citations omitted).

[84] *Id.*

> and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation. [85]

This transaction is not a de facto merger simply because Henry Ford, the purchasing corporation, paid in cash rather than stock. Thus, there is no "continuity of shareholders which results from the purchasing corporation paying for the acquired assets with shares of its own stock . . . ."[86]

We also conclude that Henry Ford is not a "mere continuation" of Associated Physicians Medical Center, Inc. As the history recited above shows, Associated Physicians split into two entities immediately before Henry Ford's purchase of Associated Physicians Medical Center, Inc. The professional corporation—Associated Physicians' medical practice—became APMC, P.C. Henry Ford was therefore able to purchase only the administrative aspects of the former professional corporation. The core functions of the entity that originally became vicariously liable to plaintiff were carried on exclusively by APMC, P.C., a professional corporation, rather than the business corporation purchased by Henry Ford. Having analyzed the "nature of the transaction,"[87] we can only conclude that the only company even arguably liable as a successor to Associated Physicians, P.C., is that which continued its medical practice—namely, APMC, P.C.

Moreover, we have never applied successor liability in the medical malpractice context. Plaintiff has adduced

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[85] *Turner, supra* at 420 (citations, quotation marks, and emphasis deleted), quoting *Shannon v Samuel Langston Co*, 379 F Supp 797, 801 (WD Mich, 1974).

[86] *Id.*

[87] *Foster, supra* at 702.

no reason why we should do so in this case. Not only are the *Turner*/*Foster* requirements not met here but, more important, the policies that justify the imposition of successor liability are noticeably inapplicable here. We stated in *Foster* that

> [t]he thrust of the decision in *Turner* was to provide a remedy to an injured plaintiff in those cases in which the first corporation "legally and/or practically becomes defunct." . . . The underlying rationale for the *Turner* Court's decision to disregard traditional corporate law principles was to provide a source of recovery for injured plaintiffs.[88]

Here, plaintiff has already sought and obtained a judgment from Drs. Gennaoui and Kittur, from Associated Physicians, P.C., and from Oakwood Hospital. Because plaintiff obtained a judgment against other sources, there was no need to impose successor liability on Henry Ford, even if the *Turner*/*Foster* factors had justified such liability. The trial court erred in imposing successor liability on Henry Ford and the Court of Appeals erroneously affirmed this ruling.

VI. CONCLUSION

We conclude that the trial court erred when it refused to grant defendants' motion for judgment notwithstanding the verdict. Plaintiff failed to present any evidence from which the fact-finder could reasonably conclude that any breach of the applicable standard of care by defendants proximately caused his cerebral palsy, mental retardation, and other neurological conditions. In addition, the trial court improperly denied defendant Oakwood Hospital's motion to compel an evidentiary hearing regarding the qualifications and theories propounded by one of the plaintiff's expert witnesses. Finally, the trial

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[88] *Foster, supra* at 705-706.

court erred in concluding that Henry Ford Health Care Corporation was a corporate successor to the professional medical corporation that employed Dr. Gennaoui. For those reasons, we reverse the judgment of the Court of Appeals and remand the matter for entry of judgment in defendants' favor.

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

CAVANAGH, J. (*concurring*). I concur with the majority in this case. I write separately, however, because I do not agree with some of the rationale regarding successor liability articulated by the majority in part V. Therefore, as it pertains to successor liability, I concur in the result only.

KELLY, J. (*concurring in part and dissenting in part*). I dissent from the majority's decision that the trial court abused its discretion in denying a *Davis-Frye*[1] hearing. I also disagree that there was insufficient evidence of causation. I agree with the conclusion that Henry Ford Hospital is not liable under the theory of successor liability. Therefore, with respect to the defendants other than Henry Ford Hospital, I would affirm the rulings of both lower courts for plaintiff.

THE *DAVIS-FRYE* HEARING

Defendant Oakwood Hospital failed to present any substantiation for its motion asserting that the testimony of plaintiff's causation expert, Dr. Ronald Gabriel, was inadmissible because it was not recognized in the scientific community. Rule 2.119(A)(1)(b) of the Michi-

[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955), and *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

gan Court Rules requires that a motion state with particularity the grounds and authority on which it is based. All that defendant stated was a conclusory and overbroad statement that

> [t]he testimony and opinions regarding plaintiff's condition and the causes for it that were offered by Dr. Ronald Gabriel in deposition are groundless in the extreme and, by his own admission, without support or even mention in modern medical literature.

To this statement, defendant attached several pages of Dr. Gabriel's deposition testimony. After reviewing them, I find that Dr. Gabriel's only relevant admission is that few recent studies regarding fetal head compression exist because it occurs rarely. The reason it occurs rarely is that fetal heart monitors and other medical technology help detect the conditions associated with it so that head compression is averted.

A lack of recent studies does not necessarily indicate that a scientific theory has been abandoned or has fallen into disrepute. It may indicate that the theory has become generally accepted. For instance, although there are no recent scientific studies showing the shape of the earth, the statement, "The earth is round," would be accepted in the scientific community.

In its response to defendant's motion, plaintiff cited the Physician's Desk Reference and quoted a textbook describing the effects of labor on a fetus. Defendant offered nothing in response. Had it set forth specific grounds and authority to support the motion, a *Davis-Frye* hearing would have been appropriate.

Under the majority's relaxed standard articulated today, whenever in the future a party claims that a theory is "groundless in the extreme," it appears that party will be entitled to a *Davis-Frye* hearing. This effectively removes from the trial court the discretion to

decide whether a hearing is needed, making it automatic. Criminal defendants questioning proffered testimony regarding the psychological effect their actions had on a child victim could receive a *Davis-Frye* hearing on the bald assertion that the testimony is unacceptable in the scientific community.

Defendant's written motion was vague. Attached to it was some of Dr. Gabriel's deposition testimony in which he stated that a compression injury occurred and that it resulted from the administration of excessive Pitocin. The court heard oral argument on the motion. In focusing on the expert testimony that it believed was inadmissible, defendant referred to Dr. Gabriel's testimony that plaintiff had experienced a traumatic head injury during childbirth. It asked for a hearing at which it might present an expert to testify that there is no scientific support for this theory. Defendant did not have an expert nor did it provide an affidavit signed by an expert indicating that Dr. Gabriel's theory is not recognized in the scientific community.

In denying the motion, the judge noted:

> The problem with your [defendant's] motion is you don't have any Affidavits. You don't have any evidence in there that — I mean, that there should be a Davis Frye Hearing. I mean, it's just you as an attorney saying that . . . [granting a hearing without any support for defendant's argument] would mean that everybody can come in here and allege that whatever everybody's expert is saying is not supported by scientific data, and I would have to hold a Davis Frye Hearing in every single case where any expert had to testify. And that's not the standard. You have to submit some evidence to me that I need a Davis Frye Hearing, other than you just saying it.[2]

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[2] As did the judge in this case, others have noted the difference between the burden of persuasion, which is on the proponent of the evidence, and the initial burden of production. "Because of judicial economy and the

The judge indicated a willingness to revisit the motion should defendant provide support for its contention: "[Y]ou can submit anything additional. I will take a look at it. But that's my ruling today." Defendant never renewed the motion.

The Michigan Rules of Evidence grant considerable deference to a trial judge in ruling on motions. With regard to preliminary questions, MRE 104(a) provides that questions regarding the qualification of a person to be a witness and the admissibility of evidence "shall be determined by the court . . . . In making its determination, it is not bound by the Rules of Evidence except those with respect to privileges." Contrary to the majority's assertions and in accordance with this rule, the trial court was not bound by MRE 702, which governs the testimony of expert witnesses, when it ruled on defendant's motion.

'liberal thrust' of the rules pertaining to experts, it seems reasonable to place the initial burden of production on the opponent for purposes of [a] hearing." *Gentry v Magnum*, 195 W Va 512, 522; 466 SE2d 171 (1995). Appellate decisions in the area offer "little guidance on how trial courts should procedurally accomplish their gatekeeping responsibilities without frustrating" the policy of liberal admissibility of expert evidence. *Alberts v Wickes Lumber Co*, 1995 US Dist LEXIS 5893 (ND Ill, 1995).

Commentators have also addressed the problem. They have noted that allocating the initial burden of production to the opponent of the evidence "furthers the [] gatekeeping objective without hampering the 'liberal thrust' of the [rules of evidence]." Accordingly, the opponent's burden is merely to go forward with evidence showing that the plaintiff's expert proof is inadmissible. "Plaintiff bears the burden of showing by a preponderance of the evidence that the expert's opinion is admissible." Berger, *Procedural paradigms for applying the Daubert test*, 78 Minn L Rev 1345, 1365-1366 (1994). See, also, Brown, *Procedural issues under Daubert*, 36 Hous L Rev 1133, 1140-1141 (1999). While these decisions and articles deal with the newer *Daubert* test, the inquiry about who bears the burden of production is not affected. See *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). The change occasioned by the adoption of the *Daubert* test relates only to what the proponent must show to prove admissibility once the determination is made that a hearing is warranted.

It is without question that, once a defendant shows that a genuine issue exists with regard to a theory's acceptance, the theory's proponent must prove its acceptance in the medical community. But before that, the party raising the issue must present more than a conclusory allegation that an issue exists.

Defendant failed to make the necessary showing in this case. It never provided support for counsel's proposition that Dr. Gabriel's traumatic injury theory lacked recognition in the scientific community. Even given the opportunity to provide support to the court, defendant was either unwilling or unable to do so. Hence, the trial court did not abuse its discretion when it refused to hold a *Davis-Frye* hearing.

THE EVIDENCE OF CAUSATION

Defendants assert that plaintiff failed to present sufficient evidence that his damages were caused by defendants' medical malpractice to allow the case to go to the jury. In presenting its evidence of a prima facie case, a plaintiff must show causation but need not use any particular formulation of words.

In this case, plaintiff's expert did not say "Antonio Craig's cerebral palsy was caused by hypoxia resulting from defendants' breaches of the standard of care." Although desirable, such precision is simply not mandated. "[T]he plaintiff's evidence is sufficient if it 'establishes a logical sequence of cause and effect, notwithstanding the existence of other plausible theories . . . .' " *Skinner v Square D Co*, 445 Mich 153, 159-160; 516 NW2d 475 (1994), quoting *Mulholland v DEC Int'l Corp*, 432 Mich 395, 415; 443 NW2d 340 (1989).

The trial court ruled that plaintiff presented sufficient evidence. After the jury found for plaintiff, defen-

dants moved for judgment notwithstanding the verdict. The motion was denied, and on appeal defendants challenge that ruling. They question the sufficiency of the evidence only with respect to the element of causation.

The standard for reviewing a decision on a motion for judgment notwithstanding the verdict is deferential to the nonmoving party:

> If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury. [*Matras v Amoco Oil Co*, 424 Mich 675, 682; 385 NW2d 586 (1986).]

The trial court found:

> Dr. Donn testified that Pitocin can cause both trauma and hypoxia. Dr. Gatewood testified that Pitocin can cause compression, and compression can cause head injury. Dr. Dombrowski testified that Pitocin can cause trauma and hypoxia. Dr. Gabriel testified that Antonio suffered a brain injury during labor and delivery, based on the character of the labor and delivery, based on the fetal monitoring, based on the positioning of the head, based on the MRI findings, it was caused by the use of Pitocin. He testified that there was compression of the head in the pelvic ridge. There was elevation of the venous pressure and loss of blood flow and the loss of oxygen and fusing the brain.

Testimony was also presented that an excessive dose of Pitocin causes cerebral palsy in animals. The majority notes that animal experiments are the only authority that plaintiff offered showing a correlation between excessive amounts of Pitocin and cerebral palsy. The implication is that animal studies are insufficient evidence upon which to base medical expert testimony. That is incorrect.

Dr. Gabriel's authority was sufficient for a jury reasonably to infer that the same effects occur in humans. Dr. Gabriel also testified that the animal

studies were the types "upon which the American Medical Establishment formulated their warnings on the use of oxytoxic drugs." These warnings appear in medical reference materials discussing the effects of Pitocin. Defendants did not refute these statements.

Dr. Gabriel testified that he believed that excessive Pitocin caused plaintiff's condition. He testified that the drug affected plaintiff in two ways. It produced both a vascular effect and a traumatic effect. At trial, Dr. Gabriel used the terms "pounding and grinding" to explain the traumatic component of the injury. He testified:

> In part, what happened to Antonio I think is more complicated because I think there is a traumatic component as well as a vascular component. Those studies showed the vascular component, that is to say the reduced blood flow.
>
> Antonio also suffered from the trauma of the head being pounded or grinded [sic] into the pelvic rim with successive uterine contractions which were of a high pressure and which resulted in marked decelerations. So I think it's a combination of vascular and trauma.

Dr. Gabriel testified that what happened to Antonio Craig would not have happened without the administration of Pitocin.

The majority focused attention on Dr. Gabriel's "pounding and grinding" theory as if it were the only theory that plaintiff presented. It was not. Dr. Gabriel testified that there were two different contributors to plaintiff's injuries. He claimed that plaintiff suffered from both a decreased blood flow and from a traumatic compression injury.[3]

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[3] The majority maintains that "Dr. Gabriel did not testify that an excessive dosage of Pitocin *alone* . . . could have caused plaintiff's cerebral palsy." *Ante* at 91 n 68 (emphasis in original). Yet, the majority begins its causation discussion by noting that "[e]ven if plaintiff were

In addition to Dr. Gabriel, Dr. Paul Gatewood testified for plaintiff regarding the standard of care. He stated that an excessive dosage of Pitocin was given to plaintiff's mother. In his expert opinion, this was a deviation from the standard of care. Dr. Gatewood also explained that the administration of excessive Pitocin was the proximate cause of Antonio's injuries.[4]

After Dr. Gatewood established a breach of duty, Dr. Gabriel testified that excessive Pitocin causes fetal brain damage and cerebral palsy in animals. In Dr. Gabriel's opinion, the excessive Pitocin caused the fetal brain damage that led to Antonio's cerebral palsy.[5] In all, there was sufficient evidence to establish the element of causation. The jury was entitled to decide the case on the evidence presented.

CONCLUSION

The failure to hold a *Davis-Frye* hearing was not an abuse of discretion under the facts of this case. Defen-

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able to show upon remand that Dr. Gabriel's testimony was properly admitted, defendants would nevertheless be entitled to JNOV." *Ante* at 85. Thus, for purposes of its causation discussion, the majority assumes both theories were admissible. Were this not the case, the proper outcome should be a remand for a *Davis-Frye* hearing, not an appellate ruling that the defendants were entitled to JNOV. The testimony of Dr. Gabriel indicates that excessive Pitocin causes reduced blood flow ("the vascular component"). The studies showed a link between this vascular component and cerebral palsy. There was sufficient evidence of causation, regardless of the majority's reading of the record.

[4] When plaintiff's counsel asked whether these deviations "were the proximate causes of the reduced oxygen, reduced blood flow to the fet[us] here Antonio Craig," the doctor answered "[T]hese deviations are a result in the hypoxic episodes . . . all of these factors contributed to the development and prolongation of the interim hypoxia that this baby's brain suffered."

[5] When asked whether Antonio's cerebral palsy was related to the administering of Pitocin, the doctor testified that "without Pitocin this would not have happened."

dant Oakwood had an obligation to provide support for the claim that Dr. Gabriel's traumatic injury theory was not accepted within the scientific community.

Moreover, plaintiff presented sufficient evidence to establish the element of causation. Both Dr. Gabriel and Dr. Gatewood testified effectively that an excessive dosage of Pitocin gave rise to the conditions that caused the baby's injuries.

Therefore, I would affirm the decision of the Court of Appeals on all issues except that Henry Ford Hospital is liable under a theory of successor liability. In that regard, I agree with the majority's conclusion that the Court of Appeals was incorrect. With that exception, the decision of the Court of Appeals should be affirmed.

KREINER v FISCHER
STRAUB v COLLETTE

Docket Nos. 124120, 124757. Argued April 20, 2004 (Calendar Nos. 4, 5). Decided July 23, 2004. Rehearing denied *post*, 1201.

Richard A. Kreiner brought an action in the Lapeer Circuit Court against Robert O. Fischer, seeking noneconomic tort damages under the no-fault act, MCL 500.3135(1), for injuries sustained in an automobile accident. The court, Nick O. Holowka, J., granted summary disposition for the defendant. The Court of Appeals, WHITE, P.J., and MURPHY and FITZGERALD, JJ., reversed, holding that the trial court's determination that the impairment of body function suffered was not serious enough to impinge on the plaintiff's ability to lead a normal life was erroneous because the statute does not require a showing of seriousness. 251 Mich App 513 (2002). The Supreme Court vacated that decision and remanded the case to the Court of Appeals to determine whether the plaintiff satisfied the threshold for serious impairment of body function, MCL 500.3135(7). 468 Mich 885 (2003). The same panel of the Court of Appeals again reversed the decision of the trial court, but recognized that to meet the threshold, the injury must affect one's general ability to lead his normal life. 256 Mich App 680 (2003). The defendant appealed.

Daniel L. Straub brought an action in the Monroe Circuit Court against Phillip M. Collette and Teresa M. Heil-Wylie, seeking noneconomic tort damages under the no-fault act, MCL 500.3135(1), for an injury to his nondominant left hand sustained when his motorcycle collided with an automobile. The court, Michael W. LaBeau, J., granted summary disposition for the defendants. The Court of Appeals, HOOD, P.J., and SMOLENSKI and KELLY, JJ., reversed because it determined that the plaintiff's injury had affected his general ability to lead his normal life by eliminating his ability to play in his band for four months and by making him unable to engage in full-time employment for three months. 254 Mich App 454 (2002). The Supreme Court vacated the decision and remanded the case to that Court for consideration in light of *Kreiner v Fischer*, 468 Mich 885 (2003). 468 Mich 920 (2003). The Court of Appeals, SMOLENSKI, P.J., and WHITE and

KELLY, JJ., concluded on remand that the injury affected Straub's ability to lead his normal life because the injury affected his ability to play his guitar, perform household tasks, and to operate his business. 258 Mich App 456 (2003). The defendants appealed.

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

In *Kreiner*, although the plaintiff suffered an impairment after comparing his life before and after the accident, the nature and extent of that impairment did not affect his overall or broad ability to lead his normal life.

In *Straub*, given that the injury was not extensive, recuperation time was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, the plaintiff's general ability to live his normal life was not affected.

1. In order to be able to maintain an action for noneconomic tort damages under the no-fault act, the objectively manifested impairment of an important body function that the plaintiff has suffered must affect his general ability to lead his normal life. Determining whether the impairment affects a plaintiff's general ability to lead his normal life requires considering whether the plaintiff is for the most part able to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.

2. The objectively manifested impairment of an important body function must affect the course of a person's life. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's general ability to lead his normal life has not been affected and he does not meet the serious impairment of body function threshold.

3. In determining whether a plaintiff who alleges a serious impairment of body function as a result of a motor vehicle accident meets the statutory threshold for third-party tort recovery, a court must, first, determine that there is no factual dispute concerning the nature and extent of the person's injuries, or, if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If the court so concludes, it may continue to the next step. Otherwise, it may not decide the issue as a matter of law. Second, if the court can decide the issue as a matter of law, it must determine if an important body function of the plaintiff has been

impaired and whether the impairment is objectively manifested. Where both answers are affirmative, the court must then decide if the impairment affects the person's general ability to lead his normal life by comparing the person's life before and after the accident as well as the significance of any affected aspects on the course of the person's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the person's preaccident and postaccident lifestyle has actually affected the person's general ability to conduct the course of his normal life.

4. Among the factors that may be evaluated in determining whether the plaintiff's general ability to conduct the course of his normal life has been affected are the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. Self-imposed restrictions based on real or perceived pain do not establish the extent of any residual impairment.

The decision of the Court of Appeals is reversed in *Straub*.

The decision of the Court of Appeals is reversed in *Kreiner*.

Justice CAVANAGH, joined by Justices WEAVER and KELLY, dissenting, stated that the definition of "serious impairment of body function" contained in MCL 500.3135(7) should be applied as unambiguously written. The definition contains three elements. A serious impairment of body function is (1) an objectively manifested impairment (2) of an important body function (3) that affects the person's general ability to lead his normal life. All three elements must be satisfied. Importance or value is necessarily a subjective inquiry that must proceed on a case-by-case basis. The impairment must have an influence on most, but not all, of the person's capacity to lead his or her normal preaccident lifestyle. This subjective inquiry requires a court to compare the particular plaintiff's life before and after the impairment and must proceed on a case-by-case basis. A brief impairment may be devastating to one person while a near permanent impairment may have little effect on another person.

Straub satisfies the three elements and, therefore, the decision of the Court of Appeals should be affirmed. The majority errs in adding to the inquiry temporal limitations regarding the duration of the impairment, the type and length of treatment required, the extent of the residual impairment, and the prognosis for eventual recovery.

Kreiner's claims, if true, indicate that his injuries had an influence on most, but not all, of his capacity to lead his preaccident lifestyle. Therefore, because there is a factual dispute concerning the nature and extent of his injuries and such a dispute is material with respect to § 3135(7), the determination of the Court of Appeals should be affirmed and the matter should be remanded to the trial court. The majority errs in its belief that every aspect of a person's life must be affected in order to satisfy the tort threshold and that the effects must last the course of the plaintiff's entire normal life.

STATUTES — NO-FAULT ACT — SERIOUS IMPAIRMENT OF BODY FUNCTION.

Tort liability for serious impairment of body function requires an evaluation of the injury's effect on the plaintiff's general ability to lead his normal life, which requires a comparison of the plaintiff's lifestyle before and after the accident, but a minor change in how a person performs a specific activity does not alter the fact that the person is still generally able to perform the activity; an objective analysis of the plaintiff's actual capabilities and capacities is undertaken to determine the plaintiff's general ability to lead his normal life; the analysis requires evaluation of the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery; self-imposed restrictions based on real or perceived pain do not establish the extent of any residual impairment that affects the plaintiff's general ability to lead his normal life (MCL 500.3135[1]).

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *George T. Sinas*), *Cochran, Foley & Associates, P.C.* (by *Terry L. Cochran*), and *Cooper & Kirk, PLLC* (by *Charles J. Cooper, Hamish P.M. Hume*, and *Derek L. Shaffer*), for plaintiff Kreiner.

Law Offices of Lawrence S. Katkowsky, P.C. (by *Lawrence S. Katkowsky* and *Dondi R. Vesprini*), for plaintiff Straub.

Garan Lucow Miller, P.C. (by *Daniel S. Saylor, William J. Brickley*, and *Beth A. Andrews*), for defendant Fischer.

Willingham & Coté, P.C. (by *John A. Yeager* and *Curtis R. Hadley*), for defendants Collette and Heil-Wylie.

Amici Curiae:

Gross, Nemeth & Silverman, P.L.C. (by *Mary T. Nemeth*), for the Auto Club Insurance Association in *Kreiner*.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Kevin J. Moody* and *Jaclyn Shoshana Levine*), for the Coalition Protecting Auto No Fault.

Gross, Nemeth & Silverman, P.L.C. (by *Mary T. Nemeth*), for the Insurance Institute of Michigan in *Straub*.

TAYLOR, J. In these consolidated cases, we granted leave to appeal to consider whether plaintiffs satisfy the "serious impairment of body function" threshold set by the no-fault insurance act in order to be able to maintain an action for noneconomic tort damages. See MCL 500.3135(1). The trial courts granted defendants' motions for summary disposition, concluding that neither plaintiff has suffered a "serious impairment of body function." The Court of Appeals reversed.[1] Because we conclude that plaintiffs do not satisfy the "serious impairment of body function" threshold, we reverse the judgments of the Court of Appeals and reinstate the trial courts' orders granting summary disposition for defendants.

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[1] *Straub v Collette*, 254 Mich App 454; 657 NW2d 178 (2002), vacated and remanded 468 Mich 920 (2003), *(On Remand),* 258 Mich App 456; 670 NW2d 725 (2003). *Kreiner v Fischer*, 251 Mich App 513; 651 NW2d 433 (2002), vacated and remanded 468 Mich 885 (2003), *(On Remand),* 256 Mich App 680; 671 NW2d 95 (2003).

I. ORIGIN AND DEVELOPMENT OF THE NO-FAULT ACT

Before 1973, actions seeking damages for injuries resulting from motor vehicle related accidents proceeded, for the most part, pursuant to common-law accident principles in Michigan's courts. However, with the enactment of the no-fault act, 1972 PA 294, effective October 1, 1973, the Legislature abolished tort liability generally in motor vehicle accident cases and replaced it with a regime that established that a person injured in such an accident is entitled to certain economic compensation from his own insurance company regardless of fault. Similarly, the injured person's insurance company is responsible for all expenses incurred for medical care, recovery, and rehabilitation as long as the service, product, or accommodation is reasonably necessary and the charge is reasonable. MCL 500.3107(1)(a). There is no monetary limit on such expenses, and this entitlement can last for the person's lifetime. An injured person is also entitled to recover from his own insurance company up to three years of earnings loss, i.e., loss of income from work that the person would have performed if he had not been injured. MCL 500.3107(1)(b).[2] An injured person can also recover from his own insurance company up to twenty dollars a day for up to three years in "replacement" expenses, i.e., expenses reasonably incurred in obtaining ordinary and necessary services that the injured person would otherwise have performed. MCL 500.3107(1)(c).

[2] There is a cap on the amount recoverable in a thirty-day period, which cap is adjusted annually for changes in the cost of living. We are advised that the work loss cap for accidents occurring between October 2002 and September 2003 was $4,070. An injured person may file a tort claim against the party at fault seeking to recover *excess* economic losses (wage losses and replacement expenses beyond the daily, monthly, and yearly maximum amounts). MCL 500.3135(3)(c).

In exchange for the payment of these no-fault economic loss benefits from one's own insurance company, the Legislature limited an injured person's ability to sue a negligent operator or owner of a motor vehicle for bodily injuries. In particular, the Legislature significantly limited the injured person's ability to sue a third party for noneconomic damages, e.g., pain and suffering. No tort suit against a third party for noneconomic damages is permitted unless the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement."[3] MCL 500.3135(1).

Following enactment of the no-fault act, Governor Milliken requested of this Court an advisory opinion regarding the act's constitutionality. We issued such an opinion in *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441; 208 NW2d 469 (1973), holding that the significant wording of the statute—"serious impairment of body function" and "permanent serious disfigurement"—provided standards sufficient for legal interpretation. We also held that the fact-finding related to these standards was within the province of the jury rather than a judge.

This Court next addressed the no fault act in *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978). We held that the act was a proper exercise of the police power and that the legislative scheme did not offend either the due process or equal protection guarantees of the Michigan Constitution. We did, however, find the rate-making procedure of the act unconstitutional and allowed the Legislature eighteen months to correct it. As our subsequent order in *Shavers* demonstrates, the

[3] It is also the case that a party is foreclosed from recovery of noneconomic loss if the person is more than fifty percent at fault, MCL 500.3135(2)(b) and (4)(a), or if the person was operating his own vehicle while uninsured, MCL 500.3135(2)(c).

Legislature did correct it through 1979 PA 145 and 1979 PA 147. 412 Mich 1105 (1982). We also discussed in *Shavers* the compromise rationale of the act:

> The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort.
>
> . . . The act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence advanced at trial that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were undercompensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination. [402 Mich 578-579.][4]

Six years later, after the phrase "serious impairment of body function" and other phrases in the act, such as "permanent serious disfigurement," had been placed

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[4] We later discussed this compromise concept further in *Cassidy v McGovern*, 415 Mich 483, 500; 330 NW2d 22 (1982), where we quoted from 7 Am Jur 2d, Automobile Insurance, § 340, p 1068:

> "It has been said of one such plan that the practical effect of the adoption of personal injury protection insurance is to afford the citizen the security of prompt and certain recovery to a fixed amount of the most salient elements of his out-of-pocket expenses * * *. In return for this he surrenders the possibly minimal damages for pain and suffering recoverable in cases not marked by serious economic loss or objective indicia of grave injury, and also surrenders the outside chance that through a generous settlement or a liberal award by a judge or jury in such a case he may be able to reap a monetary windfall out of his misfortune."

before juries as questions of fact pursuant to the 1976 advisory opinion, this Court in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), retrenched on whether these were issues for the jury. In *Cassidy* we held that opinions requested under Const 1963, art 3, § 8 are only advisory and not precedential and that revisiting the issue was advisable where the Court had before it actual adverse parties to an existing controversy. The *Cassidy* Court again reiterated the general understanding this Court had of the no-fault act—namely that it was a compromise encompassing the notion of a certain recovery for economic loss in return for reduced tort suit opportunities for noneconomic loss. The Court said:

> At least two reasons are evident concerning why the Legislature limited recovery for noneconomic loss, both of which relate to the economic viability of the system. First, there was the problem of the overcompensation of minor injuries. Second, there were the problems incident to the excessive litigation of motor vehicle accident cases. Regarding the second problem, if noneconomic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would likely be illusory. The combination of the costs of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability, or at least desirability, of providing so many benefits without regard to fault. If every case is subject to the potential of litigation on the question of noneconomic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault. [*Cassidy, supra* at 500.]

Further, the Court rejected its A*dvisory Opinion* conclusion that juries should find facts and held that trial judges were to decide, as a matter of law, whether the plaintiff had suffered a serious impairment of body function when there was no factual dispute about the nature and extent of the plaintiff's injuries, or when

there was a dispute, but it was not material to the determination whether the plaintiff had suffered a serious impairment of body function. Next, the Court held, without reference to textual support but in an apparent effort to effectuate the "goal of reducing motor vehicle accident litigation," that to satisfy the "serious impairment" threshold, an "important" body function must be impaired, that the injury must be an "objectively manifested injury," and that the injury must have an effect "on the person's general ability to live a normal life." *Id*. at 505.[5] The Court, in reading this language into the act, clearly intended its holding to assist in making the compromise at the heart of the no-fault act viable. This judicially created formula, or gloss, in fact became the central inquiry for a court to resolve when a plaintiff alleged that the tort threshold for a third-party tort suit had been met.

Yet, four years after *Cassidy* was decided, and interestingly after four new justices joined the Court, in

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[5] The *Cassidy* Court stated:

> . . . impairment of body function is better understood as referring to important body functions. . . .
>
> We believe that the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live a normal life. . . .
>
> Another significant aspect of the phrase "serious impairment of body function" is that it demonstrates the legislative intent to predicate recovery for noneconomic loss on objectively manifested injuries. Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body. . . .
>
> * * *
>
> . . . [W]e conclude that an injury need not be permanent to be serious. Permanency is, nevertheless, relevant. (Two injuries identical except that one is permanent do differ in seriousness.) [*Id*. at 504-506.]

DiFranco v Pickard, 427 Mich 32, 50-58; 398 NW2d 896 (1986),[6] the Court overruled *Cassidy* in several particulars as to how the "serious impairment" issue should be interpreted and applied. First, the Court found no textual authority for the notion that "serious impairment" was not to be decided as a matter of law and overruled *Cassidy* in that regard. Next, *DiFranco,* using a textualist approach, rejected the *Cassidy* requirement that an "important" body function had to be impaired, concluding that there was no such requirement in the statutory language. *Id.* at 39. Similarly, *DiFranco* rejected the *Cassidy* "objectively manifested injury" requirement—as it had been subsequently construed in *Williams v Payne*, 131 Mich App 403; 346 NW2d 564 (1984), to not include objectively manifested symptoms—on the basis that it had proved to be an almost insurmountable obstacle to recovery of noneconomic damages in soft-tissue injury cases. *DiFranco, supra* at 40, 73. Indeed, the Court believed that, as interpreted, this requirement was limiting recovery only to catastrophically injured persons. *Id.* at 45. Next, *DiFranco* discarded the "general ability to live a normal life" test because, as the Court characterized it, there is no such thing as "a normal life." Moreover, the Court believed that this standard was flawed because of the practical, if debatable, proposition that it had proved an almost insurmountable obstacle to recovery of noneconomic damages. *Id.* at 39, 66.

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[6] The *Cassidy* majority opinion was signed by Justices FITZGERALD, WILLIAMS, RYAN, COLEMAN, and LEVIN. Justice KAVANAGH concurred in part and dissented in part. Justice RILEY did not participate. The *DiFranco* majority opinion was signed by four new justices: CAVANAGH, BRICKLEY, BOYLE, and ARCHER. Justices WILLIAMS, LEVIN, and RILEY concurred in part and dissented in part. Justices WILLIAMS and RILEY complained that the majority was overruling *Cassidy* only four years after it was decided.

Having dispatched the bulk of the *Cassidy* standards, the *DiFranco* Court held that the phrase "serious impairment of body function" involved two inquiries: (1) "What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?" and (2) "Was the impairment serious?" *Id*. at 39, 67. Next, the Court readopted the old *Advisory Opinion* rule that the serious impairment issue was to be decided by a jury whenever reasonable minds could differ on the issue even if there were no material factual dispute about the nature or extent of the injuries. *Id.* at 38. Finally, *DiFranco* said that the jury should consider such factors as "the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors." *Id.* at 39-40, 69-70.

This resolution produced sufficient dissatisfaction to the extent that eventually, in 1995, a bill was placed before the Legislature to reform the 1972 act. As enacted, the bill was 2½ pages long. The relevant goal of the 1995 bill was "to modify tort liability arising out of certain accidents." Notably, the bill amended only § 3135 of the voluminous 1972 act. As passed and signed by the Governor, the amendment required courts to decide the "serious impairment of body function" issue if "[t]here is no factual dispute concerning the nature and extent of the person's injuries," or if there is a factual dispute, but it is not material to the determination whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a)(i), (ii). Second, "serious impairment of body function" was defined as

> an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life. [MCL 500.3135(7).]

This means then that pursuant to the Legislature's directives embodied in the 1995 amendment, "serious impairment of body function" contains the following components: an objectively manifested impairment, of an important body function, and that affects the person's general ability to lead his or her normal life.[7] Furthermore, courts, not juries, should decide these issues.[8]

Plaintiffs and their proponents argue that after 1995 it is only necessary to show that there has been an impairment of an important body function that, in some way, influences, touches or otherwise affects the plaintiff's lifestyle, *regardless of degree*. If some effect has been demonstrated, the new legislative test is satisfied, *regardless of the extent of the effect*. (Emphasis added).[9]

Defendants and their amicis, on the other hand, contend that a plaintiff must demonstrate not simply

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[7] While *Cassidy, supra* at 505, required an evaluation of the effect of an injury on the person's general ability to live "a normal life," the *DiFranco* Court concluded that it was impossible to objectively determine what "a normal life" is, asserting: "there is no such thing as 'a normal life.' " *DiFranco, supra* at 66. Apparently cognizant of this comment, and attempting to reconcile the incongruity that *DiFranco* had pointed out, the Legislature, in the 1995 act, requires that the impairment affect "the person's general ability to lead *his or her* normal life." (Emphasis added.) It is then clear that, harkening to the *DiFranco* Court's guidance that there is no objectively "normal life," the Legislature modified the entirely objective *Cassidy* standard to a partially objective and partially subjective inquiry. Thus, what is "normal" is to be determined subjectively on the basis of the plaintiff's own life and not the life of some objective third party. However, once that is fixed as the base, it is to be objectively determined whether the impairment in fact affects the plaintiff's "general ability to lead" that life.

[8] As should be evident, and as previous panels of the Court of Appeals have noted, the most uncomplicated reading of the 1995 amendment is that the Legislature largely rejected *DiFranco* in favor of *Cassidy*. See, e.g., *Jackson v Nelson*, 252 Mich App 643, 649-650; 654 NW2d 604 (2002), and *Miller v Purcell*, 246 Mich App 244, 248; 631 NW2d 760 (2001).

[9] Sinas & Ransom, *The 1995 no-fault tort threshold: A statutory hybrid*, 76 Mich Bar J 76 (1997).

that some aspect of his life has been affected, but that *generally* he is no longer able to lead his normal life.

II. FACTS AND PROCEEDINGS BELOW

A. *STRAUB V COLLETTE*

Daniel Straub injured three fingers on his nondominant hand when his motorcycle collided with an automobile on September 19, 1999. He suffered a broken bone in his little finger and injured tendons in his ring and middle fingers. Straub underwent outpatient surgery on September 23, 1999, to repair the tendons. No medical treatment was required for the broken bone. He wore a cast for about one month following surgery to assist the healing of the tendons. He also took prescription pain medication for about two weeks following the surgery and completed a physical therapy program.

About two months following the surgery, Straub's doctor noted that Straub's injuries were healing nicely. Around the same time, Straub returned to work as a cable lineman for a cable television company, initially working twenty to twenty-five hours a week, but returning to full-time work about three weeks later, on December 14, 1999. He testified at his deposition that since returning to work, he was able to perform all his job duties, but sometimes with discomfort. In addition, he testified that until late December 1999, he had difficulty doing household chores, such as washing dishes, doing yard work, and making property repairs. He was also unable to operate his archery shop during the hunting season in the fall of 1999. Operating his shop required him to repair bows, make arrows, and process deer meat. In mid-January 2000, however, he was able to resume playing bass guitar in a band that performed on weekends. By the time of Straub's depo-

sition, he could perform all the activities in which he had engaged before the accident, although he was still unable to completely straighten his middle finger. He was also still unable to completely close his left hand, which decreased his grip strength.

Straub filed an action in circuit court to recover noneconomic damages under the no-fault act. The trial court granted defendants' motion for summary disposition, finding that Straub's injuries relate only to "extrinsic" considerations such as playing guitar and processing deer meat, and thus did not meet the threshold of "serious impairment of body function." MCL 500.3135(7).

The Court of Appeals reversed, holding that, between the date of the accident and mid-January 2000, Straub's injuries affected his "general ability to lead his normal life," and, thus, Straub satisfied the serious impairment threshold. *Straub v Collette*, 254 Mich App 454, 459; 697 NW2d 178 (2002). The Court reasoned that Straub was unable to play bass guitar in his band for approximately four months after the accident and that, before the accident, he performed almost every weekend and practiced several times each week. It also concluded that four months was a significant amount of time during which Straub was unable to play the guitar. The panel further reasoned that Straub was unable to engage in full-time employment for about three months. The Court concluded that, for a limited amount of time, Straub's injuries affected his general ability to lead his normal life, "particularly his ability to perform musically and to work." *Id*.

Thereafter, defendants filed an application for leave to appeal in this Court. On June 12, 2003, this Court entered an order vacating the judgment of the Court of Appeals and remanding this case to the Court of Ap-

peals for consideration in light of this Court's order in *Kreiner v Fischer*, 468 Mich 885 (2003). *Straub v Collette*, 468 Mich 920 (2003).

On remand, the Court of Appeals again reversed. *Straub v Collette (On Remand)*, 258 Mich App 456; 670 MW2d 725 (2003). The Court again concluded that Straub's injuries affected his ability to play the guitar and to work. The Court determined that Straub's injuries affected his ability to perform household tasks and to operate his archery shop. Thus, the Court of Appeals concluded that Straub's injuries affected his ability to lead his normal life, "given the work and tasks that he performed before the accident . . . ." *Id*. at 463. We subsequently granted leave to appeal. 469 Mich 948 (2003).

B. *KREINER V FISCHER*

On November 28, 1997, plaintiff Kreiner was injured in an automobile accident. Four days after the accident he visited his family doctor, complaining of pain in his lower back, right hip, and right leg. The doctor ordered x-rays and cortisone injections for pain. Kreiner returned to his doctor three days later and complained that the pain was persisting. The doctor administered another cortisone injection and prescribed physical therapy and pain medication.

When Kreiner complained that his pain continued six weeks after the accident, his doctor referred him to a neurologist, Karim Fram, M.D., who conducted an electromyography (EMG)[10] that revealed mild nerve irritation to the right fourth lumbar (l4) nerve root in Kreiner's back and degenerative disc disease with

[10] EMG testing is a process by which impairment to nerves in the arms and hands may be verified objectively. It involves measuring and analyzing the responses of muscles to stimulation by electricity. *Dorland's Illustrated Medical Dictionary* (28th ed, 1994), p 537.

spondylolisthesis.[11] Dr. Fram prescribed Motrin for pain along with a muscle relaxant, and instructed Kreiner to perform certain back and muscle strengthening exercises at home.

Kreiner returned to Dr. Fram in May 1998 complaining of pain radiating from the back of his right thigh and right calf, which pain was aggravated by bending over and either sitting or standing for any length of time. Dr. Fram prescribed pain medication and a continued program of back and muscle strengthening exercises. In August 1998, after Kreiner returned and complained of constant lower back pain aggravated by climbing, bending over, pushing, and pulling, Dr. Fram prescribed a three-week physical therapy course. In October 1998, Dr. Fram again prescribed an anti-inflammatory medication and home exercises.

Dr. Fram's notes reveal that plaintiff visited him in August 1999 for a follow-up examination. At that time, Kreiner was still complaining of continuous pain in his lower back and of right leg pain radiating to the lower extremities on the right side. Standing, lifting, climbing a ladder, and staying in one position for a long time tended to aggravate the pain. Dr. Fram advised Kreiner to continue the home exercises, to use a back support during daily activity, to avoid lifting objects over fifteen pounds, and to refrain from excessive bending or twisting. Dr. Fram also prescribed a mild muscle relaxant. Kreiner subsequently stopped treating with any physician and stopped taking medications.

Before and after the accident, Kreiner worked as a self-employed carpenter and construction worker performing home remodeling, such as building decks, doing

[11] Spondylolisthesis is the "forward movement of the body of one of the lower lumbar vertebrae on the vertebra below it . . . ." *Stedman's Medical Dictionary* (26th ed, 1995), p 1656.

electrical work, and performing plumbing, siding, and some mechanical work. After the accident, he could no longer work eight-hour days as he had previously. He was forced to limit his workday to only six hours. Kreiner said he was also unable to stand on a ladder longer than twenty minutes at a time, could no longer perform roofing work, and was unable to lift anything over eighty pounds.[12] He also could no longer walk more than half a mile without resting and could no longer hunt rabbits. He could, however, continue to hunt deer.

In October 1998, Kreiner filed a complaint against Fischer, seeking noneconomic damages under MCL 500.3135. The trial court granted Fischer's motion for summary disposition, finding that Kreiner failed to satisfy the "serious impairment of body function" threshold. The trial court stated in part:

> While somewhat restricted, the Plaintiff in this case is able to engage in lifting, bending, twisting, and standing that is required by his job. Furthermore, he continues to engage in his favorite recreational activity which is hunting.
>
> Based on these facts, Plaintiff is hard-pressed to show how his alleged impairment is serious enough to affect his normal life.
>
> Further, the Court finds that under the factors enumerated in *Harris* [*v Lemicex*, 152 Mich App 149; 393 NW2d 559 (1986)], the claimed injury is not serious. Here, Plaintiff's treatment is limited to wearing a back support garment and taking muscle relaxants and painkillers. He has not been actually physically disabled at any time, and the duration of his injury is intermittent.
>
> Finally, his own doctor has stated that there is a chance that the damaged root will heal completely.

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[12] Despite his limitations, Kreiner's tax returns revealed that 1998 was his highest income-earning year, including several years before the injuries occurred.

> For these reasons, the Court finds as a matter of law the impairments for which Plaintiff claims he suffers from do not impinge in any real sense in his ability to lead a normal life. Therefore, he is not entitled to maintain this action in tort against the Defendant under the No-Fault Statute, MCL 500.3135(1).

The Court of Appeals reversed the trial court's decision. *Kreiner v Fischer*, 251 Mich App 513; 651 NW2d 95 (2002). The Court determined that the trial court erred by finding that Kreiner's impairment was not "serious enough" because MCL 500.3135(7) does not require a showing of seriousness. *Kreiner, supra* at 518. The panel remanded for a jury trial because Fischer disputed Kreiner's claims regarding his limitations on working and hunting. The Court stated, however, that if Kreiner's claims were not in dispute, it would hold that Kreiner satisfied the serious impairment of body function threshold and that he would be entitled to summary disposition on that issue. The Court of Appeals directed the trial court to grant summary disposition to Kreiner if the trial court determined that there are no material factual disputes with respect to Kreiner's claims regarding the effect of his injury on his ability to work.

On appeal, this Court peremptorily vacated the Court of Appeals decision and remanded for consideration regarding "whether plaintiff's impairment affects his general ability to lead his normal life." 468 Mich 885 (2003). This Court's order stated:

> The issue here is whether plaintiff satisfies the "serious impairment of body function" threshold set by the no-fault insurance act in order to be able to maintain an action for noneconomic tort damages. See MCL 500.3135(1). The no-fault act, MCL 500.3135(7), defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the

> person's general ability to lead his or her normal life." The circuit court granted defendant's motion for summary disposition, concluding that plaintiff's impairment is not "serious enough" to meet the tort threshold. The Court of Appeals reversed, concluding that plaintiff is not required to show that his impairment "seriously" affects his ability to lead his normal life in order to meet the tort threshold. The Court of Appeals then concluded that, if the facts as alleged by plaintiff are true, his impairment has affected his general ability to lead his normal life. In our judgment, both the circuit court and the Court of Appeals erred. Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life. Because the Supreme Court believes that neither of the lower courts accurately addressed this issue, the case is remanded to the Court of Appeals for it to consider whether plaintiff's impairment affects his general ability to lead his normal life. [468 Mich 885 (2003) (emphasis in original).]

On remand, the same panel of the Court of Appeals again reversed the trial court's decision. *Kreiner v Fischer (On Remand)*, 256 Mich App 680; 671 NW2d 95 (2003). The Court of Appeals stated that this Court's order did not change in any significant manner the panel's analysis in its previous opinion. The panel reiterated a large portion of its previous analysis because this Court had vacated the prior opinion. The Court of Appeals then agreed with this Court's order that, under MCL 500.3135(7), just *any* effect on a person's general ability to lead a normal life will not satisfy the statutory threshold. Rather, the injury must affect one's *general* ability to lead his normal life. Although the panel stated that its previous opinion had addressed this issue, it further opined that "one's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life, such as in the case at bar."

Id. at 688. The Court further opined that Kreiner's limitations "if true, indicate that plaintiff suffered a serious impairment of body function under § 3135." *Id*. at 689. We subsequently granted leave to appeal. 469 Mich 948 (2003).

III. STANDARD OF REVIEW

This Court reviews de novo the grant or denial of summary disposition. *American Federation of State, Co & Muni Employees v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003). Similarly, questions of statutory interpretation are reviewed de novo. *In re MCI*, 460 Mich 396, 413; 596 NW2d 164 (1999).

IV. ANALYSIS

In construing statutes we examine the language the Legislature has used. That language is the best indicator of the Legislature's intent. *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).

MCL 500.3135(1) provides:

> A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

The issue in these consolidated cases is whether plaintiffs have suffered a "serious impairment of body function." MCL 500.3135(7) defines "serious impairment of body function" as

> an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.

The specific issue in these consolidated cases is whether plaintiffs' impairments affect their general ability to lead their normal lives.

In order to be able to maintain an action for noneconomic tort damages under the no-fault act, the "objectively manifested impairment of an important body function" that the plaintiff has suffered must affect his "general ability" to lead his normal life. Determining whether the impairment affects a plaintiff's "general ability" to lead his normal life requires considering whether the plaintiff is "generally able" to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.

Random House Webster's College Dictionary (1991) defines "general" as "considering or dealing with broad, universal, or important aspects." "In general" is defined as "with respect to the entirety; as a whole." *Id*. "Generally" is defined as "with respect to the larger part; for the most part." *Id*. *Webster's New International Dictionary* defines "general" as "the whole; the total; that which comprehends or relates to all, or the chief part; a general proposition, fact, principle, etc.;—opposed to particular; that is, opposed to special." Accordingly, determining whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is, "for the most part" able to lead his normal life.

In addition, to "lead" one's normal life contemplates more than a minor interruption in life. To "lead" means, among other things, "to conduct or bring in a particular course."[13] Given this meaning, the objectively manifested impairment of an important body function

[13] *Random House Webster's Unabridged Dictionary* (2001).

must affect the *course* of a person's life. Accordingly, the effect of the impairment on the course of a plaintiff's entire normal life must be considered. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold.[14]

The starting point in analyzing whether an impairment affects a person's "general," i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity.

From all the above we deduce several principles that a court must consider in determining whether a plaintiff who alleges a "serious impairment of body function" as a result of a motor vehicle accident meets the statutory threshold for third-party tort recovery. The following multi-step process is meant to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not.

First, a court must determine that there is no factual dispute concerning the nature and extent of the per-

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[14] As we stated in *Kreiner,* 468 Mich at 885:

> Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life. [Emphasis in original.]

son's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. MCL 500.3135(2)(a)(i) and (ii).[15]

Second, if a court can decide the issue as a matter of law, it must next determine if an "important body function" of the plaintiff has been impaired. It is insufficient if the impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired. If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient.

If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of

[15] MCL 500.3135(2)(a)(ii) creates a special rule for closed head injuries by providing that a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed head injuries testifies under oath that there may be a serious neurological injury.

the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "*any* effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.[16]

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment[17], and (e) the prognosis for eventual recovery.[18] This list of factors is not meant to be exclusive nor are any of the individual

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[16] Contrary to the dissent, we do not require that "every aspect of a person's life must be affected in order to satisfy the tort threshold . . . ." *Post* at 154. Rather, in a quite distinct proposition, we merely require that the whole life be *considered* in determining what satisfies this threshold, i.e., whether an impairment "affects the person's general ability to lead his or her normal life."

[17] Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.

[18] See *DiFranco, supra* at 67-70; *Hermann v Haney*, 98 Mich App 445; 296 NW2d 278 (1980). The dissent argues that these factors have no bases in the statutory text. *Post* at 148-149. The statutory text provides that "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life" is a "serious impairment of body function." MCL 500.3135(7). Does the dissent really believe that an impairment lasting only a few moments has the same effect on a person's "general ability to lead his or her normal life" as an impairment lasting several years or that an impairment requiring annual treatment has the same effect on a person's "general ability to lead his or her normal life" as an impairment requiring daily treatment?

factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life."[19]

V. APPLICATION TO STRAUB

We are satisfied that there is no material factual dispute regarding the nature and extent of Straub's injuries. Thus, it is proper to determine whether he sustained a serious impairment of body function as a matter of law. MCL 500.3135(2)(a)(i).

First, we find that Straub's injuries to his nondominant hand (a closed fracture, open wounds, tendon injuries to two fingers, and a quarter-size wound on the palm) constituted an impairment of an important body function that was objectively manifested.

Thus, the issue is whether the impairment affected his general ability to live his life. In determining whether Straub's general, overall ability to lead his

[19] We agree with the dissent that the "serious impairment of body function" inquiry must "proceed[] on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations." *Post* at 145. Whether an impairment that precludes a person from throwing a ninety-five miles-an-hour fastball is a "serious impairment of body function" may depend on whether the person is a professional baseball player or an accountant who likes to play catch with his son every once in a while.

preaccident life was affected, we consider his functional abilities and activities. A necessary part of this analysis is determining how long and how pervasively his activities and abilities were affected. While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff's life. The primary focus of the Court of Appeals was on the work Straub missed, even while initially acknowledging it was a "relatively limited time." 254 Mich App 459. Straub did not work for eight weeks.[20] Over the next three weeks, Straub worked twenty to twenty-five hours a week at his primary job as a cable lineman. This time frame coincided with the deer hunting season. Because Straub had been advised not to use his left hand, he did not operate his shop or process deer for that season.

The Court of Appeals considered an additional month of work "disability" because Straub did not return to his weekend job as a bass guitar player until mid-January 2000. Straub estimated that over a four-month period he had to miss fifteen to twenty club dates.

Straub's treatment consisted of having his wounds sutured, wearing a cast, and taking antibiotics and pain medication. Four days after the accident, outpatient surgery was performed on the fingers and palm. The treatment was not significant or long-term. Within two months, the fracture and surgical wounds had healed. There were two sessions of physical therapy. At that point, Straub discontinued all medical treatment. Plaintiff estimated he was ninety-nine percent back to normal by mid-January 2000. Given that Straub's injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive, we conclude

[20] His doctor had authorized him to return to work two weeks earlier than he did.

that Straub's general ability to live his normal life was not affected. There is no medical evidence that Straub has any residual impairment or that the course of Straub's life has been affected. The temporary limitations Straub experienced do not satisfy the statutory prerequisites. Considered against the backdrop of his preimpairment life and the limited nature and extent of his injuries, we conclude that Straub's postimpairment life is not so different that his "general ability" to lead his normal life has been affected. Because the course of Straub's normal life has not been affected, he failed to satisfy the "serious impairment of body function" threshold for recovery of noneconomic damages. Accordingly, the trial court properly granted summary disposition for defendants in Straub's lawsuit.

VI. APPLICATION TO KREINER

We are satisfied that there is no factual dispute that is material to the determination whether Kreiner suffered a serious impairment of body function.[21] Thus, it is appropriate to determine as a matter of law whether he experienced a serious impairment of body function. MCL 500.3135(2)(a)(ii).

First, we find that Kreiner's medically documented injuries to his lower back, right hip, and right leg constitute an impairment of an important body function that was objectively manifested.

Thus, the issue is whether the impairment affected his general ability to lead his life. We find that Kreiner's

[21] Although there is a factual dispute concerning the nature and extent of plaintiff's injuries, this dispute is not material to the determination whether plaintiff has suffered a "serious impairment of body function" because even assuming that all plaintiff's allegations concerning the nature and extent of his injuries are true, we conclude that plaintiff has still not suffered a "serious impairment of body function."

impairment did not affect his overall or broad ability to conduct the course of his normal life. In fact, his life after the accident was not significantly different than it was before the accident. He continued working as a self-employed carpenter and construction worker and was still able to perform all the work that he did before, with the possible exception of roofing work. His injuries did not cause him to miss one day of work.

Kreiner states that he can no longer stand on a ladder for longer than twenty minutes, can no longer lift anything over eighty pounds, and was forced to limit his workday to six hours because he can no longer work eight-hour days. Kreiner does not contend, however, that these limitations prevent him from performing his job. He also has difficulty walking more than a half mile without resting and can no longer hunt rabbits, although he continues to hunt deer.

Looking at Kreiner's life as a whole, before and after the accident, and the nature and extent of his injuries, we conclude that his impairment did not affect his overall ability to conduct the course of his normal life.[22] While he cannot work to full capacity, he is generally able to lead his normal life. A negative effect on a particular aspect of an injured person's life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life. Considered against the backdrop of his preimpairment life, Kreiner's postimpairment life is not so different that his "general ability" to conduct the course of his normal life has been affected.[23]

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[22] As the trial court noted, plaintiff, while somewhat restricted, is able to engage in lifting, bending, twisting, and standing as required by his job.

[23] Contrary to the dissent's contention, we are not concluding that Kreiner would have to show that he is unable to work at all in order to

Because Kreiner failed to establish that his impairment affected his general ability to conduct the course of his normal life, he did not satisfy the "serious impairment of body function" threshold for recovery of noneconomic damages. Accordingly, the trial court properly granted summary disposition of Kreiner's lawsuit.

VII. RESPONSE TO THE DISSENT

It must be pointed out that the dissent's approach leads to the rather dismaying conclusion that the intent of the Legislature in 1995 was, in effect, to pull down the no-fault temple and produce an auto insurance catastrophe for the state's drivers. That is, the dissent concludes that the 1995 amendment, despite no words to this effect, was designed, as the thrust of his argument makes clear, to undermine the great compromise (no-fault benefits in return for limited tort remedies) that all previous Supreme Court decisions have recognized as existing in the no-fault legislation and that is an indispensable requirement to make no-fault viable. We decline to join him in this calculated exercise predicated on what we believe is a studied ignorance of what the Legislature intended.

VIII. CONCLUSION

In both of the cases before us the trial courts granted summary disposition for defendants because the courts

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show that he has suffered a "serious impairment of body function." *Post* at 153. Instead, we are simply concluding that, although plaintiff has suffered an impairment that does have an effect on his ability to work, it is not a "serious impairment of body function," as defined by the Legislature, because plaintiff is "generally able" to work and the course of his normal life is otherwise unaffected. We disagree with the dissent's suggestion that *any* effect on one's ability to work is sufficient to establish a "serious impairment of body function."

determined that plaintiffs had not established a serious impairment of a body function. The respective panels of the Court of Appeals, however, reversed. We reverse the judgments of the Court of Appeals because we conclude that the trial courts properly determined that plaintiffs did not establish a serious impairment of body function.

The decision of the Court of Appeals is reversed in *Straub*.

The decision of the Court of Appeals is reversed in *Kreiner*.

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

CAVANAGH, J. (*dissenting*). In these cases, this Court is called upon to interpret MCL 500.3135. Because I disagree with the majority's construction of MCL 500.3135(7) and the result reached in these cases, I must respectfully dissent. Accordingly, I would affirm the decisions of the Court of Appeals.

I. RULES OF STATUTORY INTERPRETATION

Questions of statutory interpretation are questions of law, which this Court reviews de novo. *In re MCI Telecom Complaint*, 460 Mich 396, 413; 596 NW2d 164 (1999). "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *Id*. at 411. To this end, this Court abides by the governing principle that the first step in determining the Legislature's intent is to examine the language of the statute itself. *Id*. "If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible." *Id*.

II. MCL 500.3135

MCL 500.3135(1) unambiguously states that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(2) provides in pertinent part:

> For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:
>
> (a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
>
> (i) There is no factual dispute concerning the nature and extent of the person's injuries.
>
> (ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement.

Pursuant to the plain and unambiguous language of § 3135(2), the trial court determines, as a question of law, whether a particular plaintiff has satisfied the tort threshold under two enumerated circumstances. Namely, (1) where there is no factual dispute concerning the plaintiff's injuries, or (2) where there is a factual dispute concerning the plaintiff's injuries, but the dispute is not material or outcome determinative regarding whether the plaintiff suffered a serious impairment of body function or permanent serious disfigurement.

The question becomes, however, who decides whether a particular plaintiff has satisfied the tort threshold where there is a factual dispute concerning

the nature and extent of the plaintiff's injuries *and* such a dispute is material or outcome determinative with respect to the serious impairment of body function or permanent serious disfigurement issue. The most natural reading of the statute suggests that in such a situation, a question of fact is presented for the jury and the jury decides whether the plaintiff has suffered a serious impairment of body function or permanent serious disfigurement.

Important to the resolution of these cases is the statutory definition of "serious impairment of body function." MCL 500.3135(7) unambiguously states, "As used in this section, 'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." The Legislature's definition necessarily contains three elements. A serious impairment of body function is (1) an objectively manifested impairment, (2) of an important body function, (3) that affects the person's general ability to lead his normal life. All three requirements must be satisfied and, thus, a thorough review of each requirement is necessary.

A. OBJECTIVELY MANIFESTED

The clear import of the "objectively manifested" requirement is that the impairment must be observable or identifiable in order for the impairment to satisfy the first prong of the legislative definition. "Objective" means "1. Of or having to do with a material object as distinguished from a mental concept. 2. Having actual existence or reality. 3. a. Uninfluenced by emotion, surmise, or personal prejudice. b. Based on observable phenomena; presented factually . . . ." *The American Heritage Dictionary*, *Second College Edition* (1982).

Further, "manifest" means "[c]learly apparent to the sight or understanding . . . . To show or demonstrate plainly; reveal . . . ." *Id*. Thus, the first prong of the serious impairment of body function analysis is, effectively, an objective inquiry.

B. OF AN IMPORTANT BODY FUNCTION

Once it is determined that the impairment is objectively manifested, the trial court or jury must then decide whether an important body function is impaired. "Important" means "[m]arked by or having great value, significance, or consequence." *Id.* Importance or value is necessarily a subjective inquiry—what may be important to one individual may not be as important or valuable to another. As such, the Legislature plainly intended the second prong of the analysis to be subjective in nature, in contrast to the first prong.[1] Thus, the "of an important body function" analysis does not lend itself to any judicial line drawing, and the utilization of nonexhaustive factors is unwarranted.

For example, suppose a person is injured in a motor vehicle accident and, as result, the person is unable to fully manipulate her pinky finger to some degree. To an "average" person, the ability to fully extend or bend her pinky finger may not be important. But suppose the person injured in the motor vehicle accident is Roger Clemens (and he loses the zip on his fastball), or B. B. King (and he can no longer play guitar in the same fashion), or Annika Sorenstam (and she loses the distance on her drives). For these individuals, the ability to manipulate their pinky finger is important. Therefore,

[1] Although it may be appropriate for a court to engage in a so-called objective analysis of the "important body function" prong, such an analysis is still undertaken with the goal of ascertaining the subjective importance that a particular plaintiff places on that body function.

the unambiguous language of MCL 500.3135(7) does not lend itself to any bright-line rule and the analysis of this prong must proceed on a case-by-case basis.

C. THAT AFFECTS THE PERSON'S GENERAL ABILITY TO LEAD HIS OR HER NORMAL LIFE

Central to the resolution of these cases is the proper interpretation of the third prong of the Legislature's definition of "serious impairment of body function." "Affect" means "[t]o have an influence on; bring about a change in." *American Heritage Dictionary*, *supra*. "General" means:

> 1. Relating to, concerned with, or applicable to the whole or every member of a class or category. 2. Affecting or characteristic of the majority of those involved; prevalent: *a general discontent*. 3. Being usually the case; true or applicable in most instances but not all. 4. a. Not limited in scope, area, or application: *as a general rule*. b. Not limited to one class of things: *general studies*. [*Id*. (emphasis in original).]

"Able" means "having sufficient power, skill, or resources to accomplish an object [sic, objective]." *Merriam-Webster Online Dictionary*, <http://www.m-w.com> (accessed June 21, 2004). Thus, the Legislature requires that the impairment have an influence on most, but not all, of the person's capacity "to lead his or her normal life."

The last phrase in the statutory definition of "serious impairment of body function" inevitably contemplates a subjective inquiry. The phrase "his or her normal life" requires a court to compare a particular plaintiff's life before and after the impairment. Further, a person's "normal" life is unavoidably relative and, thus, inherently subjective. Because such an endeavor proceeds on a case-by-case basis and each particular plaintiff's ability to lead his own normal life is uniquely individual-

ized, the third prong is not amenable to any bright-line rule or set of nonexhaustive factors.

In sum, the third prong of the serious impairment of body function analysis requires a reviewing court to compare the plaintiff's pre- and post-accident life and determine whether the impairment has an influence on most, but not all, of the plaintiff's capacities to lead his preaccident lifestyle.[2]

III. THE LEGISLATURE'S STATED TEST

On the basis of the foregoing, the unambiguous statute sets forth the following test. The first step in the serious impairment of body function analysis is to determine whether there is a factual dispute concerning the nature and extent of the person's injuries and, if there is a factual dispute, whether the dispute is material to the serious impairment of body function issue.

If there is no factual dispute concerning the nature and extent of the person's injuries, a question of law is presented for the trial court. MCL 500.3135(2)(a)(i).

If there is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to adjudging whether the person has suffered a serious impairment of body function, a question of law is presented for the trial court. MCL 500.3135(2)(a)(ii).

If there is a factual dispute concerning the nature and extent of the person's injuries and the dispute is

[2] Similar to the second prong, the third prong of the analysis is inherently subjective in nature. While a court may engage in a so-called objective analysis to determine whether the impairment affects the person's general ability to lead his normal life, this endeavor is made with the understanding that a person's subjective normal life is the relevant frame of reference.

material to adjudging whether the person has suffered a serious impairment of body function, a question of fact is presented for the jury.

Once this initial determination is made, the second step is to decide whether the Legislature's statutory definition has been fulfilled. Under the plain and unambiguous language of MCL 500.3135(7), the serious impairment of body function threshold is satisfied where the impairment is (1) an objectively manifested impairment (observable and identifiable), (2) of an important body function (a body function that the particular plaintiff deems valuable), (3) that affects the person's general ability to lead his normal life (influences most, but not necessarily all, of the particular plaintiff's capacity to lead his own unique preaccident lifestyle).

The Legislature's statutory definition does not lend itself to any bright-line rule or imposition of nonexhaustive list of factors. Instead, the "serious impairment of body function" inquiry proceeds on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations. The Legislature recognized that what is important to one is not important to all, a brief impairment may be devastating whereas a near permanent impairment may have little effect. The Legislature avoided drawing lines in the sand and so must we.

IV. APPLICATION OF THE LEGISLATURE'S STATED TEST

A. *STRAUB V COLLETTE*

Because there is no factual dispute regarding the nature and extent of plaintiff Straub's injuries, the existence of a serious impairment of body function is determined as a matter of law. MCL 500.3135(2)(a)(i).

There is little debate that Straub's injuries to his hand were observable and identifiable. Straub sustained a closed left fifth metacarpal fracture, as well as open wounds and tendon injuries to his middle and ring fingers. Thus, Straub's impairment was objectively manifested and, therefore, the first prong of the statutory definition is satisfied.

The second prong of the serious impairment of body function analysis is satisfied where the impairment is to a body function that Straub considers valuable. According to Straub's testimony, the injury to his hand was to an important body function. Straub relied on the use of his hand to work as a cable lineman, play guitar in his band, operate his bow shop during deer season, and perform household and personal tasks. Thus, because Straub's use of his hand was related to important body functions, the second prong of MCL 500.3135(7) is satisfied.

Central to the resolution of this case is whether the third prong of the serious impairment analysis has been met; namely, whether the injury to his hand affected Straub's general ability to lead his normal life. Under the undisputed facts in this case, I believe that Straub's injury had an influence on most, but not all, of Straub's capacity to lead his unique preaccident lifestyle.

Straub was able to work as a cable lineman before the motor vehicle accident, but could not perform that work following the accident. Further, before the injury, Straub played in a band that practiced three or four times a week and played at clubs almost every weekend. After the accident, Straub could not play his guitar. Before the accident, Straub would operate his bow shop during deer season, but, as a result of the motor vehicle accident, he could not operate his shop during the 1999 season. Finally, Straub had difficulty performing house-

hold tasks in the same manner as he did before the accident. As such, the impairment to Straub's hand had an influence on most, but not all, of his capacity to lead his preaccident lifestyle. Therefore, under the plain and unambiguous language of MCL 500.3135(7), Straub has satisfied the tort threshold and I would affirm the decision of the Court of Appeals.

The majority reaches a contrary conclusion because it imposes additional requirements on Straub that the Legislature never envisioned. The majority places great weight on the fact that

> Straub's injury was not extensive, recuperation was short, unremarkable, and virtually complete, and the effect of the injury on body function was not pervasive . . . . There is no medical evidence that Straub has any *residual impairment or that the course of Straub's life has been affected*. The temporary limitations Straub experienced do not satisfy the statutory prerequisites. [*Ante* at 135-136 (emphasis added).]

However, the clear language of MCL 500.3135(7) does not make any express or implicit mention of time or temporal considerations. As noted above, under the no-fault act, a person may remain subject to tort liability if the injured person suffered death, permanent serious disfigurement, or serious impairment of body function. MCL 500.3135(1). Unlike death or permanent serious disfigurement, the serious impairment of body function threshold does not suggest any sort of temporal limitation. Further, the plain and unambiguous language of the statutory definition of "serious impairment of body function" does not set forth any quantum of time the judge or jury must find dispositive when determining whether a serious impairment of body function has occurred. Therefore, the duration of the impairment is not an appropriate inquiry.

The majority noticeably departs from accepted principles of statutory interpretation when it concludes that certain temporal factors should be considered when evaluating whether the serious impairment of body function threshold has been met. For example, the majority reasons that "the type and length of treatment required," "the duration of the impairment," "the extent of any residual impairment," and "the prognosis for eventual recovery" are relevant factors to consider when making the threshold determination.[3] *Ante* at 133. Unlike the majority, however, I do not find any support for these considerations in the unambiguous language of MCL 500.3135(7).

Moreover, the majority disregards the principles of statutory interpretation that it claims to follow. For example, in construing the term "lead" in convenient isolation, the majority states, "To 'lead' means, among other things, 'to conduct or bring in a particular course.'. . . Given this meaning, the objectively manifested impairment of an important body function must affect the *course* of a person's life. Accordingly, the affect of the impairment on the course of a plaintiff's *entire normal life* must be considered." *Ante* at 130-131 (citation omitted and emphasis added). Additionally, the majority further asserts that the impairment "must be of sufficient duration to affect the course of a plaintiff's life." *Id*. at 135. In what is best described as tortured logic, the majority has seen fit to impose a temporal requirement teetering on the brink of permanency into the unambiguous statute. Because the statute does not define "serious impairment of body function" with respect to permanency, or any temporal factor for that

[3] Curiously, the majority finds support for these factors in *Hermann v Haney*, 98 Mich App 445; 296 NW2d 278 (1980), and *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986).

matter, the majority impermissibly adds additional requirements not found in the text of MCL 500.3135(7).[4]

It is evident that the amount of time Straub was injured drives the majority's result. A fair reading of the majority opinion seems to indicate that if Straub's injuries were of a more permanent nature, the majority may be inclined to find that the requirements of MCL 500.3135(7) have been met. As mentioned above, however, unlike *death* or *permanent* serious disfigurement, nothing in the plain text of MCL 500.3135(7) suggests that the Legislature intended temporal limitations or permanency be considered when making the "serious impairment of body function" determination. Therefore, the majority errs when it reads additional language into the plain text of MCL 500.3135(7).

While this roughly four-month serious impairment of body function may appear to be at odds with the stated

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[4] The majority poses the following question which I believe is indicative of the difference between the majority and the dissent in this case:

> Does the dissent really believe that an impairment lasting only a few moments has the same effect on a person's "general ability to lead his or her normal life" as an impairment lasting several years or that an impairment requiring annual treatment has the same effect on a person's "general ability to lead his or her normal life" as an impairment requiring daily treatment? [*Ante* at 133 n 18.]

In response, I must note that the statutory threshold is evaluated on a case-by-case basis and under the majority's rationale none of the majority's hypothetical plaintiffs is likely to meet the threshold. The majority would effortlessly conclude that interrupting several years out of, for example, forty is a minor interruption. This is precisely the reason why this Court should avoid reading additional temporal requirements into the unambiguous statute.

Moreover, my interpretation of MCL 500.3135(7) is not based on what I believe or hope. Rather, my interpretation is based on how the unambiguous statute is written and, unlike the majority, not how I personally believe the statute *should be* written.

purpose of the no-fault act, any trepidation over such a policy concern is best left to the Legislature. Because the statute does not speak in terms of "residual impairment," "recuperation," or "permanency," this Court should avoid reading those requirements into the plain and unambiguous text of the statute.

B. *KREINER V FISCHER*

Because there is a factual dispute concerning the nature and extent of plaintiff Kreiner's injuries *and* such a dispute is material to the serious impairment of body function issue, a question of fact is presented. Kreiner is a self-employed construction worker and carpenter. Additionally, Kreiner engages in recreational hunting. After the motor vehicle accident, Kreiner claimed he could no longer work eight-hour days, was unable to stand on a ladder longer than twenty minutes, could no longer perform general roofing work, was unable to lift heavy items, could no longer walk more than one-half mile, and could no longer hunt rabbits.

Defendant attempted to submit videotapes to the trial court that allegedly demonstrate that Kreiner's injuries do not affect his life to the degree that Kreiner claims. Additionally, in its brief to this Court, defendant argues that these videotapes show Kreiner climbing up and down extension ladders, driving nails, tearing off siding, reaching, lifting, and crawling on a roof. In initially remanding this case, the Court of Appeals directed the trial court to consider the admissibility of the videotape offered by defendant to determine whether there are material issues of fact regarding Kreiner's claims relative to the effects of his injuries. *Kreiner v Fischer*, 251 Mich App 513, 519; 651 NW2d 433 (2002), vacated and remanded 468 Mich 885 (2003). Thus, there is a factual dispute that is material to the

serious impairment of body function issue because if the effects of Kreiner's injuries were undisputed, the requirements of MCL 500.3135(7) would be satisfied.

Kreiner's injuries were observable and identifiable. The injury to Kreiner's back was observable and verified by magnetic resonance imaging and electromyography examinations. Because the injury was objectively manifested, the first prong of MCL 500.3135(7) is satisfied. The second prong of the serious impairment of body function analysis is also satisfied because the impairment was to a body function that Kreiner deems valuable. According to Kreiner's testimony, the injury to his back was to an important body function. Kreiner relied on the use of his back to sustain his livelihood as a construction worker and carpenter. Thus, the central issue for this Court to resolve is whether Kreiner's injury affected his general ability to lead his normal life.

The third prong of the statutory definition of "serious impairment of body function" is satisfied if the impairment has an influence on most, but not all, of Kreiner's capacity to lead his preaccident lifestyle. In resolving this issue, I find the reasoning of the Court of Appeals on remand to be persuasive.

> We find that one's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life, such as in the case at bar. Employment or one's livelihood, for a vast majority of people, constitutes an extremely important and major part of a person's life. Whether it be wrong or right, our worth as individuals in society is often measured by our employment. Losing the ability to work can be devastating; employment, regardless of income issues, is important to a sense of purpose and feeling of vitality. For those working a standard forty-hour work week, a quarter of their lifetime before retirement is devoted to time spent on the job. An

> injury affecting one's employment and ability to work, under the right factual circumstances, can be equated to affecting the person's *general* ability to lead his or her normal life. For many, life in general revolves around a job and work. It would be illogical to conclude that where a person loses the ability to work because of an injury resulting from a motor-vehicle collision, after being gainfully employed, the person's life after the accident, in general, would be unaffected. [*Kreiner v Fischer (On Remand)*, 256 Mich App 680, 688-689; 671 NW2d 95 (2003).]

Moreover, the panel noted, "Here, there was documentary evidence presented by plaintiff that his ability to walk, undertake certain physical movements, and engage in recreational hunting was limited by the injury. These limitations along with plaintiff's alleged employment limitations, if true, indicate that plaintiff suffered a serious impairment of body function under § 3135." *Id*. at 689. Under the circumstances presented in this case, I would affirm the decision of the Court of Appeals because if Kreiner's claims are true, his injuries had an influence on most, but not all, of his capacity to lead his preaccident lifestyle. Additionally, because there is a factual dispute concerning the nature and extent of Kreiner's injuries and such a dispute is material with respect to MCL 500.3135(7), I would likewise remand this case to the trial court.

In support of its conclusion that Kreiner did not satisfy MCL 500.3135(7), the majority places great weight on the notion that Kreiner's life was "not significantly different than it was before the accident." *Ante* at 137. Specifically, the majority posits Kreiner "was still able to perform all the work that he did before, with the possible exception of roofing work. His injuries did not cause him to miss one day of work." *Id*. at 137 However, the majority also acknowledges that Kreiner "cannot work to full capacity . . . ." *Id*. at 137.

In an effort to reconcile this doublespeak, the majority then concludes that Kreiner's work was simply a "particular aspect" of his life and that Kreiner's "postimpairment life [was] not so different . . . ." *Id*. at 137.

Implicit in the majority's rationale is the idea that a person has not suffered a serious impairment of body function unless that person is absolutely precluded from engaging in their particular preaccident lifestyle and the impairment lasts the length of the person's life. Stated differently, it is not enough that Kreiner can only function at seventy-five percent of his preaccident work ability, because the majority would conclude that Kreiner must not be able to work at all.[5] It is not enough that Kreiner is limited in his lifting, bending, twisting, and standing, because the majority would conclude that Kreiner must not be able to lift, bend, twist, and stand at all.[6] The majority would conclude that it is not enough that Kreiner cannot hunt rabbits, because Kreiner can hunt deer. The majority would conclude that it is not enough that Kreiner can no longer walk one-half mile, because Kreiner can still walk.

Such an all-or-nothing approach is not supported by the unambiguous text of the statute. Moreover, it is evident that the indivisible sum of the affected lifestyle activities mentioned above leads to the logical conclusion that Kreiner's injuries had an influence on most, but not all, of his capacity to lead his preaccident life. It is equally evident that the majority uses the facts of the

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[5] The majority notes that "[d]espite his limitations, Kreiner's tax returns revealed that 1998 was his highest income-earning year, including several years before the injuries occurred." *Id*. at 126 n 12. However, such an assertion ignores the idea that Kreiner claims to have been working at seventy-five percent of his preaccident ability. If Kreiner's claims are true, Kreiner may have earned twenty-five percent more that year. Thus, I do not find Kreiner's 1998 tax returns dispositive.

[6] As noted by the Court of Appeals, "injuries affecting the ability to work, by their very nature, often place physical limitations on numerous aspects of a person's life." *Kreiner (On Remand)*, *supra* at 689.

Kreiner case to effectively create a more rigorous threshold requirement than that mandated by the Legislature.

Despite the majority's assertions to the contrary, its application of its stated test in *Kreiner* demonstrates that it believes that every aspect of a person's life must be affected in order to satisfy the tort threshold, and the effects must last the course of the plaintiff's entire normal life. For example, the majority concludes that the term "general" in MCL 500.3135(7) means "entire," "whole," and "for the most part." *Ante* at 130. Remarkably, the majority then determines that

> whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is, "for the most part" able to lead his normal life.
>
> * * *
>
> [T]he effect of the impairment on the course of a *plaintiff's entire normal life* must be considered. Although some aspects of a *plaintiff's entire normal life* may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold. [*Id*. at 130, 131 (emphasis added).]

The majority further states, "*we* merely require that the *whole life* be *considered* in determining what satisfies [the] threshold . . . ." *Id*. at 133 n 16 (emphasis added).

The term "general" as used in MCL 500.3135(7) does not, as the majority asserts, modify the phrase "to lead his or her normal life." Rather, "general" modifies the term "ability."[7] In a disingenuous sleight of hand, the

[7] Again, MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

majority attempts to create a more difficult test than that required by the Legislature. MCL 500.3135(7) does not require that the impairment affect every aspect of the course of a person's "entire" or normal life.

Similarly, in its attempt to effectively raise the statutory threshold, the majority's actual application of its test seeks to revive *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982), in full. In *Cassidy*, this Court previously held that the "serious impairment of body function" threshold was satisfied where the injury affects "the person's general ability to live *a* normal life." *Id*. at 505 (emphasis added). Later, in *DiFranco v Pickard*, 427 Mich 32, 66; 398 NW2d 896 (1986), this Court found that standard flawed because "there is no such thing as '*a* normal life.' " (Emphasis added.) In 1995, the Legislature amended the no-fault act and set forth its own definition of "serious impairment of body function."

The majority claims that in 1995 the Legislature was "[a]pparently cognizant" of the *DiFranco* Court's repudiation of *Cassidy*'s "*a* normal life" standard. *Ante* at 121 n 7. The majority further states:

> [T]he Legislature, in the 1995 act, requires that the impairment affect "the person's general ability to lead *his or her* normal life." (Emphasis added.) It is then clear that, harkening to the *DiFranco* Court's guidance that there is no objectively "normal life," the Legislature modified the entirely objective *Cassidy* standard to a partially objective and partially subjective inquiry. [*Id*. at 121.]

In construing MCL 500.3135(7), the majority then concludes that the statute requires a comparison of the person's pre- and post-accident lifestyle.

However, the majority merely pays lip service to its own construction and fails to actually compare Kreiner's pre- and post-accident life. Kreiner framed the

effects of his impairment in terms of the limitations he experienced at work, hunting rabbits, lifting and twisting, and walking more than one-half mile. Kreiner convincingly argued that these particular aspects were the indivisible sum of his normal life. The majority, however, simply concludes that these particular aspects of Kreiner's "life as a whole" are insufficient to meet the threshold. Implicit in the majority's actual application of its test is the conclusion that "*a* normal life" cannot consist solely of work, hunting rabbits, lifting and twisting, and walking more than one-half mile. Yet, MCL 500.3135(7) requires the impairment affect the *plaintiff's* normal life, not what the majority infers to be "*a* normal life." Kreiner's normal life apparently consisted of working, hunting rabbits, lifting and twisting, and walking one-half mile and, thus, he satisfied the statutory threshold. In my opinion, the majority's actual application of its test is merely a subtle method of returning to the now refuted *Cassidy* "*a* normal life" standard in order to fashion what it believes to be a more difficult legislative definition.

The plain and unambiguous language set forth by the Legislature simply requires that the impairment affect a person's general ability to lead his normal life. Unlike the majority, I prefer to simply apply MCL 500.3135(7) as written and leave any unresolved policy concerns in the hands of the Legislature.

V. RESPONSE TO THE RESPONSE TO THE DISSENT

I am cognizant of the overall purpose of the no-fault scheme. Further, I am aware that my view may be perceived as an invitation to increased litigation; but this is the logical byproduct of the unambiguous words chosen by the Legislature. Any apparent tension be-

tween the act's overall purpose and the Legislature's unambiguous statutory definition is best addressed by the Legislature itself.

The majority suggests that my approach is sacrilegious to the "no-fault temple" and is an exercise predicated on "studied ignorance." *Ante* at 138. While admittedly unaware that I was required to worship the no-fault insurance gods, I believe that my "studied ignorance" is more properly labeled as "judicial restraint." If ignorance comes from applying this unambiguous statute as written and not substituting my own view for that of the Legislature, I must say that ignorance is bliss. If so-called wisdom comes from rewriting this unambiguous statute to comport with my own preference on how the statute *should be* written and applied, in this instance I must choose "ignorance."

Today's decision serves as a chilling reminder that activism comes in all guises, including so-called textualism.

VI. CONCLUSION

Under accepted principles of statutory interpretation, a plain and unambiguous statute should speak for itself. We should not casually read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute. Because the majority departs from this premise, I must respectfully dissent. Rather, I would apply MCL 500.3135 as unambiguously written and, thus, affirm the decisions of the Court of Appeals.

WEAVER and KELLY, JJ., concurred with CAVANAGH, J.

JENKINS v PATEL

Docket No. 123957. Argued April 20, 2004 (Calendar No. 9). Decided July 26, 2004.

Margaret Jenkins, as personal representative of the estate of Mattie Howard, deceased, brought a wrongful death action in the Wayne Circuit Court, Marianne O. Battani, J., against Jayesh K. Patel, M.D., Inc., and Comprehensive Health Services, alleging that the decedent died as a result of medical malpractice by the defendants. A jury rendered a verdict in favor of the plaintiff, awarding $10 million in noneconomic damages. The defendants filed a motion for remittitur or a new trial, arguing that the damages cap set forth in MCL 600.1483 regarding medical malpractice actions required a reduction in the damage award, or, in the alternative, that the award was excessive under MCR 2.611. The court, Gershwin A. Drain, J., concluded that the damages cap set forth in MCL 600.1483 did not apply, but agreed that the award was excessive. Judge Drain, however, did not set a remittitur amount, finding it difficult to assess damages because he had not been present at the trial to hear testimony of the witnesses. The court also refused to grant the defendants a new trial. The Court of Appeals, COOPER, P.J., and MURPHY, J. (KELLY, J., concurring), affirmed the trial court's decision, but remanded the case to the trial court, holding that the trial court, having found the award to be excessive, must either set a remittitur amount or grant a new trial on damages alone. 256 Mich App 112 (2003). The defendants appealed, alleging that the damages cap does apply to this action.

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

The medical malpractice noneconomic damages cap does apply to wrongful death actions where the underlying claim is medical malpractice. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the Court of Appeals for consideration of the constitutional issues raised by the plaintiff that were not resolved by the Court of Appeals in light of its analysis of the statutory issue.

1. The wrongful death act, MCL 600.2922, is not the only act that is pertinent in a wrongful death action. Section 1483 specifi-

cally states that it applies to "an action for damages alleging medical malpractice . . . ." A wrongful death action grounded in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent.

2. Section 1483's definition of "noneconomic loss," which includes "other noneconomic loss," includes noneconomic losses not specifically listed, including those sought by a plaintiff's next of kin for their own pain and suffering, such as loss of society and companionship. The Court of Appeals erred in concluding that § 1483 is not meant to limit damages that a next of kin would seek for his own suffering, such as loss of society and companionship.

3. MCL 600.6304(3) incorporates the noneconomic damages cap of § 1483 into wrongful death actions by ensuring that in any action subject to § 6304, expressly including wrongful death actions, the court will reduce the verdict for the plaintiff both on the basis of the allocation of fault provisions of § 6304 and on the basis of the provisions of § 1483, the noneconomic damages cap for medical malpractice cases.

4. Section 1483 and the provisions of MCL 600.2922(6) are not incompatible. Section 1483 does not violate a plaintiff's statutory right under § 2922(6) to have the court or the jury award damages as the court or the jury shall consider fair and equitable.

Reversed and remanded.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that the Court of Appeals correctly held that the medical malpractice noneconomic damages cap found in MCL 600.1483 does not apply to actions brought under the wrongful death act, MCL 600.2922. The decision of the Court of Appeals should be affirmed.

The wrongful death act contains no cap on the damages available. The act mandates recovery in any amount, limited only by the requirement that the amount be fair and equitable, for noneconomic losses, including those for loss of society and companionship. The wrongful death act clearly and unambiguously, without taking into consideration the medical malpractice noneconomic damages cap, governs a medical malpractice action involving death and the accompanying request for damages.

The wrongful death act and the medical malpractice noneconomic damages cap statute need not be read in pari materia. The statutes serve different purposes. Although the Legislature could have expressly made the medical malpractice noneconomic damages cap applicable to wrongful death actions, it chose not to do so,

knowing that the wrongful death act provides specifically and exclusively for damages in wrongful death claims.

The Legislature's use of the word "if" in MCL 600.6098(1) in the phrase "[i]f the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483," supports the conclusion that the medical malpractice noneconomic damages cap does not apply in wrongful death actions.

DAMAGES — WRONGFUL DEATH ACTIONS — MEDICAL MALPRACTICE — NONECONOMIC DAMAGES — LIMITS.

The medical malpractice noneconomic damages cap applies to wrongful death actions where the underlying claim is medical malpractice (MCL 600.1483; MCL 600.6304).

Ira B. Saperstein, P.C. (by *Ira B. Saperstein*), for the plaintiff.

Grier & Copeland, P.C. (by *Wilson Copeland*), and *Kitch Drutchas Wagner DeNardis & Valitutt*i (by *Susan Healy Zitterman*) for the defendants.

Amici Curiae:

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Michael J. Fraleigh*, Assistant Attorney General, for the Commissioner of the Office of Insurance and Financial Services and Rehabilitator of the Wellness Plan.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Graham K. Crabtree*), for ProNational Insurance Company and Michigan Health and Hospital Association.

Kerr, Russell and Weber, PLC (by *Richard D. Weber* and *Joanne Geha Swanson*), for Michigan State Medical Society.

MARKMAN, J. We granted leave to appeal to consider whether the medical malpractice noneconomic damages cap, MCL 600.1483(1), applies to a wrongful death

action where the underlying claim is medical malpractice. The jury awarded plaintiff $10 million in noneconomic damages. The trial court denied defendants' motion for remittitur or a new trial, concluding that the medical malpractice noneconomic damages cap does not apply to wrongful death actions. The Court of Appeals affirmed. Because we conclude that the medical malpractice noneconomic damages cap does apply to wrongful death actions where the underlying claim is medical malpractice, we reverse the judgment of the Court of Appeals and remand this case to the Court of Appeals for consideration of the constitutional issues raised by plaintiff that were not resolved by the Court of Appeals in light of its analysis of the statutory issue.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff brought this wrongful death action against defendants, seeking to recover damages for the death of her mother that allegedly resulted from defendants' medical malpractice. Plaintiff's decedent began treating with defendant Dr. Jayesh Patel shortly after being hospitalized for a stroke. Plaintiff contends that Dr. Patel negligently managed the decedent's renal disease and hypertension, which ultimately led to her death. Plaintiff sought damages for the loss of society and companionship sustained by the decedent's seven children and seven siblings. The jury awarded plaintiff $10 million in noneconomic damages.

Defendants filed a motion for remittitur or for a new trial, arguing that the medical malpractice noneconomic damages cap, MCL 600.1483(1), requires a reduction in the damage award, and, in the alternative, that the award is excessive. The trial court held that the medical malpractice noneconomic damages cap does not apply to wrongful death actions. The trial judge further

held that, although the award is excessive, he could not determine an appropriate amount of damages because he was not personally present at the trial to hear the testimony of the witnesses and judge their credibility.[1] Therefore, he let the jury's $10 million verdict stand. In a published decision, the Court of Appeals affirmed the trial court's decision that the medical malpractice noneconomic damages cap does not apply to wrongful death actions.[2] The Court of Appeals, however, remanded the case to the trial court, holding that the trial court, having found the award to be excessive, must either set a remittitur amount or grant a new trial on damages only.[3] One of the judges on the panel wrote a concurring opinion to emphasize her belief that the language of the wrongful death act precludes application of the medical malpractice noneconomic damages cap. We granted defendants' application for leave to appeal.[4]

II. STANDARD OF REVIEW

Whether the medical malpractice noneconomic damages cap, MCL 600.1483(1), applies to a wrongful death action where the underlying claim is medical malpractice is an issue of statutory interpretation, which is a question of law that this Court reviews de novo. *Morales v Auto-Owners Ins Co (After Remand),* 469 Mich 487, 490; 672 NW2d 849 (2003).

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[1] The judge who presided over the jury trial was subsequently appointed to a federal judicial position and was no longer on the trial court at the time the motion for remittitur or for a new trial was heard.

[2] 256 Mich App 112; 662 NW2d 453 (2003).

[3] The Court of Appeals further instructed the trial court that it could revisit its ruling concerning whether the verdict was excessive if it acknowledged that its previous ruling was "nondefinitive" in light of its concern at the time that it had not been present at trial.

[4] 469 Mich 958 (2003).

III. ANALYSIS

MCL 600.1483, also referred to as the medical malpractice noneconomic damages cap, provides, in pertinent part:

> (1)In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (i) Injury to the brain.
>
> (ii) Injury to the spinal cord.
>
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.
>
> (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.
>
> (2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.
>
> (3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

The wrongful death act, MCL 600.2922, provides, in pertinent part:

(1) Whenever the death of a person or injuries resulting in death shall be caused by wrongful act, neglect, or fault of another, and the act, neglect, or fault is such as would, if death had not ensured, have entitled the party injured to maintain an action and recover damages, the person who or the corporation that would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under circumstances that constitute a felony.

(2) Every action under this section shall be brought by, and in the name of, the personal representative of the estate of the deceased person . . . .

* * *

(6) In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

There is no common-law right to recover damages for a wrongfully caused death. Instead, the wrongful death act provides the exclusive remedy under which a plaintiff may seek damages for a wrongfully caused death. *Courtney v Apple,* 345 Mich 223, 228; 76 NW2d 80 (1956). That does not mean, however, that the wrongful death act is the only act that is applicable in a wrongful death action. For instance, the medical malpractice statute of limitations, MCL 600.5838a, applies to wrongful death actions where the underlying claim is medical malpractice because "in all actions brought under the wrongful death statute, the limitations pe-

riod will be governed by the provision applicable to the liability theory of the underlying wrongful act." *Hawkins v Regional Medical Laboratories, PC,* 415 Mich 420, 436; 329 NW2d 729 (1982); *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004). Additionally, actions brought under the wrongful death act "accrue as provided by the statutory provisions governing the underlying liability theory . . . ." *Hawkins, supra* at 437. Accordingly, when the underlying claim is medical malpractice, the medical malpractice accrual statute, MCL 600.5838a, applies to a wrongful death action. Further, this Court has recently applied the medical malpractice notice of intent requirement of MCL 600.2912b, the medical malpractice tolling provision of MCL 600.5856(d), the medical malpractice affidavit of merit requirement of MCL 600.2912d, and the medical malpractice expert witness qualification requirements of MCL 600.2169(1)(a) to wrongful death actions. *Waltz, supra*; *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004); *Halloran v Bhan*, 470 Mich 572; 683 NW2d 129 (2004).[5]

Clearly, the wrongful death act is not the only act that is pertinent in a wrongful death action. "The mere fact that our legislative scheme requires that suits for tortious conduct resulting in death be filtered through the so-called 'death act', MCL 600.2922; MSA 27A.2922, does not change the character of such actions except to expand the elements of damage available." *Hawkins, supra* at 436. That is, a wrongful death action grounded

[5] The dissent is correct that neither this Court nor the parties in these cases addressed whether these medical malpractice provisions apply to wrongful death actions; their application was just assumed. *Post* at 179.

See also *Anthony v Forgrave,* 126 Mich App 489, 493; 337 NW2d 546 (1983), in which the Court of Appeals held that "in a wrongful death action, venue is determined through application of the venue statutes governing personal injury actions; focus is on the cause of action which underlies the wrongful death claim."

in medical malpractice is a medical malpractice action in which the plaintiff is allowed to collect damages related to the death of the decedent.

The statute at issue here, MCL 600.1483, specifically provides that it applies to "an action for damages alleging medical malpractice . . . ."[6] Plaintiff's action is clearly an "action for damages alleging medical malpractice . . . ." Section 1483(1). This fact is undisputed. Although the Court of Appeals recognized that "§ 1483 applies in an action for damages alleging medical malpractice, and that the case before us, with respect to the subject matter from which the negligence arose, is such an action," *Jenkins v Patel*, 256 Mich App 112, 122; 662 NW2d 453 (2003), it went on to conclude that "the Legislature did not intend [§ 1483's noneconomic] damages cap to limit those damages in a wrongful-death, medical-malpractice action." *Id*. at 125-126. It reached this conclusion on the basis that § 1483(3)'s definition of "noneconomic loss" does not specifically include losses related to wrongful death, such as loss of society and companionship.

Section 1483(3) defines "noneconomic loss" as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss." The wrongful death act, MCL 600.2922(6), specifically provides that "the loss of the

[6] The dissent contends that "the limitation on noneconomic damages does not always apply in an 'action alleging medical malpractice,' " *post* at 179, as indicated by MCL 600.6098(1), which provides, "*If* the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483." [Emphasis added.] We agree that the cap does not always apply in an action alleging medical malpractice. Instead, the cap applies only in medical malpractice actions in which the plaintiff is awarded an amount of *noneconomic* damages that *exceeds* the pertinent cap. The Legislature's use of the word "if," however, does not, as the dissent contends, indicate that the cap *never* applies in a wrongful death action.

society and companionship of the deceased" is an available remedy in a wrongful death action. The Court of Appeals concluded that the damages referred to in § 1483(3) "relate to damages sustained by an individual surviving plaintiff rather than damages sustained by next of kin in a wrongful-death action . . . ." *Jenkins, supra* at 124. Thus, the Court of Appeals concluded that § 1483 is not meant to limit damages that a next of kin would seek for his own suffering, such as loss of society and companionship.

The Court of Appeal's reasoning is flawed, in our judgment, because it fails to give meaning to all the words of the statute and "[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 surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). If the definition of "noneconomic loss" in § 1483(3) does not encompass damages sought by a next of kin under the wrongful death act for his own suffering, as the Court of Appeals concluded, then such definition also would not encompass such damages when sought by a next of kin of a plaintiff who survived the medical malpractice. If that is so, then the Legislature's specific directive that § 1483 limits the total damages recoverable by "all plaintiffs" means nothing. However, this language has to mean something. In our judgment, the "all plaintiffs" language means that the plaintiff who most directly suffered from the medical malpractice is not necessarily the only plaintiff in a medical malpractice action. Rather, the "plaintiff's" next of kin may also be plaintiffs in a medical malpractice action and they may seek damages for the losses that they have suffered as a result of the medical malpractice, such as the loss of society and companionship. *Blackwell v Citizens Ins Co of America*, 457 Mich

662, 664 n 1; 579 NW2d 889 (1998)(a plaintiff's husband's loss of consortium claim is derivative of the plaintiff's medical malpractice claim).

Furthermore, § 1483(3)'s definition of "noneconomic loss" is not limited to "damages or loss due to pain, suffering, inconvenience, physical impairment, [and] physical disfigurement . . . ." Rather, § 1483(3) specifically includes within the definition of "noneconomic loss" all the things mentioned above and "other noneconomic loss." Therefore, just because a noneconomic loss, such as loss of society, is not specifically listed under § 1483(3), does not mean that it is not a covered noneconomic loss. Section 1483(2) directs the trier of fact to "itemize damages into damages for economic loss and damages for noneconomic loss." Noneconomic damages are subject either to the $280,000 cap or the $500,000 cap, while economic damages are not subject to either of these caps.[7] Damages awarded in an action for medical malpractice can obviously only be economic or noneconomic. The damages awarded in this case for loss of society and companionship are clearly noneconomic damages. *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 504-505; 309 NW2d 163 (1981)(loss of consortium, which is defined as including loss of society and companionship, is a noneconomic loss). This fact is undisputed. Accordingly, we agree with defendants that § 1483's definition of "noneconomic losses," which includes "other noneconomic loss," includes noneconomic losses not specifically listed, including those sought by plaintiff's next of kin

[7] Pursuant to MCL 600.1483(4), "[t]he state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index." The 2004 limitations are $366,000 and $653,500. See http://www.michigan.gov/documents/nonecolimit101_3658_7.pdf.

for their own pain and suffering. Otherwise, a plaintiff's next of kin would not be able to recover for such things as loss of consortium, loss of society, and loss of companionship in a medical malpractice action, and, as discussed above, a medical malpractice plaintiff's next of kin can most certainly recover such damages. See *Blackwell, supra*.

Further support for our conclusion that the medical malpractice noneconomic damages cap applies to a wrongful death action where the underlying claim is medical malpractice can be found in the allocation of liability statute, MCL 600.6304. Section 1483(1) refers expressly to § 6304, stating that if the court determines, pursuant to § 6304, that one of the enumerated exceptions apply, then the $500,000 cap, rather than the $280,000 cap, is applicable. Section 6304 provides, in pertinent part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or *wrongful death* . . . 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 . . . .
>
> * * *
>
> (3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) . . . and shall enter judgment against each party, including a third-party defendant . . . .
>
> * * *

> (5) In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483. [Emphasis added.]

Section 6304(1), requiring the jury to allocate fault among all persons, expressly applies to wrongful death actions, because it explicitly states, "In an action based on . . . wrongful death . . . ." Section 6304(3) then requires the court to reduce the plaintiff's award in all subject actions, including wrongful death actions, according to the jury's allocation of fault and subject to any reduction required under subsection 5. As noted above, subsection 5 is the subsection requiring the court to apply the noneconomic damages cap of § 1483. Thus, subsection 3 of § 6304 incorporates the noneconomic damages cap of § 1483 into wrongful death actions by ensuring that in any action subject to § 6304, expressly including wrongful death actions, the court will reduce the plaintiff's verdict both on the basis of the allocation of fault and on the basis of § 1483—the noneconomic damages cap for medical malpractice cases.[8]

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[8] The 1986 version of § 1483 provided, in pertinent part:

> (1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:
>
> (a) There has been a death.

The 1986 version of § 1483 capped noneconomic damages at $225,000 unless one of seven exceptions, including death, applied. Section 1483 was amended in 1993 to adopt a two-tiered cap system. Under this two-tiered cap system, the lower cap applies unless one of three exceptions, not including death, applies. While the 1986 version of § 1483 specifically provided that the noneconomic damages cap does not apply to

Plaintiff argues that the wrongful death act expressly precludes application of the medical malpractice noneconomic damages cap to wrongful death actions. As noted above, MCL 600.2922(6) provides, in pertinent part:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Plaintiff argues that this provision governs damages in wrongful death claims, in such a manner that other provisions are rendered inapplicable. However, this Court has held that other statutory and common-law limitations on the amount of damages apply to wrongful death actions. For instance, comparative negligence principles and the collateral source setoff rule, MCL 600.6303(1), apply to wrongful death actions. *Solomon v Shuell*, 435 Mich 104; 457 NW2d 669 (1990); *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998), overruled on other grounds by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000).[9]

Contrary to plaintiff's contention, § 1483 and § 2922(6) are not incompatible. Notwithstanding § 1483, in accordance with § 2922(6), "[i]n every action under" the wrongful death act, "the court or jury may award damages as the court or jury shall consider fair

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wrongful death actions, the current version does not specifically provide that the cap does not apply to wrongful death actions.

[9] The dissent is correct that neither this Court nor the parties in these cases addressed whether these limitations apply to wrongful death actions; their application was just assumed. *Post* at 179.

and equitable," including "reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased." Only after the court or jury has, in its discretion, awarded damages as it considers fair and equitable does the court, pursuant to § 6304(5), apply the noneconomic damages cap of § 1483. This is made explicitly clear in § 6098(1), which states:

> A judge presiding over an action alleging medical malpractice shall review each verdict to determine if the limitation on noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483.

Section 6304(5) similarly provides:

> In an action alleging medical malpractice, the court shall reduce an award of damages in excess of 1 of the limitations set forth in section 1483 to the amount of the appropriate limitation set forth in section 1483. The jury shall not be advised by the court or by counsel for either party of the limitations set forth in section 1483 or any other provision of section 1483.

Although § 1483 reduces the damages awarded by the trier of fact, it does nothing to impinge upon the trier of fact's ability to determine an amount that is "fair and equitable." That is, § 1483 does not diminish the ability of the trier of fact to render a fair and equitable award of damages; it merely limits the plaintiff's ability to recover the full amount awarded in cases where the cause of action is based upon medical malpractice and the amount exceeds the cap. See *Phillips v Mirac, Inc,* 470 Mich 415; 685 NW2d 174 (2004).

As the Court of Appeals in *Zdrojewski v Murphy*, 254 Mich App 50, 76; 657 NW2d 721 (2002), quoting *Phillips v Mirac, Inc*, 251 Mich App 586, 594; 651 NW2d 437 (2002), aff'd 470 Mich 415; 685 NW2d 174 (2004), explained when it held that the noneconomic damages cap does not violate a plaintiff's right to a jury trial, the noneconomic damages cap " 'does not impinge on a jury's right to . . . determine[e] . . . the amount of damages . . . incurred.' " Instead, it " 'only limits the legal consequences of the jury's finding.' " That is, " '[o]nce the jury has reached its verdict, the trial judge merely enters a judgment on the verdict that is consistent with the law.' " *Zdrojewski*, *supra* at 76-77. "Plaintiff was able to try this case in front of a jury that rendered a verdict awarding plaintiff damages. Because MCL 600.6304(5) prohibits the trial court from informing the jury of the noneconomic damages limitation of MCL 600.1483, the jury rendered its damages award on the basis of the facts of the case, unaware of the limitation of the statute." *Id.* at 77. Accordingly, the noneconomic damages cap does not violate a plaintiff's statutory right to have the court or jury "award damages as the court or jury shall consider fair and equitable." Section 2922(6).

IV. CONCLUSION

We conclude that the medical malpractice noneconomic damages cap does apply to wrongful death actions where the underlying claim is medical malpractice.[10] Accordingly, we reverse the judgment of the

[10] Because no allegation has been made that plaintiff was hemiplegic, paraplegic, quadriplegic, or had permanently impaired cognitive capacity, or that there had been permanent loss of or damage to a reproductive organ because of defendants' medical malpractice, we conclude that the lower cap applies. Cf. *Shinholster* v *Annapolis Hosp*, 471 Mich 540; 685 NW2d 275 (2004).

Court of Appeals and remand this case to the Court of Appeals for consideration of the constitutional issues raised by plaintiff, which were not resolved by the Court of Appeals in light of its analysis of the statutory issue.[11]

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

KELLY, J. (*dissenting*). I disagree with the majority's conclusion that the medical malpractice noneconomic damages cap applies to wrongful death actions. The Court of Appeals analysis and decision concerning this issue were correct and should be affirmed.

STATUTORY INTERPRETATION

This Court has often repeated the proper approach to interpreting statutes. We recently stated:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992)."

[11] Because we conclude that the medical malpractice noneconomic damages cap applies to actions filed under the wrongful death action where the underlying claim is medical malpractice, and because defendants have not argued that an award so capped is excessive, noneconomic damages in this case must be reduced in accordance with § 1483, consistent with this opinion.

[*Omelenchuk v City of Warren,* 466 Mich 524, 528; 647 NW2d 493 (2002), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

THE WRONGFUL DEATH ACT

The wrongful death act[1] is the exclusive remedy in wrongful death cases. *Courtney v Apple,* 345 Mich 223, 228; 76 NW2d 80 (1956). The Court of Appeals correctly reasoned that the medical malpractice noneconomic damages cap found in MCL 600.1483 does not apply to actions brought under the act. *Jenkins v Patel*, 256 Mich App 112; 662 NW2d 453 (2003). Furthermore, the Court of Appeals concurring opinion of Judge KELLY underscores that a plain language reading of the act precludes the application of the MCL 600.1483 cap.

The wrongful death act was passed to ensure the preservation of claims that, at common law, would have terminated with the death of the victim or the tortfeasor. *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 428-429; 329 NW2d 729 (1982). To ensure the survival of a claim, a wrongful death claim must be filed in conformity with the provisions of the act.

An injured plaintiff may file suit under other statutory provisions. However, if he dies in the course of litigation, to recover damages for the death, his estate must file a claim under the wrongful death act. MCL 600.2921. The act contains no cap on the damages available. See MCL 600.2922. It was not amended by tort reform legislation.[2]

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[1] MCL 600.2922.

[2] The most recent amendment to the wrongful death act occurred in 2000. This amendment made modifications to the statute in conformity with the Estates and Protected Individuals Code. MCL 700.1101 *et seq*. Before that, the statute was amended in 1985. It was not amended in 1995, when tort reform legislation was passed.

In this case, the decedent's estate sought damages for losses sustained by the decedent's seven children and seven siblings. A malpractice action brought on behalf of the decedent had she been alive would not have survived her. Plaintiff had no alternative but to file suit under the wrongful death act.

The act contains the substance, procedures, and the measure of damages in an action brought against one who has caused the death of another.

MCL 600.2922(6) provides:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

Indisputably, plaintiff's action is governed by the specific provisions of the act. I agree with the Court of Appeals majority that

> standing alone, the [wrongful death act] mandates recovery in any amount, limited only by the requirement that the amount be fair and equitable, for noneconomic losses, including those for loss of society and companionship. Without taking into consideration the damages cap . . . the [act] clearly and unambiguously governs a medical-malpractice action involving death and the accompanying request for damages. This was clearly the Legislature's intent in enacting the [act]. Tort-reform legislation, which included the damages cap, did not result in any amendment of the [act]. [*Jenkins*, *supra* at 119-120.]

In short, the only limitation intended by the Legislature on noneconomic damages under the wrongful death act is that the amount be fair and equitable.

THE MEDICAL MALPRACTICE NONECONOMIC DAMAGES CAP STATUTE

I agree with Court of Appeals Judge KELLY that the wrongful death act and the medical malpractice damages cap statute need not be read in pari materia. The statutes serve different purposes. The medical malpractice damages cap serves to limit liability in a medical malpractice action. As stated above, the wrongful death act provides for the survival of an action once the victim dies. It allows the estate to recover damages for the value to the estate of the life of the deceased. While the Legislature could have made the medical malpractice damages cap expressly applicable to wrongful death actions, it chose not to do so.

The wrongful death act specifically provides for damages in actions filed in accordance with its provisions. See MCL 600.2922(6). Just as this Court should not expand the remedies available under the act, it should not narrow them, absent an explicit indication that the Legislature intended it.

If the Legislature wanted the medical malpractice damages cap statute to apply in wrongful death actions, some indication of that intention would be present in the language of the wrongful death act. Furthermore, although the Legislature was aware of the exclusive damages provision in the wrongful death act, it made no reference to a limitation on damages in the medical malpractice noneconomic damages cap statute.

The Legislature is presumed to have knowledge of existing laws. It is assumed to have measured the effect of new laws on all existing laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). It is presumed to know that the wrongful death act

provides specifically and exclusively for damages in wrongful death claims.

Therefore, it is significant that the Legislature declined the opportunity to list death as an injury subject to the damages cap in either the wrongful death act or the medical malpractice noneconomic damages cap statute. The inference is strong that the damages cap does not apply in wrongful death cases arising from underlying medical malpractice claims.

OTHER LEGISLATION

The Legislature has specifically addressed death in other legislation. In the products liability cap act, MCL 600.2946a,

> a statute analogous to the damages cap, the Legislature not only specifically addressed death, but identified death as one of the two injuries that results in the second-tier cap:
>
> "In an action for product liability, the total amount of damages for noneconomic loss shall not exceed $280,000.00, unless the defect in the product caused either the person's death or permanent loss of a vital bodily function, in which case the total amount of damages for noneconomic loss shall not exceed $500,000.00." [MCL 600.2946a(1).]
>
> Thus, while the Legislature was clearly aware that death is a possible injury in medical-malpractice claims just as in products-liability claims, it chose not to identify it as an injury subject to the damages cap. [*Jenkins, supra* at 135-136 (KELLY, J., concurring).]

MCL 600.6098(1) lends support to the plaintiff's argument. The language of this section requires a judge presiding over an action alleging medical malpractice to determine

> if the limitation of noneconomic damages provided for in section 1483 applies. If the limitation applies, the court shall set aside any amount of noneconomic damages in excess of the amount specified in section 1483.

The Legislature's use of the word "if" in MCL 600.6098(1) suggests that the limitation on noneconomic damages does not always apply in an "action alleging medical malpractice." This language supports the conclusion that the medical malpractice damages cap does not apply in wrongful death actions.

The majority claims that this section means that the cap is applicable only where the amount of a damage award exceeds the damages cap. It believes that the limitation does not apply if the jury award is less than the damages cap amount. I disagree. The cap is applicable even in that case. When it has not been necessary to reduce the award, the cap is unapplied, not inapplicable.

The majority references cases in which, it says, this Court has applied other statutes to the wrongful death act. *Ante* at 165. See *Halloran v Bhan* 470 Mich 572; 683 NW2d 129 (2004); *Grossman v Brown*, 470 Mich 593; 685 NW2d 198 (2004). This is accurate; however, the issue was not raised in those cases. The issue in *Halloran* and *Grossman* was not whether the statutes mentioned were properly applied to claims made under the wrongful death act. The parties in those cases raised questions involving medical malpractice expert witness's qualifications to testify. The parties did not question whether the statutes in question applied to the wrongful death act.

Likewise, contrary to the majority's characterization of *Solomon*[3] and *Rogers*,[4] this Court did not *hold* "that

[3] *Solomon v Shuell*, 435 Mich 104; 457 NW2d 669 (1990).

[4] *Rogers v Detroit*, 457 Mich 125; 579 NW2d 840 (1998).

other statutory and common-law limitations on the amount of damages apply to wrongful death actions." *Ante* at 171. Again, those cases involved different issues. *Rogers* involved questions of governmental immunity, attorney misconduct, and various evidentiary claims. The only reference to wrongful death is in the factual background of the case. *Solomon* involved whether certain evidence was admissible under an exception to the hearsay rule. It also involved the application of the rescue doctrine. Again, reference to the wrongful death nature of the case is mentioned only in the factual background. While the Court assumed the application of these statutes, that is a far cry from deciding an issue raised by the parties.

Furthermore, whether the savings provision in the wrongful death act[5] applies to medical practice actions[6] has little bearing on whether the Legislature intended that the *damages cap* statute applies. The wrongful death act specifically references the relevant statute of limitations provision of the underlying claim. MCL 600.5852; *Waltz v Wyse*, 469 Mich 642, 658-659; 677 NW2d 813 (2004) (CAVANAGH, J., dissenting).

CONCLUSION

The Legislature made no mention in the wrongful death act to there being a cap on damages available under it. No other act, including MCL 600.1483, makes the medical malpractice damages cap applicable to wrongful death actions. I conclude that the Legislature did not intend that the medical malpractice damages cap should be applied to wrongful death actions.

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[5] MCL 600.5852.

[6] See *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

Therefore, the Court of Appeals analysis and decision regarding this issue should be affirmed.

CAVANAGH, J., concurred with KELLY, J.

PEOPLE v RUSSELL

Docket No. 122998. Argued March 9, 2004 (Calendar No. 1). Decided July 27, 2004.

Lord S. Russell was convicted by a jury in the Kent Circuit Court of drug offenses after a trial in which he represented himself. At trial and before the jury was chosen, the defendant advised the court that he wanted a different attorney than his second court-appointed attorney. The court gave the defendant four options: retaining counsel at defendant's expense, continuing with the court-appointed counsel, self-representation, or self-representation with the court-appointed counsel available for consultation. When the defendant rejected all four options presented, the court, Donald A. Johnston, J., determined that the defendant effectively chose to represent himself. The Court of Appeals, FITZGERALD, P.J., HOLBROOK, JR., and CAVANAGH, JJ., affirmed the convictions, holding that, after being advised of his options, defendant's conduct in repeatedly rejecting representation by the court-appointed counsel demonstrated his unequivocal choice to proceed with self-representation, as is his right under US Const, Am VI; Const 1963, art 1, § 13. 254 Mich App 11 (2002). The defendant appealed on the basis that he had not unequivocally waived his right to counsel because he had not agreed to represent himself at trial.

In an opinion by Justice YOUNG, joined by Justices CAVANAGH, WEAVER, KELLY, and TAYLOR, the Supreme Court *held*:

In this case, defendant clearly and unequivocally declined self-representation, and he never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial. While defendant was given clear choices, defendant consistently denied that he was choosing to represent himself. Courts must indulge every reasonable presumption *against* the waiver of the right to counsel. If any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel. In these circumstances, defendant could not be presumed to have waived his right to counsel and required to represent himself at trial.

Where defendant refused to explicitly choose between continued representation by appointed counsel and self-representation,

the question of waiver of the right to counsel should have been resolved in favor of representation. Although the right to counsel and the right to self-representation are both fundamental constitutional rights, representation by counsel, as a guarantor of a fair trial, is the standard, not the exception.

Reversed and remanded to the circuit court for a new trial.

Justice MARKMAN, joined by Chief Justice CORRIGAN, dissenting, stated that he would affirm the defendant's conviction because the defendant, by his conduct alone, unequivocally waived his constitutional and statutory right to trial counsel and that the waiver satisfied the requirements of *People v Anderson*, 398 Mich 361, 367-368 (1976), and MCR 6.005(D).

Waiver of the right to trial counsel requires that the defendant's request to represent himself be made unequivocally, knowingly, intelligently, and voluntarily. *Anderson*, *supra*. This defendant was offered four options by the trial court in response to his request for a third appointed counsel. Having clearly rejected three of these options, as a matter of logic, it can fairly be concluded that the defendant "unequivocally" assented to the sole remaining option. Further, given the fact that the defendant repeatedly informed the trial court that he did not want his current court-appointed lawyer to represent him, the majority's holding that the trial court should have required defendant to retain his current lawyer would arguably have violated defendant's Sixth Amendment right to trial counsel. Further, the defendant "knowingly and intelligently" waived his right to trial counsel because he made such waiver only after the trial court repeatedly warned him of the dangers of self-representation. *Anderson, supra* at 368, 370-371. Finally, the defendant "voluntarily" waived his right to trial counsel because he failed to assert a valid reason for having the trial court appoint new counsel.

CRIMINAL LAW — RIGHT TO COUNSEL — WAIVER.

A trial court must indulge every reasonable presumption against the waiver of the right to counsel by a criminal defendant; any question regarding the waiver of the right to counsel must be resolved in favor of continued representation by counsel (US Const, Am VI).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *William A. Forsyth*, Prosecuting At-

torney, *Timothy K. McMorrow*, Chief Appellate Attorney, and *Gary A. Moore*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for the defendant.

YOUNG, J. In this case, we granted leave to appeal to consider whether a defendant may, by conduct alone, "unequivocally" waive his Sixth Amendment Right to counsel and elect to proceed pro se. We need not reach that question in this case because a review of the record reveals that defendant clearly and unequivocally declined self-representation. We reverse the decision of the Court of Appeals and remand for a new trial.

I. FACTS AND PROCEDURAL HISTORY

Defendant was charged with possession with intent to deliver less than fifty grams of both cocaine and heroin.[1] At the beginning of trial, defendant informed the trial court that he wanted his trial counsel, Damian Nunzio, removed and new trial counsel appointed.[2]

The trial court did not grant defendant's request, but noted that he "would entertain" the request if defendant presented "some valid reason" to appoint substitute counsel other than "personality difficulties." Defendant offered no such explanation. After refusing to grant defendant's request, the trial court offered defendant the following four options:

> [O]ur alternatives here are basically these. You may, if you have made arrangements on your own, bring in your

[1] MCL 333.7401(2)(a)(iv).

[2] Mr. Nunzio was defendant's second appointed attorney. Defendant's first appointed attorney withdrew after defendant complained about counsel's representation.

> own lawyer at your own expense and hire anybody you want, and I will allow that lawyer to substitute right now and we'll go from here.
>
> Option number two, we can go forward with Mr. Nunzio, the second lawyer that's been provided for you at government expense, and try this case on the merits. I would strongly suggest that, if Mr. Nunzio thinks you have a valid defense, that you consult with him and work with him on it because he's a man that knows how to present such a defense.
>
> Or number three, you may decide to serve as your own counsel and represent yourself. I caution you strongly against the third course because obviously a trial involves issues of complicated legal procedure and, unless you are legally trained, and I don't know whether you are or not but I suspect you are not, there are many pitfalls there for the unwary.
>
> And that leads us, I suppose, to option four, which is sort of a variation on option number three, in which you provide your own defense but Mr. Nunzio would be available to consult with you and provide you assistance as to technical legal points when you need counsel.[3]

After defendant continued to indicate that he did not "feel comfortable" with his appointed attorney's representation, the trial court reminded defendant of his other available options—defendant could retain counsel or he could represent himself:

> *The Court*: And, while I would not advise it, I will certainly guard your rights and see to it that you have the opportunity to present your own defense, if that's your wish.
>
> *Defendant*: Well, that's putting words in my mouth. I—
>
> *The Court*: Well, then maybe you should put words in your mouth and tell me what you want.

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[3] Thus, two of the four options presented to defendant involved forms of self-representation.

> *Defendant*: I told you. I don't want Mr. Nunzio as my attorney.
>
> *The Court*: . . . So, your options are really kind of limited.
>
> *Defendant*: The State has the obligation to give me representation.

At a later point in the proceedings, the following exchange occurred:

> *The Court*: . . . And if you can't cooperate with the man, then you can try the case yourself, and that's fine. You have a constitutional right to do it. I don't think it's a good idea, but I'm here to guarantee your constitutional rights. And if you want to try your case yourself, by goodness, that's what we're going to do.
>
> *Defendant*: Well, that's what you keep insisting that I do, *and I'm telling you that I need competent counsel* . . . . [Emphasis added.]

Although the trial court then gave defendant several more opportunities to select among the four proffered options, defendant continued to reject all of them. The trial court then empanelled the jury and asked defendant if he had any questions for the panel. Defendant stated:

> Yes. Ladies and gentlemen, this is something totally new for me. I'm being forced into this situation . . . .
>
> I requested the Court appoint new counsel for me, and they said, for some reason being that we're here and they don't see the difference—any differences between me and Mr. Nunzio. So they forced me to go on with this trial alone by myself.

After a four-day trial, defendant was convicted of both charges and sentenced to consecutive prison terms of 2½ to 40 years for each conviction.

The Court of Appeals affirmed defendant's convictions in a published opinion. The panel concluded that

defendant implicitly "made his unequivocal choice" to proceed in propria persona "by his own conduct" when he continued to reject appointed counsel's representation.[4]

II. STANDARD OF REVIEW

We review for clear error the trial court's factual findings surrounding a defendant's waiver. However, to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo.[5]

III. ANALYSIS

A. THE FEDERAL REQUIREMENTS FOR SELF-REPRESENTATION

The Sixth Amendment provides that the accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of counsel for his defence." US Const, Am VI.[6] This requirement was made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[7] The right to counsel is considered fundamental because it is essential to a fair trial and

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[4] 254 Mich App 11, 17; 656 NW2d 817 (2002).

[5] See *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001); *People v Daoud*, 462 Mich 621, 629-630; 614 NW2d 152 (2000).

[6] Likewise, Const 1963, art 1, § 20 provides that the accused in a criminal prosecution "shall have the right . . . to have the assistance of counsel for his . . . defense." Our Michigan Constitution is not at issue here because the federal Supremacy Clause, US Const, art VI, cl 2, requires that we apply the federal constitutional analogue to the degree that our Constitution provides less protection to a criminal defendant. *California v Ramos*, 463 US 992; 103 S Ct 3446; 77 L Ed 2d 1171 (1983). This case does not present an opportunity to discern whether our Constitution provides a right of self-representation that is greater than its federal counterpart.

[7] *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

attaches at the trial stage, which is clearly a critical stage of the proceedings.[8] While a defendant may choose to forgo the assistance of counsel at trial, any waiver of the right to counsel must be knowing, voluntary, and intelligent.[9] In addition, it is a long-held principle that courts are to make every reasonable presumption *against* the waiver of a fundamental constitutional right,[10] including the waiver of the right to the assistance of counsel.[11]

In *Faretta v California*,[12] the United States Supreme Court held that a defendant "has a constitutional right to proceed without counsel when he voluntarily and intelligently *elects* to do so."[13] While the *Faretta* majority noted that the framers of the Constitution never

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[8] *Id.*

[9] *Iowa v Tovar*, 541 US 77; 124 S Ct 1379; 158 L Ed 2d 209 (2004); *Godinez v Moran*, 509 US 389; 113 S Ct 2680; 125 L Ed 2d 321 (1993); *Patterson v Illinois*, 487 US 285, 292 n 4; 108 S Ct 2389; 101 L Ed 2d 261 (1988).

[10] The principle that every reasonable presumption should be indulged against the waiver of a fundamental constitutional right has a long-standing pedigree in federal constitutional law. See *Hodges v Easton*, 106 US (16 Otto) 408, 413; 1 S Ct 307; 27 L Ed 169 (1882) ("It has been often said by this court that the trial by jury is a fundamental guaranty of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver.").

[11] *Johnson v Zerbst*, 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938) (every reasonable presumption should be indulged against the waiver of counsel); *Michigan v Jackson,* 475 US 625, 633; 106 S Ct 1404; 89 L Ed 2d 631 (1986); *Martinez v Court of Appeal of California*, 528 US 152, 161; 120 S Ct 684; 145 L Ed 2d 597 (2000) (noting that there is a " 'strong presumption against' " waiver of counsel) (citation omitted); *People v Adkins (After Remand)*, 452 Mich 702; 551 NW2d 108 (1996).

[12] 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975). In *Faretta*, the majority identified a "nearly universal conviction" that forcing representation on an unwilling defendant "is contrary to his basic right to defend himself *if he truly wants to do so*." *Id.* at 817 (emphasis added).

[13] *Id.* at 807 (emphasis added). See also *Martinez, supra* at 154. In Michigan, the right of self-representation is a right explicitly conferred in

imagined that the right of self-representation "might be considered inferior to the right of assistance of counsel,"[14] the United States Supreme Court has also noted that the "right to self-representation is not absolute."[15] Indeed, because a defendant automatically enjoys the right to the assistance of counsel,[16] and the right of self-representation and the right to counsel are mutually exclusive, a defendant must *elect* to conduct his own defense " 'voluntarily and intelligently,' "[17] and must be made aware of the dangers and disadvantages of self-representation "in order to"[18] proceed pro se.[19] Therefore, while the right of self-representation is a fundamental constitutional right, other interests, such as the failure to effectively waive the right to counsel or a governmental interest in "ensuring the integrity and efficiency of the trial" may in some instances outweigh the defendant's constitutional right to act as his own counsel.[20] In sum, although the right to counsel and the right of self-representation are both fundamental con-

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our Constitution. See Const 1963, art 1, § 13. This right has been afforded to the citizens of Michigan since 1850. See Const 1850, art 6, § 24.

[14] *Faretta, supra* at 832.

[15] *Martinez, supra* at 161.

[16] The right to the assistance of counsel is automatic; assuming the right is not waived, assistance must be made available at critical stages of a criminal prosecution, regardless whether the defendant has requested it. *United States v Wade*, 388 US 218, 223-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Carnley v Cochran*, 369 US 506, 513; 82 S Ct 884; 8 L Ed 2d 70 (1962).

[17] *Martinez*, *supra* at 161 (citation omitted).

[18] *Faretta*, *supra* at 835.

[19] Moreover, even once properly elected, self-representation may be terminated or standby counsel appointed, over a defendant's objection. *Faretta, supra* at 834 n 46. Standby counsel may participate in the trial proceedings, without the express consent of the defendant, as long as that participation does not "seriously undermin[e]" the "appearance before the jury" that the defendant is representing himself. *McKaskle v Wiggins*, 465 US 168, 187; 104 S Ct 944; 79 L Ed 2d 122 (1984).

[20] *Martinez*, *supra* at 162.

stitutional rights, representation by counsel, as guarantor of a fair trial, "is the standard, not the exception,"[21] in the absence of a proper waiver.

B. MICHIGAN'S APPLICATION OF THE FEDERAL STANDARD

In *People v Anderson*,[22] this Court applied the *Faretta* standard for self-representation and established requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself. Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.

In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides in pertinent part as follows:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

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[21] *Id.* at 161. See also *United States v Martin*, 25 F3d 293, 295 (CA 6, 1994) ("While the right to self-representation is related to the right to counsel, the right to self-representation is grounded more in considerations of free choice than in fair trial concerns.").

[22] 398 Mich 361; 247 NW2d 857 (1976). See also *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994).

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

In *Adkins*, this Court clarified the scope of judicial inquiry required by *Anderson* and MCR 6.005(D) when confronted with an initial request for self-representation. *Adkins* rejected a "litany approach" in favor of a "substantial compliance" standard:

> We hold, therefore, that trial courts must substantially comply with the aforementioned substantive requirements set forth in both *Anderson* and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach. Further, we believe this standard protects the "vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary burden on the criminal justice system."
>
> Completion of these judicial procedures allows the court to consider a request to proceed in propria persona. *If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. The defendant should then continue to be represented by retained or appointed counsel,* unless the judge determines substitute counsel is appropriate.[23]

Under *Adkins*, if the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively

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[23] *Adkins*, *supra* at 726-727 (emphasis added; internal citation omitted).

waived his Sixth Amendment right to the assistance of counsel. In addition, the rule articulated in *Adkins* provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel.

C. RESOLUTION

In this case, a review of the record indicates two key facts: first, that defendant expressly rejected self-representation and, second, that defendant never voluntarily waived his Sixth Amendment right to the assistance of counsel at trial.[24] Indeed, defendant clearly sought appointment of *another* trial counsel, and defendant and the trial court engaged in a lengthy dialogue over defendant's desire to have substitute counsel appointed.

While defendant was given clear choices, defendant consistently denied that *his* choice was self-representation. Throughout his colloquy with the trial court, defendant steadfastly rejected the option of proceeding to trial without the assistance of counsel.[25] Therefore, it cannot be said, as the Court of Appeals and

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[24] Because defendant clearly and unambiguously rejected self-representation, we need not address whether a defendant's desire to proceed pro se may *ever* be inferred by conduct.

[25] Defendant did not have the *right* to a third appointed counselor, because no defendant is entitled to the appointed counselor of his choice. See *Wheat v United States*, 486 US 153; 108 S Ct 1692; 100 L Ed 2d 140 (1988); *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973); *People v Portillo*, 241 Mich App 540; 616 NW2d 707 (2000). Rather, the decision to permit substitution of appointed counsel is within the discretion of the trial court. *People v Hooper*, 406 Mich 978; 280 NW2d 444 (1979). In this case, defendant does not argue that the trial court abused its discretion in failing to appoint substitute counsel; rather, defendant argues before this

dissenting opinions maintain, that defendant *unequivocally* chose self-representation and voluntarily waived his Sixth Amendment right to counsel.[26]

We believe that defendant's repudiation of self-representation was unmistakable in this case. However, to the degree that defendant's refusal to explicitly choose between continued representation by appointed counsel and self-representation created any ambiguity regarding defendant's desire to unequivocally waive his right to trial counsel, any ambiguity should have been resolved in favor of representation because, consistently with *Adkins* and United States Supreme Court precedent, courts *must* indulge every reasonable presumption against the waiver of the right to counsel.[27]

Court that the trial court reversibly erred because defendant did not unequivocally waive his right to counsel and did not elect to represent himself.

[26] As the dissent notes, there are some federal circuit court cases holding that an unreasonable insistence on the appointment of a new attorney operates as a waiver of the right to counsel. This view is in contravention of the principle articulated in *Johnson*. Until the United States Supreme Court sees fit to distinguish or overrule *Johnson*, this Court is required to follow it. Moreover, it does not logically follow that a defendant affirmatively waives a fundamental constitutional right simply because he insists on a favorable ruling on something to which he is not entitled. Under the theory advocated by the dissent, if a defendant were to insist on empanelling only left-handed jurors, his insistence would constitute an affirmative waiver of his right to a jury trial *even if* he explicitly indicates that he *desires* a jury trial.

[27] Because defendant's waiver of his right to the assistance of counsel at trial was not voluntary, we need not address whether defendant's waiver was knowing and intelligent. It is worth noting, however, that an effective waiver of *trial* counsel requires a more exacting waiver than that required to waive counsel at pretrial stages of the proceedings. See *Iowa v Tovar*, *supra,* 124 S Ct 1387-1388; 158 L Ed 2d 220-221 (requiring that a defendant "must be warned *specifically* of the hazards ahead" and that those warnings surrounding waiver of counsel at trial be "*rigorous[ly] conveyed*") (emphasis added; citation omitted).

IV. CONCLUSION

Because defendant unequivocally rejected self-representation and did not voluntarily waive his right to the assistance of counsel at trial, the trial court erred in requiring defendant to proceed in propria persona. The clear cut rule articulated by this Court in *Adkins* requires that counsel should have been retained where defendant explicitly rejected self-representation.[28] Accordingly, the decision of the Court of Appeals is reversed and the case is remanded to the trial court for a new trial.[29]

CAVANAGH, KELLY, WEAVER, and TAYLOR, JJ., concurred with YOUNG, J.

MARKMAN, J. (*dissenting*). I respectfully dissent from the majority opinion because I agree with the trial court and the Court of Appeals and believe that defendant, by his conduct alone, "unequivocally" waived his constitutional and statutory right to trial counsel. US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. Because I believe that defendant's waiver also satisfied the requirements set forth by this Court in *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), and MCR 6.005(D), I would affirm defendant's convictions.

Further, I respectfully urge the United States Supreme Court to consider granting certiorari in this case

[28] In this instance, the trial court should have simply denied defendant's request to appoint another counsel and continued with the proceedings. Defendant's *acceptance* of the trial court's discretionary ruling was not required.

[29] The complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal. *Gideon v Wainwright, supra*; *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

to clarify the operation of the presumption against the waiver of trial counsel in *Johnson v Zerbst*, 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938). In this case, defendant unreasonably refused to cooperate with his second court-appointed counsel, but also declined to assert that he wished to proceed pro se. Some federal courts have interpreted such conduct as constituting an effective waiver of the right to trial counsel, but the lack of clarity regarding the scope of the *Johnson* presumption continues to create constitutional uncertainty. Where a defendant unreasonably declines appointed counsel's services, the *Johnson* presumption should not remain inviolate. The right to trial counsel, the right to self-representation, and the prohibition against forcing trial counsel on an unwilling defendant intersect. Thus, courts must protect a defendant's rights while also safeguarding the integrity of the judicial process from delay tactics and gamesmanship, both of which are on display in this case. If defendant here had been *required* to retain his counsel, as the majority would require, he would now almost certainly be arguing that his right to trial counsel had been violated and that such counsel had been forced upon him against his will.

I. BACKGROUND

Defendant was charged with possession of cocaine and heroin. At the beginning of trial, defendant informed the trial court that he wanted his trial counsel, Damian Nunzio, removed and new trial counsel appointed.[1] Among other allegations, defendant claimed that there had been miscommunications between him and Nunzio, that Nunzio had been convinced of defen-

[1] The trial court permitted defendant's first appointed trial counsel, Paul Mitchell, to withdraw after defendant complained about the manner in which he represented defendant.

dant's guilt, that Nunzio had failed to give defendant certain helpful documents, and that Nunzio had failed to call certain witnesses.

The court found that defendant had failed to present "some valid reason why a different lawyer should be appointed, other than the fact that [defendant was] seeming to have personal difficulties with the leading members of the bar." The trial court denied defendant's motion to appoint new counsel, and informed defendant that his options were as follows:

> You may, if you have made arrangements on your own, bring in your own lawyer at your own expense and hire anybody you want, and I will allow that lawyer to substitute right now and we'll go from here.
>
> Option number two, we can go forward with Mr. Nunzio, the second lawyer that's been provided for you at government expense, and try this case on the merits. I would strongly suggest that, if Mr. Nunzio thinks you have a valid defense, that you consult with him and work with him on it because he's a man that knows how to present such a defense.
>
> Or number three, you may decide to serve as your own counsel and represent yourself. I caution you strongly against the third course because obviously a trial involves issues of complicated legal procedure and, unless you are legally trained, and I don't know whether you are or not but I suspect you are not, there are many pitfalls there for the unwary.
>
> And that leads us, I suppose, to option four, which is sort of a variation on option number three, in which you provide your own defense but Mr. Nunzio would be available to consult with you and provide you assistance as to technical legal points when you need counsel. That pretty much exhausts the field, as far as I can determine at this moment, for what we might do about proceeding here today.

Defendant insisted that he did not want Nunzio to represent him because, "Mr. Nunzio has stated that he doesn't believe that I'm innocent." Nunzio denied this allegation.

The trial court explained to defendant:

> [E]ven if we were to assume arguendo that [Nunzio] did say that, and I don't believe it for a minute, it would not be germane. A lawyer represents a client by presenting his defense under the law.
>
> * * *
>
> It is not necessary that Mr. Nunzio believe you are innocent in order to represent you and present the very best defense available to you under the law. So, essentially we're sparring at shadows here, and this discussion is not getting us anywhere.

Defendant continued to insist that he did not want Nunzio to represent him. The trial court responded:

> I think I've given you the options as I understand them, and I'm prepared to go with whichever one you feel is the appropriate one to follow at this particular time.

Defendant replied, "*Well, I've expressed mine. I don't want Mr. Nunzio to represent me.*" (Emphasis added.)

The court then explained that only three options remained for defendant:

> Your options are that you may bring in counsel of your own choosing, which you've had many months to do and I don't see anybody sitting here, so I don't assume that [is] going to happen; or you may represent yourself in which case I will allow Mr. Nunzio to be available to provide you with legal counsel on technical and procedural points when you wish to consult with him.

The trial court then warned defendant about the dangers of self-representation, stating:

> If you wish to do that, I will certainly proceed in that fashion. I would not personally advise that you do that, but that's your right.
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> * * *
>
> I should advise you that there is an ancient adage in the law, for good reason, that a man who acts as his own counsel has a fool for a client. The corollary to the rule is that he also has a fool for a lawyer, but, as a practical matter, it all winds up in the same place.
>
> My guess is that you will not fare well in that approach, but you have the right to take that approach if you wish to do it.

Defendant replied, "Well, that's putting words in my mouth." The trial court responded, "Well then maybe you should put words in your mouth and tell me what you want." Defendant responded, "Well, I told you. I don't want Mr. Nunzio as my attorney."

The trial transcript contains four more pages of dialogue between defendant and the trial court in which, although defendant continues to request that a new attorney be appointed for him, the trial court continued to deny such request. The court eventually states:

> What I really want to know is how you want to proceed so we can get started here. And I'm willing to take a recess and let you speak to Mr. Nunzio, or if you want don't want to speak to Mr. Nunzio, I'm willing to take a recess and let you contemplate the matter. But the fact is that we need to know what it is that you wish to do and within the range of the options, which I think I've pretty clearly delineated for you. I'm prepared to accommodate you.
>
> Now, do you wish to consult with Mr. Nunzio or mull this over for a few minutes, or are you ready to make an alternative choice at this time?

Defendant answered, "Your Honor, I thought I made myself clear here." The trial court replied, "Well apparently not because I haven't heard you make any choice . . . I just need to know which of those you wish to do."

The transcript contains another six pages of dialogue between the trial court and defendant in which defendant complained about Nunzio's performance. After the trial court found all of defendant's allegations to be completely unfounded, the following exchange between the trial court and defendant occurred:

> *Defendant*: I don't—I don't want any contact with Mr. Nunzio, and I expressed that to you. I don't want Mr. Nunzio to have anything to do with anything in my case. . . . *There's no way that I will let him try to defend me.*
>
> * * *
>
> All right. Well, I just want it noted that I have stated the conflict between me and attorney Nunzio, and the statements that Mr. Nunzio has made in regards to me and my case, and there's *no way that I would feel comfortable with him having anything to do with the defense on my behalf*. And I'm requesting that you remove him from my case.
>
> *Court*: All right. Well, then, I will inform the jury that you have chosen to represent yourself and that Mr. Nunzio is available as your legal advisor. Now, are you ready to proceed or do you wish to take a few moments to get yourself organized.
>
> *Defendant*: (No verbal response)
>
> *Court*:Mr. Russell that's a question to you.
>
> *Defendant:* I've requested to you, Your Honor, *I said that I don't want Mr. Nunzio involved in nothing of my defense*, and I am requesting of this court to appoint counsel.
>
> *Court*: Well, we have appointed counsel, Mr. Russell, and he sits next to you at this particular moment. Now, you can either work with Mr. Nunzio or demonstrate some reason-

> able basis why he should be removed, which you have not done, or else we're going to start this case and you can represent yourself.
>
> * * *
>
> Inasmuch as you apparently have not made arrangements for alternate counsel, I suggest that you strongly consider going forward with the very capable lawyer that you have been provided. Failing that, I will protect your right to represent yourself. But this is the day and time of proceeding and we've run out of time. We've run out of options. So I suggest that you confine yourself to what we've discussed. [Emphasis added.]

Although the trial court then gave defendant several additional opportunities to select an option,[2] defendant continued to refuse to do so, at which time the trial court empanelled the jury and asked defendant if he had any questions for the panel. Defendant stated:

> Yes. Ladies and gentlemen, this is something totally new for me. I'm being forced into this situation . . . .
>
> I requested the Court appoint new counsel for me, and they said, for some reason being that we're here and they don't see the difference—any differences between me and Mr. Nunzio. So they forced me to go on with this trial alone by myself.

After a four-day trial, defendant was convicted on both charges and sentenced to consecutive prison terms of two-and-a-half to forty years on each count. Although the Court of Appeals remanded this case for correction of the presentence investigation report and resentencing, it affirmed defendant's convictions, concluding that

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[2] In order to accord defendant adequate opportunity to consult with Nunzio regarding the four options, the trial court took two recesses, the first for twenty minutes and the second for one-and-a-half hours.

defendant, by his conduct alone, had demonstrated his choice to represent himself at trial.[3]

II. ANALYSIS

The United States Supreme Court has held that the right to self-representation is guaranteed by the Sixth Amendment of the United States Constitution, *Faretta v California*, 422 US 806, 819-820; 95 S Ct 2525; 45 L Ed 2d 562 (1975), and that a defendant may waive his right to counsel, provided he do so "competently and intelligently." *Johnson, supra* at 468. [W]hether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and *conduct* of the accused." *Id*. (emphasis added).

In Michigan, the right to self-representation is secured by both the state constitution and statute.[4] However, this Court has stated that a trial court may only permit a defendant to represent himself if the following requirements have been satisfied: (1) the defendant's request to represent himself has been unequivocal; (2) the defendant has asserted his right of self-representation "knowingly, intelligently, and voluntarily"; (3) the trial court has been satisfied that the

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[3] 254 Mich App 11, 22; 656 NW2d 817 (2002).

[4] Const 1963, art 1, § 13 provides:

> A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney.

MCL 763.1 provides:

> On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and meet the witnesses who are produced against him face to face.

defendant, in representing himself, "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Moreover, the trial court must also satisfy MCR 6.005(D).[5] *People v Adkins* (*After Remand*), 452 Mich 702, 722; 551 NW2d 108 (1996). Taken together, the requirements of Michigan law are in accord with the waiver requirements of the federal constitution. See *Iowa v Tovar*, 541 US 77; 124 S Ct 1379, 1383; 158 L Ed 2d 209, 216 (2004) ("the [federal] constitutional requirement is satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of the guilty plea"); *Faretta, supra* at 835 (holding that, before a defendant may waive his Sixth Amendment right to counsel, a defendant "should be made aware of the dangers and disadvantages of self-representation").

Compliance with these requirements mandates that the trial court "engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant." *Adkins, supra* at 721. The defendant must exhibit " 'an intentional relinquishment or abandonment' " of the right to trial counsel, and the trial court should " 'indulge every reasonable presumption against

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[5] MCR 6.005(D) provides, in relevant part:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

waiver' " of such right. *Id.*, quoting *Johnson, supra* at 464. Further, " '[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer.' " *Adkins, supra* at 721 (citations omitted).

Defendant asserts that the trial court abused its discretion when it declined defendant's request to appoint him a third attorney, thereby forcing defendant to represent himself. That is, defendant contends that because he did not expressly waive his right to trial counsel, such waiver was, at the very least, equivocal and, therefore, invalid.[6]

I disagree. A waiver of a defendant's right to trial counsel must be "unequivocal," A*nderson, supra* at 367, meaning only that such waiver must be "[c]lear; plain; capable of being understood in only one way, or as clearly demonstrated." Black's Law Dictionary (6th ed). I do not accept the standard proposed by defendant and implied by the majority—that only a verbal waiver can sufficiently constitute an "unequivocal" waiver of the right to trial counsel. Neither defendant nor the majority has cited a single state or federal court decision that has adopted such a standard, and I do not believe this standard to be implicit in the requirement of an "unequivocal" waiver.

Here, defendant was offered four options by the trial court in response to his request for a third appointed counsel. Having clearly rejected three of these options, I believe, as a matter of logic, that it can be fairly concluded that defendant "unequivocally" assented to

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[6] It was entirely proper for the trial court to require defendant to choose between proceeding to trial with his present attorney and representing himself. See *United States v Grosshans*, 821 F2d 1247, 1251 (CA 6, 1987); *Maynard v Meachum*, 545 F2d 273, 278 (CA 1, 1976).

the fourth option. That defendant made clear his displeasure at being limited to these four options does not alter my conclusion. The fact that defendant desired the fifth option of being appointed a third counsel does not transform the trial court's decision to reject such an appointment into an abuse of discretion. See *Mowat v Walsh*, 254 Mich 302, 304; 236 NW 791 (1931); *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003). As the majority has correctly noted, "no defendant is entitled to the appointed counselor of his choice." *Ante* at 192 n 25. Because there was no abuse of discretion, there was no fifth option. Defendant was properly limited by the trial court to four options, and he clearly rejected three of these.

Concerning the first option, defendant, despite repeated invitations and opportunities to hire his own counsel, failed to do so and expressed no interest in doing so. Concerning the third and fourth options, defendant, as noted earlier, unambiguously, repeatedly, and vehemently refused to have Nunzio represent him. See pp 197, 199. The majority would disregard defendant's clear wishes on this point and force defendant to retain Nunzio. *Ante* at 194. In *Faretta, supra* at 820-821, the United States Supreme Court asserted that the Sixth Amendment "right to counsel," does not permit the trial court to appoint counsel that defendant has refused to accept:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal

> character upon which the Amendment insists. It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. . . . This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense. [Emphasis in original.]

Faretta continued by stating, "no State or Colony had ever forced counsel upon an accused; no spokesman had ever suggested that such a practice would be tolerable, much less advisable." *Id*. at 832. The Court then observed:

> There can be no blinking at the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. See *Powell v Alabama*, 287 US 45 [53 S Ct 55; 77 L Ed 158 (1932)]; *Johnson v Zerbst*, 304 US 458 [58 S Ct 1019; 82 L Ed 1461 (1938)]; *Gideon v Wainwright*, 372 US 335 [83 S Ct 792; 9 L Ed 2d 799 (1963); *Argersinger v Hamlin*, 407 US 25 [92 S Ct 2006; 32 L Ed 2d 530 (1972)]. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.
>
> But it is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-

> appointed counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them.
>
> * * *
>
> To force a lawyer on a defendant can only lead him to believe that the law contrives against him. [*Id*. at 832-834.]

Moreover, in his concurrence in *Martinez v Court of Appeals of California*, 528 US 152, 165; 120 S Ct 684; 145 L Ed 2d 597 (2000), Justice Scalia noted:

> I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power—including judicial power—that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel by the *Government* to plead a criminal defendant's case.
>
> That asserting the right of self-representation may often, or even usually, work to the defendant's disadvantage is no more remarkable—and no more a basis for withdrawing the right—than is the fact that proceeding without counsel in a custodial interrogation, or confessing to the crime, usually works to the defendant's disadvantage. Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people. As Justice Frankfurter eloquently put it for the Court in *Adams v United States ex rel. McCann*, 317 US 269, 280 [63 S Ct 236; 87 L Ed 268] (1942), to require the acceptance of counsel "is to imprison a man in his privileges and call it the Constitution."

Thus, after defendant told the trial court that he no longer wanted Nunzio to represent him, the trial court did not have the authority to force defendant to be

represented by Nunzio.[7] Accordingly, I question the basis on which the majority asserts that "the trial court should have simply denied defendant's request to appoint another counsel and continued with the proceedings." *Ante* at 194 n 27.[8] Under *Faretta*, this type of action by the trial court would seemingly have violated defendant's Sixth Amendment right to trial counsel and presumably provided a basis for a new trial.

Thus, in light of *Faretta*, the only remaining option, and this was made abundantly clear to defendant, was the second option. That defendant did not expressly assent to this option is not dispositive of his choice—for such an option is all that remained available to him.[9]

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[7] In response to the majority's assertion that, "[u]nder the theory advocated by the dissent, if a defendant were to insist on empanelling only left-handed jurors, his insistence would constitute an affirmative waiver of his right to a jury trial *even* if he explicitly indicates that he *desires* a jury trial," *ante* at 193, I simply note that, while a defendant *does* have a constitutional right not to be represented by counsel he does not want, *Faretta, supra* at 833, a defendant does *not* have a constitutional right to empanel "only left-handed jurors." Accordingly, I find the majority's example unhelpful in resolving the constitutional issue raised in this case.

[8] It appears to me that the majority's "practical, salutary tool" of thrusting unwanted counsel onto a defendant is at least arguably in contravention of *Faretta*. *Ante* at 192. The majority focuses on only a single sentence in that case, *ante* at 188 n 12, while ignoring the general rule repeatedly set forth in *Faretta* that it is a violation of a defendant's Sixth Amendment right to trial counsel to "compel a defendant to accept a lawyer he does not want." *Faretta, supra* at 833.

[9] To further support my assertion that defendant unequivocally waived his right to trial counsel, I note that defendant did not contradict Nunzio, who, after meeting with defendant during an hour-and-a-half recess, told the trial court, "I believe Mr. Russell still contends he wishes to represent himself." If, as the majority asserts, defendant "consistently denied that his choice was self-representation," *ante* at 192, I question why defendant, who was decidedly vocal in expressing any disagreements that he had during trial proceedings, did not challenge the truth of this statement by Nunzio. From this, I can only surmise that Nunzio correctly characterized defendant's wishes.

The majority's decision to require a defendant under circumstances such as these to *expressly* assent to self-representation is either to ensure that a "no decision" impasse develops in the event that a defendant refuses to give an express assent, or to unwarrantedly pressure the trial court into disregarding its own judgment—appointing new trial counsel where it is not viewed as necessary—and enduring the necessary trial delays as new counsel orients himself.

That is, the majority's decision requires the trial court to exercise its discretion in accord with defendant's own preferences and to compel the trial court to grant him a third appointed counsel. But the question of such an exercise of discretion is a distinct question from whether the trial court has complied with its obligations in permitting a defendant to proceed to trial by self-representation. Because I believe that there has been no abuse of discretion by the trial court in rejecting defendant's application for a third appointed counsel, defendant has no right to such counsel. He has a right only to the four options identified by the trial court.

The upshot of the majority's decision, in my judgment, is that it undermines the administration of justice by encouraging gamesmanship in the courtroom by criminal defendants, making more readily available an appellate parachute for appellants, and frustrating the orderly progress of trial proceedings. As this Court has previously observed:

> The Court recognizes and sympathizes with the "Catch 22" judges face in the waiver of counsel setting. On the one hand, defendants have a right to counsel. On the other hand, defendants have a right to self-representation. We realize the potential for savvy defendants to use these competing rights as a means of securing an appellate parachute. [*Adkins, supra* at 724.]

Although a defendant's rights to trial counsel and to self-representation are intertwined, defendant here would ensure that these rights increasingly take on a "zero sum" relationship in which either the former or the latter right is necessarily violated, and in which one or the other becomes a potential basis for appellate reversal. This becomes more likely when formalisms (such as the majority's unfounded requirement that a waiver only be effected by verbal statement) come to prevail over an inquiry into the totality of circumstances, including both the verbal statements and the conduct of the defendant.

Under the circumstances of this case, I would find that defendant, by his conduct alone, unequivocally waived his right to trial counsel. Given defendant's knowledge that the trial court was unprepared to appoint new counsel and defendant's clear rejection of three of the four options offered to him by the trial court, I believe that these circumstances, which do not include a verbal statement of assent to self-representation, sufficiently give rise to an "unequivocal" waiver of his right to trial counsel.

Because of the disadvantages that inure from self-representation, a defendant must also "knowingly [and] intelligently" waive his right to trial counsel. *Anderson, supra* at 368. To satisfy this requirement, the trial court must ensure that a defendant has been "made sufficiently aware of his right to have counsel" and "of the possible consequences of a decision to forgo the aid of counsel" so that his choice " 'is made with eyes open.' " *Patterson v Illinois*, 487 US 285, 292-293; 108 S Ct 2389; 101 L Ed 2d 261 (1988)(citations omitted); see also *Anderson, supra* at 368, 370-371. "The trial judge is in the best position to determine whether the defendant has made the waiver knowingly . . . ." *Adkins, supra* at

723 (citation omitted). In this case, the trial court engaged in a lengthy and methodical colloquy, over thirty-five pages long, explicitly warning defendant of the dangers of self-representation. Among other warnings, the trial court counseled that, "unless you are legally trained,. . . there are many pitfalls there for the unwary," and "I'm suggesting that you don't know legal procedure." The trial court also advised defendant as follows:

> I should advise you that there is an ancient adage in the law, for good reason, that a man who acts as his own counsel has a fool for a client. The corollary to the rule is that he also has a fool for a lawyer, but, as a practical matter, it all winds up in the same place.
>
> My guess is that you will not fare well in that approach, but you have a right to take that approach if you wish to do it. And, while I would not advise it, I will certainly guard your rights and see to it that you have the opportunity to present your own defense, if that's your wish.

Further, the trial court repeatedly warned defendant that if Nunzio were removed, new trial counsel would not be appointed. Finally, the trial court gave defendant numerous opportunities, including two separate recesses, to consult with Nunzio concerning defendant's four options. Accordingly, I am convinced, as was the trial court, that under the circumstances of this case, there is no question that defendant was provided with sufficient information to make a decision with "eyes wide open." Thus, I would hold that the trial court did not err in finding that defendant "knowingly and intelligently" waived his right to trial counsel when he repeatedly informed the trial court that he no longer wanted Nunzio to represent him.

A defendant's waiver of his right to trial counsel must also be voluntary. *Anderson, supra* at 371. "The trial judge is in the best position to determine whether

the defendant has made the waiver . . . voluntary." *Adkins, supra* at 723 (citation omitted). Substitution of counsel is a matter committed to the sound discretion of the trial court. *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972). "While a defendant may not be forced to proceed to trial with incompetent or unprepared counsel, . . . a refusal without good cause to proceed with able counsel is a 'voluntary' waiver." *Maynard v Meachum,* 545 F2d 273, 278 (CA 1, 1976). See also *United States v Harris*, 2 F3d 1452, 1455 (CA 7, 1993)(finding a voluntary and informed waiver where the defendant refused to cooperate with his lawyers and was told that no substitute counsel would be appointed for him); *United States v Kneeland,* 148 F3d 6, 12 (CA 1, 1998)(a waiver of the right to trial counsel must be considered involuntary if the defendant had a valid reason for requesting the appointment of new trial counsel).

In *United States v Moore,* 706 F2d 538 (CA 5, 1983), the trial court required the defendant to proceed pro se after he rejected several court-appointed attorneys. Like the instant defendant, the defendant in *Moore* made statements on the record that he was not waiving his right to trial counsel, but that he simply wanted different trial counsel. The defendant was convicted and appealed his conviction on this basis.

The Fifth Circuit Court of Appeals affirmed the defendant's conviction, stating:

> [Defendant] refers to a statement by the trial court which indicates that the court knew [defendant] was not waiving his right to counsel. This misperceives the record. Viewed in the context of the entire dialogue, the trial court was noting its awareness that [defendant] was not waiving his demand for dismissal of his current attorney and appointment of another. That demand is precisely the issue herein presented: may a defendant repeatedly demand that his appointed counsel be relieved and that new counsel be

> appointed and, if the request is denied, contend that his sixth amendment right to counsel . . . has been violated? We answer that inquiry in the negative.
>
> We conclude that a persistent, unreasonable demand for dismissal of counsel and appointment of new counsel, as herein discussed, is the functional equivalent of a knowing and voluntary waiver of counsel. In such an instance the trial court may proceed to trial with the defendant representing himself. [*Id.* at 540.]

Similarly, in *United States v Fazzini*, 871 F2d 635 (CA 7, 1989), the defendant sought to remove his fourth court-appointed attorney. In allowing the defendant to dismiss his latest attorney, the trial court "expressly found that defendant, through his actions, had knowingly and voluntarily waived the right to counsel." *Id*. at 642. During trial, the defendant claimed that he was being "forced" to proceed pro se, and continually expressed a desire for new counsel to be appointed.

The defendant was ultimately convicted. The Fourth Circuit Court of Appeals affirmed his conviction, stating:

> In this case, the defendant claims that he did not knowingly and intentionally waive his right to appointed counsel since he continued to ask for counsel even after Kling was excused from the case. Yet it is not necessary that a defendant verbally waive his right to counsel; so long as the district court has given the defendant sufficient opportunity to retain the assistance of appointed counsel, defendant's actions which have the effect of depriving himself of appointed counsel will establish a knowing and intentional choice. [*Id*.]

The instant defendant was essentially given only two viable options—continue with court-appointed counsel or continue without court-appointed counsel. Defendant made it abundantly clear that he would not be cooperating with his current counsel, and therefore, I

believe, that he effectively chose to proceed pro se. Like the defendant in *Fazzini,* the instant defendant denied that he was making this choice. Nevertheless, the vehement negation of one choice—to proceed with his current counsel—constituted the acceptance of the only remaining option available—to proceed pro se.

I agree with the lower courts and believe that defendant consistently failed to assert a valid reason to have new court-appointed counsel, and thus voluntarily waived his right to trial counsel. The trial court asserted that "Mr. Nunzio is a man of considerable professional ability," with an extensive history of trial work, and is an "extremely capable" and "well-respected" defense attorney. Further, Nunzio himself apprised the trial court:

> Your honor, I am prepared to try the case. I am not only familiar with all the issues surrounding this case, but I have dealt with these cases numerous times in the last number of years. And I have communicated all of those relevant issues that I have explored. The discovery is complete. I've had the opportunity to look at discovery. I talked to the prosecutor in this case regarding this case. I am more than capable at this point in time trying the case
>
> * * *
>
> But counsel is ready to proceed to trial at this point in time.

Later, after defendant asserted "that Mr. Nunzio is not representing me in a proper[] fashion," the trial court responded, "I don't see that. I see no indication that Mr. Nunzio has done anything wrong at all." I agree with the trial court and the Court of Appeals and find no evidence in the record to suggest that Nunzio's representation of defendant "fell below an objective standard of reasonableness . . . ." *People v Gonzalez*, 468 Mich

636, 644; 664 NW2d 159 (2003). Nor does defendant present any evidence to the contrary. Because I believe that this Court should follow federal precedent, holding that an unreasonable insistence on the appointment of a new attorney operates as a waiver of the right to counsel, and that defendant's protests to the contrary do not render that waiver ambiguous, I dissent.[10]

To constitute a valid waiver of the right to trial counsel, the trial court must also be satisfied that in representing himself, defendant "will not disrupt, unduly inconvenience and burden the court and the administration of the court's business." *Anderson, supra* at 368. Because the trial court, in fact, allowed defendant to represent himself, I would hold that the trial court was persuaded that defendant, in representing himself, would not disrupt or otherwise inconvenience or burden the court and, thus, fulfilled the third requirement of *Anderson*.

Further, although the requirements in *Anderson* have been satisfied, the trial court must "substantially comply" with MCR 6.005(D) for a valid waiver to occur. *Adkins, supra* at 726. "A particular court's method of inquiring into and satisfying these concepts is decidedly up to it, as long as the concepts in these requirements are covered." *Id*. at 725. I would hold that MCR 6.005(D) was satisfied here because defendant was fully advised of the nature of the charges against him and the

[10] As the majority correctly notes, the Supreme Court stated in *Martinez* that "the right to self-representation is not absolute" in that the defendant must choose self-representation voluntarily and intelligently. *Ante* at 189. *Cf. Caplin & Drysdale v United States,* 491 US 617, 651; 109 S Ct 2646; 105 L Ed 2d 528 (1989); *Arizona v Roberson*, 486 US 675, 686; 108 S Ct 2093; 100 L Ed 2d 704 (1988) (holding that even the constitutional right to counsel is not absolute.)

possible punishments in the information,[11] and of the risks involved in self-representation.[12]

Finally, the court should "indulge every *reasonable* presumption [de-italicize presumption] against waiver" of a defendant's right to trial counsel. *Adkins, supra* at 721 (citation omitted) (emphasis added). " 'The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.' " *Adkins, supra* at 721 (citations omitted). As previously discussed, defendant here intelligently waived his right to trial counsel by repeatedly stating that he did not want Nunzio to represent him. [13]

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[11] At the outset of the trial, the court stated:

> Mr. Russell is here for trial today on charges of possession with intent to deliver less than 50 grams of cocaine, possession with intent to deliver less than 50 grams of heroin, and he is also charged as a fourth felony habitual offender.

See *Adkins, supra* at 730-731 (holding that the trial court had satisfied the requirement of MCR 6.005(D) that the defendant be advised of the maximum and minimum sentences because "the judge had already expressed the nature of the charge and possible punishments to the defendant at his arraignment").

[12] "A particular court's method of inquiring into and satisfying [MCR 6.005(D)] is decidedly up to it, as long as [the proper] concepts . . . [are] covered." *Adkins, supra* at 725. Because the trial court counseled defendant that, "unless you are legally trained, . . . there are many pitfalls there for the unwary," we believe that its warning satisfied the requirement of MCR 6.005(D) that the trial court advise defendant of "the risks involved in self representation . . . ."

[13] Defendant made the following statements concerning his desire that Nunzio not represent him: (1) "I don't—I don't want any contact with Mr. Nunzio, and I expressed that to you. I don't want Mr. Nunzio to have anything to do with anything in my case"; (2) "There is no way that I will let him try to defend me . . . [T]here's no way that I would feel comfortable with him having anything to do with the defense on my behalf"; and (3) "I don't want Mr. Nunzio involving in nothing of my defense."

"The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including [the] *conduct of the accused*." *Johnson, supra* at 464 (emphasis added). I would conclude that defendant's conduct, under the circumstances of this case—his informed and unequivocal refusal to accept *any* of the other three options offered to him by the trial court—constituted an acceptance of the only remaining option, and that defendant thereby "intentional[ly] relinquish[ed] or abandon[ed]" his right to trial counsel. *Id*.

III. CONCLUSION

I believe that defendant, by his conduct alone, unequivocally waived his constitutional and statutory right to trial counsel. Further, I believe that defendant's waiver satisfied the requirements of *Anderson* and MCR 6.005(D). Accordingly, I would hold that defendant waived his right to trial counsel and thus affirm the judgment of the Court of Appeals.

CORRIGAN, C.J., concurred with MARKMAN, J.

BREIGHNER v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC

Docket No. 123529. Argued March 11, 2004 (Calendar No. 11). Decided July 29, 2004. Rehearing denied *post*, 1209.

Martin B. Breighner III and Kathryn Breighner brought an action in the Emmet Circuit Court against Michigan High School Athletic Association, Inc., seeking a declaratory judgment that the MHSAA is a public body and thus subject to the Freedom of Information Act, MCL 15.231 *et seq*. The court, Charles W. Johnson, J., held that the MHSAA was primarily funded by or through a state or local authority and was, therefore, a public body subject to the FOIA in accord with MCL 15.232(d)(iv). The Court of Appeals, SAWYER, P.J., and DONOFRIO, J. (JANSEN, J, dissenting), concluded that the MHSAA was not a public body under the definition of "public body" in either MCL 15.232(d)(iii) or (iv). 255 Mich App 567 (2003). The plaintiffs appealed.

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

The MHSAA does not qualify as a public body under either MCL 15.232(d)(iii), as being a governmental agency, or (iv), as being funded primarily by or through state or local authority or as being created by state or local authority.

1. MCL 15.232(d)(iv) defines a "public body" to include a body that is primarily funded by or through state or local authority—namely, an entity that is funded by or through the receipt of a governmental grant or subsidy. The MHSAA earns most of its revenues from admission fees to its own athletic events, receives no dues or fees from member schools, pays for the use of athletic venues, and receives no funds from host concessions. Moreover, the MHSAA is not a recipient of any governmental grant or subsidy. Therefore, the MHSAA is not "primarily funded by or through state or local authority."

2. MCL 15.232(d)(iv) also defines a "public body" to include a body that is created by state or local authority. The MHSAA is a private, self-regulated, nonprofit corporation with a wholly voluntary membership of public and private schools. It has no authority

over schools or students. The member schools remain free to join other athletic organizations instead of or in addition to the MHSAA.

3. The MHSAA is not a "public body" as that term is defined in MCL 15.232(d)(iii). That statute includes as public bodies certain governmental organizations and "agenc[ies] thereof." That statutory use of "agency" means a unit or division of government, not a relationship between a principal and an agent. The MHSAA is not an agency of a governmental organization.

Affirmed.

Justice WEAVER, joined by Justice KELLY, dissenting, stated that the Michigan High School Athletic Association is a public body that must comply with the requirements of the Freedom of Information Act, MCL 15.231 *et seq*., because, as described in MCL 15.232(d)(iv), the MHSAA was created by state or local authority and is primarily funded by or through state or local authority. The MHSAA was created by school districts in 1924 to organize interscholastic athletics. Since 1924, school districts have continued to voluntarily adopt the MHSAA's rules and regulations as their own. It can thus be concluded that the MHSAA was created by the school districts. MCL 15.232(d)(iv). The MHSAA is also primarily funded by or through school districts. MCL 15.232(d)(iv). The MHSAA receives approximately ninety to ninety-five percent of its funding from gate receipts from postseason athletic tournaments between school districts. It is by or through the MHSAA's relationship with the schools that it may sell tickets for tournaments featuring public school athletes. It follows that the MHSAA is primarily funded by or through the authority of the schools. MCL 15.232(d)(iv). The purpose of the FOIA is to allow citizens to fully participate in the democratic process regarding the affairs of government and the official acts of those who represent them. MCL 15.231(2). The school districts have effectively delegated the responsibility for those official acts, as they pertain to school athletics, to the MHSAA by adopting its rules as their own.

RECORDS — FREEDOM OF INFORMATION ACT — MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION.

The Michigan High School Athletic Association, as currently incorporated, is not a governmental agency, is not funded primarily by or through state or local authority, was not created by state or local authority, and therefore is not a public body that is subject to the records disclosure requirements of the Freedom of Information Act (MCL 15.232[d][iii], [iv]).

Wayne Richard Smith for the plaintiffs.

Edmund J. Sikorski, Jr., for the defendant.

Amici Curiae:

Butzel Long (by *Dawn Phillips Hertz*) for the Michigan Press Association.

Varnum Riddering Schmidt & Howlett LLP (by *Kevin C. O'Malley* and *Beverly Holaday*) for the Michigan Society of Association Executives.

YOUNG, J. At issue in this case is whether defendant Michigan High School Athletic Association, Inc. (MHSAA), a private, nonprofit entity that organizes and supervises interscholastic athletic events for its voluntary members, is a "public body" as that term is defined at MCL 15.232(d) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Plaintiffs contend that the MHSAA is a public body within the meaning of the FOIA because (1) it is "primarily funded by or through state or local authority," MCL 15.232(d)(iv); (2) it is "created by state or local authority," MCL 15.232(d)(iv); and (3) it is an "agency" of a school district, MCL 15.232(d)(iii).

The trial court held that the MHSAA was "primarily funded by or through state or local authority" and that it was therefore subject to the FOIA as a public body under § 232(d)(iv). The Court of Appeals reversed, concluding that neither § 232(d)(iv) nor § 232(d)(iii) applied to the MHSAA. Because we agree that the MHSAA does not qualify as a public body under § 232(d)(iii) or (iv), we affirm.

I. FACTS AND PROCEDURAL HISTORY

A. THE MHSAA

The MHSAA was originally founded in 1924 to exercise control over the interscholastic athletic activities of all

public schools in the state through agreement with the State Superintendent of Public Instruction. The MHSAA was housed within the Michigan Department of Education, and its handbook, rules, and regulations were part of the Administrative Code of the state of Michigan.

In 1972, the MHSAA became an incorporated, nonprofit membership organization. In that year, the Legislature transferred control of interscholastic athletics from the State Board of Education to the individual school boards, but retained the status of the MHSAA as the official association of the state. See MCL 340.379 (repealed by 1976 PA 451, § 1851); MCL 380.1289 (before its amendment by 1995 PA 289, § 1); MCL 380.1521 (repealed by 1995 PA 289, § 2).[1] In 1995, the Legislature adopted the Revised School Code, MCL 380.1 *et seq*., which repealed and amended several statutes. Through the Revised School Code, the MHSAA was removed as the "official" organization overseeing interscholastic sports. Under MCL 380.11a(4), a school district's membership in any athletic organization remains entirely voluntary (school districts "*may* . . . join organizations as part of performing the functions of the school district" [emphasis supplied]).

The MHSAA is governed by a representative council made up of nineteen voting members, including fourteen members elected by member schools, four mem-

[1] MCL 380.1289(1) provided, until 1995, that "[a] board of a school district . . . may join an organization, association, or league which has as its object the promotion and regulation of sport and athletic . . . contests . . . ." Section 1289(2) further provided:

> An association established for the purpose of organizing and conducting athletic events, contests, or tournaments among schools *shall be the official association of the state*. The association is responsible for the adoption and enforcement of regulations relative to eligibility of pupils in schools for participation in interscholastic athletic events, contests, or tournaments. [Emphasis supplied.]

bers appointed by the council, and one representative of the state superintendent of education. The council has control of interscholastic athletic policies, and a five-member executive committee makes rules necessary for the control and government of interschool activities.

The MHSAA regulates interscholastic athletic competition between member schools and sets standards for school membership and eligibility of students to participate in interscholastic athletics. Apparently, the vast majority of high schools in Michigan are members of the MHSAA. Approximately seven hundred Michigan high schools are members of the MHSAA and more than eighty percent of those schools are public. Member schools pay no membership dues and no tournament entry fees. The only funds collected from schools are (1) payments for the cost of publications provided to a school in excess of the quantity already provided to members and (2) meeting expenses (for example, the cost of lunch).

The majority—approximately ninety percent—of the MHSAA's revenues are gate receipts at post-season athletic tournaments for football and basketball. The gate receipt revenues come directly from the sale of the MHSAA's tickets to members of the public who attend MHSAA-sponsored events. In some cases, the MHSAA itself does not sell the tickets, but member schools remit to the MHSAA gate receipts collected from tickets sold by the schools for the MHSAA-sponsored events.

Because no revenues are derived either during the regular season or from most of the tournaments sponsored by the MHSAA, the positive cash flow from the football and basketball tournaments is used to fund these other activities. Services provided by the MHSAA to its members include the provision of medical insurance for student-athletes; dissemination of play rule books; organization of meetings for coaches and officials; pro-

vision of several school and officials publications; provision of trophies and medals; training; direction and management of tournaments; and the services of the MHSAA staff.

B. PLAINTIFFS' FOIA PROCEEDINGS

Plaintiffs are the parents of a high school student who was prohibited from participating in a ski meet sponsored by the MHSAA because he had previously participated in an unsanctioned event in violation of MHSAA rules. Plaintiffs filed a request under the FOIA seeking information related to that decision. The MHSAA refused to comply with the request, asserting that it was not a public body and was therefore not subject to the FOIA.

The trial court granted summary disposition to plaintiffs, holding that the MHSAA is "primarily funded by or through state or local authority" within the meaning of § 232(d)(iv) because the vast majority of its funding comes from gate receipts at the athletic events it sponsors. The trial court held that the gate receipts that comprised the majority of the MHSAA's revenue were received "through" the schools because the MHSAA essentially " 'enjoys the schools' moneymaking capacity as its own,' " quoting *Brentwood Academy v Tennessee Secondary School Athletic Ass'n,* 531 US 288; 121 S Ct 924; 148 L Ed 2d 807 (2001).

The Court of Appeals reversed, holding that the MHSAA was not a public body under either § 232(d)(iv) or § 232(d)(iii). 255 Mich App 567, 581-582, 583; 662 NW2d 413 (2003).

The majority first addressed plaintiffs' argument that the MHSAA was "created by state or local authority" under § 232(d)(iv). The majority held that, although it

was originally created under such authority, the modern incarnation of the MHSAA was a unique, private entity that had ceased being the official athletic association for the state. This unique entity was not "created" by state or local authority.

The majority further rejected the trial court's conclusion that the MHSAA is primarily funded by or through state or local authority. The panel noted that the state provides no financial resources to fund the MHSAA's activities, and that the MHSAA actually paid fees for the use of host facilities. Member schools pay no fees or dues to the MHSAA. The MHSAA is a private, nonprofit organization that hires and trains its own officials and pays its own employees; furthermore, its revenues are derived from the sale of its own tickets for its own events. The majority further noted that schools are not forced to join the MHSAA and that member schools voluntarily chose to engage the MHSAA's services. The individual schools have authority over their own interscholastic events and have no independent authority over the MHSAA.

Finally, the majority rejected plaintiffs' argument that the MHSAA is an "agent" of the state and therefore subject to the FOIA under § 232(d)(iii). The majority looked to Black's Law Dictionary (7th ed), where "agency" was defined as "[a] fiduciary relationship created by express or implied contract or by law, in which one party (the *agent*) may act on behalf of another party (the *principal*) and bind that other party by words or actions." The majority further noted that, pursuant to *St Clair Intermediate School Dist v Intermediate Ed Ass'n*, 458 Mich 540, 558 n 18; 581 NW2d 707 (1998), "an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.' "

(citations omitted). The majority held that the MHSAA was governed by its board of directors, not the individual schools who voluntarily became its members. No one school or district could control the MHSAA, because it was controlled by its own board. Therefore, the majority held, the MHSAA was not an "agent" of its member schools.

Judge JANSEN dissented, opining that the public policy behind the FOIA favored disclosure and that the MHSAA was primarily funded by or through state or local authority because its gate receipts came to it only through or by means of the schools' authority to regulate sporting events. Judge JANSEN opined that the majority's holding was contrary to two cases, *State Defender Union Employees v Legal Aid & Defender Ass'n of Detroit,* 230 Mich App 426, 432; 584 NW2d 359 (1998), and *Kubick v Child & Family Services*, 171 Mich App 304; 429 NW2d 881 (1988), in which the Court of Appeals had held, respectively, that (1) "funded" for purposes of the FOIA definition of "public body" meant the receipt of a governmental grant or subsidy and (2) funding that amounted to less than half the total funding of a corporation did not amount to primary funding. Judge JANSEN opined that the gate receipts remitted to the MHSAA were the functional equivalent of a grant or subsidy and that virtually the entire budget of the MHSAA came from gate receipts. Finally, Judge JANSEN opined that the majority's holding was contrary to the Supreme Court's holding in *Brentwood* that the Tennessee Secondary School Athletic Association (TSSAA), an organization that is allegedly analogous to the MHSAA, was a state actor for Fourteenth Amendment purposes.

We granted plaintiffs' application for leave to appeal. 469 Mich 952 (2003).

II. STANDARD OF REVIEW

This case involves questions of statutory interpretation, which are reviewed de novo. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 62; 642 NW2d 663 (2002). We review the trial court's grant of summary disposition de novo. *Id*.

III. ANALYSIS

A. INTRODUCTION

The FOIA generally requires disclosure, upon written request, of public records in the possession of a "public body." MCL 15.233(1). "Public body" is defined in MCL 15.232(d) as follows:

> (i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.
>
> (ii) An agency, board, commission, or council in the legislative branch of the state government.
>
> (iii) A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, *or agency thereof*.
>
> (iv) Any other body which is *created by state or local authority* or which is *primarily funded by or through state or local authority*.
>
> (v) The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. [Emphasis added.]

B. THE MHSAA IS NOT PRIMARILY FUNDED BY OR THROUGH STATE OR LOCAL AUTHORITY

We agree with and adopt the reasoning of the Court of Appeals majority in holding that the MHSAA is not a

"public body" as that term is defined by MCL 15.232(d)(iv).

In granting summary disposition for plaintiffs, the trial court held that the MHSAA was "primarily funded through state or local authority" and thus qualified as a public body under § 232(d)(iv). The court, noting that it was required to give effect to each word and provision of the statute, held that the use of the terms "by" *and* "through" indicated that funds received both directly and indirectly would be considered in determining whether an entity was a public body under § 232(d)(iv). The court concluded that, although the MHSAA did not receive money directly from the schools, it " 'enjoy[ed] the schools' moneymaking capacity as its own,' " quoting *Brentwood, supra*, and was therefore publicly funded.

Although we agree that the statutory terms "by" and "through" must each be accorded their unique meanings, and that this terminology suggests that even *indirect* public funding might satisfy the requirements of § 232(d)(iv), we find persuasive the analysis of the Court of Appeals majority:

> We read "by or through" to distinguish between the different meanings of the word "authority," that is, funding "by" a governmental authority (an *entity*) and funding "through" governmental decision-making authority (the *power* to regulate). Under our reasoning, the former refers to an entity that directly distributes its financial resources to the disputed organization, while the latter refers to the disputed organization indirectly receiving funds through some action or decision of the governmental body. [255 Mich App 579-580 (emphasis in original).]

The MHSAA is funded neither "by" nor "through" a governmental authority. As our Court of Appeals held in *State Defender Union Employees,* "funded," as used in

§ 232(d)(iv), means "the receipt of a governmental grant or subsidy." The MHSAA is not the recipient of any governmental grant or subsidy. The MHSAA's member schools do not distribute their financial resources to the MHSAA; nor do the schools indirectly fund the MHSAA through allocations of public monies. Rather, the MHSAA—an independent, nonprofit corporation—is primarily funded by the sale of its own tickets to private individuals who have voluntarily paid a fee to observe an MHSAA-sponsored athletic event. Member schools pay no dues or fees to the MHSAA, the MHSAA pays fees for the use of host facilities, and it receives no funds from host concessions; thus, the state provides absolutely no public resources to the MHSAA.[2]

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[2] The dissent has extracted broad dictionary definitions of the words "by" and "through" to suggest that the receipt of any monies "*by virtue of*" an entity's *relationship* with a state or local governmental body is sufficient to render that entity "funded by or through state or local authority." The dissent's analysis, aside from conflating the distinct meanings of the words "by" and "through," completely disregards the meaning of the statutory term "*funded*." As we have explained, the word "funded" does not connote the simple receipt of payment in return for services or materials provided; it connotes receipt of an allocation of resources or a subsidization. See *State Defender Union Employees*, *supra* at 432; *Random House Webster's College Dictionary* (1997). Yet the dissent does not even require that an entity doing business with the government collect fees for goods or services in order to qualify as a public body; the *relationship* alone seems critical. Such an extreme position is neither warranted by the language of the statute nor fathomable within the bounds of common sense. Taken to its logical conclusion, the dissent's version of the statute would place within the ambit of § 232(d)(iv) any contractor or other business that obtains a majority of its income from sales made or services rendered to governmental bodies. See *Brentwood, supra* at 311 (Thomas, J., dissenting) ("the [Tennessee Secondary School Athletic Association's] 'fiscal relationship with the State is not different from that of many contractors performing services for the government.'"). (Citation deleted.) Consider, for example, the nonprofit College Board, which administers the SAT to hundreds of Michigan students in the classrooms of participating public schools each year. Public school students pay the examination fee directly to the

Nor, contrary to the holding of the trial court and the opinion of our dissenting colleague, does the MHSAA "enjoy[] the schools' moneymaking capacity as its own."[3] The MHSAA organizes postseason tournaments,

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College Board, but under the dissent's rationale the Board would be a "public body" subject to FOIA disclosure requirements simply because it derives income "by virtue" of the fact that the public schools have facilitated an opportunity for the Board to administer this test in the schools.

[3] Our holding today is limited to the specific question whether the MHSAA is a "public body" within the meaning of the FOIA. We express no opinion concerning the relevance of *Brentwood, supra*, insofar as it may apply to the due process implications of the actions of the MHSAA. We have before us no constitutional question and decline to address whether the MHSAA is a "state actor" for purposes of 42 USC 1983 and the Fourteenth Amendment, as it would be inappropriate to import the concept of and analysis relevant to state action into our statutory analysis. Rather, we are constrained to apply the plain language of the FOIA's definitional provisions in determining whether the MHSAA is subject to the requirements of the FOIA.

While our dissenting colleague acknowledges this fact, see *post* at 239-240, she nevertheless appears to contend that the definition of "state actor" under federal law is "pertinent" in defining "public body" under the FOIA. This is particularly true of Justice Weaver's focus on "entwinement" as a relevant inquiry for defining "public body."

There is a rather straightforward answer to the dissent's utilization of "state actor" analysis: it is possible for MHSAA to be a state actor under § 1983 and the Fourteenth Amendment without being a "public body" under the FOIA *if the Legislature has defined "public body" in a manner inconsistent with Fourteenth Amendment jurisprudence in the* FOIA. The dissent apparently cannot accept the possibility that the Legislature has the discretion to define "public body" in any way it chooses; yet she offers no support for the proposition that the Legislature was bound by or had in mind the definition of "state actor" under federal law when it drafted the FOIA. And, of course, there *is* no support for that proposition. The Legislature was free to define "public body" in the FOIA as narrowly or broadly as it wished. We give meaning to the Legislature's terms while the dissent is in search of alternate meanings.

The dissent not only conflates the meaning of "state actor" under § 1983 and the Fourteenth Amendment with the definition of a "public body" under the FOIA, but she goes on to extract from *Brentwood* the

rents the game venues and sells tickets for those games. Without the MHSAA's leadership and organizational effort, no revenue from tournament games would be generated for any entity, including MHSAA member schools. In short, MHSAA creates its own "market" and revenue therefrom that would otherwise not exist without its effort. Finally, it is worth noting that member schools have *voluntarily* relinquished to the MHSAA any interest they may have had in ticket sales for athletic tournaments sponsored by the MHSAA, and the MHSAA, in turn, is fully responsible for the organization and administration of the tournament.

In this vein, we agree with the reasoning of the Court of Appeals in *State Defender Union, supra* at 432-433, that

> an otherwise private organization is not "funded by or through state or local authority" merely because public monies paid in exchange for goods provided or services rendered comprise a certain percentage of the organization's revenue. Earned fees are simply not a grant, subsidy, or funding in any reasonable, common-sense construction of those synonymous words. Rather, it is clear that, in the FOIA, *funded* means something other than an exchange of services or goods for money, even if the source of money is a governmental entity. [Emphasis in original.]

The MHSAA, as noted, provides numerous services for its member schools, such as medical insurance for students, publications, training, and many other benefits that schools would not otherwise be in a position to provide. Here, even assuming that the private ticket-sale revenue at issue somehow passes "through" a

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concept that the Tennessee Secondary School Athletic Association (TSSAA) (and, by analogy, the MHSAA) "enjoys the schools' moneymaking capacity as its own." As stated *supra* in note 2, the MHSAA is not "funded" by participating school districts but provides services in the activities it conducts and for which it collects gate receipts.

governmental entity, these funds are received by the MHSAA in exchange for the multitude of services it performs for its members, most significantly the administration of the tournaments for which the tickets are sold. The MHSAA is therefore not "funded" by or through a governmental entity within the meaning of § 232(d)(iv).

C. THE MHSAA IS NOT CREATED BY STATE OR LOCAL AUTHORITY

Plaintiffs contend that the MHSAA is a "creature" of the schools and that it is therefore "created by state or local authority" within the meaning of § 232(d)(iv). In support of this rather tenuous argument, plaintiffs cite *Kirby v MHSAA*, 459 Mich 23, 39 n 17; 585 NW2d 290 (1998), in which this Court stated that the MHSAA "is a creature of its members, with no independent authority over schools or students. The schools can and should exercise appropriate oversight of the MHSAA." Plaintiffs additionally, and inconsistently, argue that the MHSAA is a "de facto public body" because it has retained much of the same authority that was originally bestowed upon it in 1924: the authority to exercise control over the interscholastic athletic activities of all high schools of the state. Plaintiffs stress that high schools have no practical choice but to join the MHSAA if they want to participate in interscholastic sports.

We agree with the Court of Appeals majority that the MHSAA is no longer the same entity that was arguably "created" by state authority in 1924. Rather, the modern incarnation of the MHSAA is a wholly different organization from the entity that was at one time legislatively designated as the official organization for the regulation of interscholastic sports in Michigan and that was housed within the Michigan Department of Education. The MHSAA is now a private corporation that is wholly self-regulated. Membership is, by statute,

completely voluntary. See MCL 380.11a(4) (providing that "[a] . . . school district may join organizations as part of performing the functions of the school district"). In short, the MHSAA in its current form is not "created by state or local authority."

We further note that our comment in *Kirby*—that the MHSAA "is a creature of its members, with no independent authority over schools or students"—merely lends further credence to our conclusion that the MHSAA is not a public body. Michigan schools are in no way obligated to join the MHSAA, and they remain free to join other athletic organizations in lieu of, or in addition to, the MHSAA. Member schools do not relinquish authority or decision-making capacity to the MHSAA, nor does the MHSAA have any independent authority over its members.[4] There is simply no basis for concluding that this private corporation is "created" by any governmental authority.[5]

D. THE MHSAA IS NOT AN AGENCY OF THE SCHOOLS

Finally, plaintiffs contend that the MHSAA acts as an "agent" for its member schools and that it is therefore a public body as defined by § 232(d)(iii):

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[4] Justice WEAVER's assertion that the school districts "have delegated the authority to the MHSAA to make policy decisions," *post* at 246-247, is flatly incorrect. As noted above, the school districts have *voluntarily assumed* the athletic eligibility conditions set by the MHSAA. Again, while "entwinement" may be a relevant constitutional inquiry for defining who might be a state actor, it has no relevance to our obligation to give meaning to "public body" as the Legislature has defined it.

[5] The dissent's analysis suffers for placing undue emphasis on the historical connection between what is now a private, not-for-profit corporation and its previous incarnation as a state-controlled entity. See *post* at 237-238. This historical connection to the state, however interesting, is irrelevant to the question currently before the Court. At issue is not whether the 1924 incarnation of the MHSAA is a "public body," but whether today's *private* corporation composed of *voluntary* members is a "public body" under the FOIA. When one engages in this inquiry without conflating the present private corporation with its public ancestor, it is manifest that the MHSAA is not a "public body" under the FOIA.

> A county, city, township, village, intercounty, intercity, or regional governing body, council, *school district*, special district, or municipal corporation, or a board, department, commission, council, *or agency thereof*. [Emphasis added.]

The Court of Appeals majority and the parties appear to have assumed that § 232(d)(iii) includes "agents" of enumerated governmental entities in the definition of "public body." We disagree and believe that there is a fundamental difference between the terms "agent" and "agency" as the latter term is used in the statute.

As we have noted on many occasions, a statutory term cannot be viewed in isolation, but must be construed in accordance with the surrounding text and the statutory scheme.

> "Contextual understanding of statutes is generally grounded in the doctrine of *noscitur a sociis*: 'it is known from its associates,' see Black's Law Dictionary (6th ed), p 1060. This doctrine stands for the principle [of interpretation] that a word or phrase is given meaning by its context or setting." . . . Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. [*Sweatt v Dep't of Corrections*, 468 Mich 172, 179-180; 661 NW2d 201 (2003) (citations omitted).]

Although the noun "agency" may be used to describe a business or legal relationship between parties, it is wholly evident from the context of § 232(d)(iii) that this is not the sense in which that term is used. Section 232(d)(iii) designates several distinct governmental units as public bodies, and proceeds to include in this definition any "agency" of such a governmental unit. In this specific context, the word "agency" clearly refers to a *unit or division of government* and not to the *relationship* between a principal and an agent. Had the Legislature intended any "agent" of the enumerated governmental entities to qualify under § 232(d)(iii), it would

have used that term rather than "*agency*."[6] Thus, we reject plaintiffs' argument that the MHSAA acts as an "agent" of its member schools and that it thus qualifies as an "agency" under § 232(d)(iii).[7]

IV. CONCLUSION

The MHSAA, a private, nonprofit organization having a wholly voluntary membership of private and public schools, is not a "public body" within the meaning of the FOIA and is therefore not subject to the FOIA's provisions. Accordingly, we affirm the decision of the Court of Appeals.

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

WEAVER, J. (*dissenting*). Plaintiffs in this case seek information pursuant to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, regarding how the

[6] The Department of Labor and Economic Growth, for example, is a governmental "agency," but a real estate office hired to sell governmental property is *not* a governmental "agency." Indeed, it would defy logic (as well as the plain language of § 232[d][iii]) to conclude that the Legislature intended that any person or entity qualifying as an "agent" of one of the enumerated governmental bodies would be considered a "public body" for purposes of the FOIA.

[7] Moreover, even if we were to conclude that the term "agency" as used in § 232(d)(iii) includes agents of the enumerated governmental entities, the MHSAA is an independent body that is in no way the "agent" of its members. As noted by the Court of Appeals majority in this case, "[i]t is a fundamental principle of hornbook agency law that an agency relationship arises only where the principal 'has the right to control the conduct of the agent with respect to matters entrusted to him.' " *St Clair Intermediate School Dist, supra* at 557-558 (citations omitted). The MHSAA is governed by its own internal board. The individual school members have no authority over the actions of the MHSAA. Moreover, by joining the MHSAA, member schools are required to relinquish to the MHSAA complete authority over the rules and officiating of MHSAA-sponsored athletics.

Michigan High School Athletic Association, Inc. (MHSAA), determines which alpine ski races and racers are sanctioned from or for participation. The MHSAA disqualified plaintiffs' son from competing with his public high school ski team during the 2002 season because he skied in one race that the MHSAA did not sanction.

The question in this case is whether the MHSAA is a public body that must comply with the disclosure requirements of the FOIA. Until the revision of the public school code by 1995 PA 289, there was no dispute that the MHSAA was subject to the FOIA. However, the majority holds that the 1995 revision of the school code insulated the MHSAA from public scrutiny previously available under the FOIA. I disagree and would hold that the MHSAA is a public body subject to the FOIA because it is both created by and primarily funded by or through public school districts.

I

The FOIA was enacted to continue the common-law right Michigan citizens have traditionally possessed to access government documents. See *Walen v Dep't of Corrections*, 443 Mich 240, 253; 505 NW2d 519 (1993) (RILEY, J. concurring in part); *Evening News Ass'n v Troy*, 417 Mich 481, 494-495; 339 NW2d 421 (1983) (discussing Michigan's established history of requiring public agency disclosure). As *Nowack v Auditor General*, 243 Mich 200, 203-204; 219 NW 749 (1928), explained:

> If there be any rule of the English common law that denies the public the right of access to public records, it is repugnant to the spirit of our democratic institutions. Ours is a government of the people. Every citizen rules. . . . Undoubtedly, it would be a great surprise to the citizens and taxpayers of Michigan to learn that the law denied

> them access to their own books for the purpose of seeing how their money was being expended and how their business was being conducted. There is no such law and never was either in this country or in England. Mr. Justice MORSE was right in saying:
>
> "I do not think that any common law ever obtained in this free government that would deny to the people thereof the right of free access to, and public inspection of, public records." *Burton v. Tuite*, 78 Mich 363, 374 (7 LRA 73) [44 NW 282 (1889)].
>
> There is no question as to the common-law right of the people at large to inspect public documents and records. The right is based on the interest which citizens necessarily have in the matter to which the records relate.

This right to access provides the policy foundation underlying the FOIA. "The FOIA was enacted to continue this tradition of openness." *Walen*, *supra* at 254 (RILEY, J.).

The FOIA specifically provides that

> all persons . . . are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process. [MCL 15.231(2).]

The FOIA subjects "public bodies" to its public records disclosure requirements. MCL 15.235. The FOIA provides several definitions of "public body," any one of which subjects an entity to the FOIA's public record disclosure requirements. MCL 15.232(d)(iv) defines one sort of public body as "[a]ny other body which is created by state or local authority or which is primarily funded by or through state or local authority." I would hold that the MHSAA is a public body because it is both "created by state or local authority" and "primarily funded by or through state or local authority."

Statutory language is to be read according to its ordinary and generally accepted meaning. *Tryc v Michigan Veterans' Facility*, 451 Mich 135; 545 NW2d 642 (1995). If the language at issue is plain and unambiguous, we assume the Legislature intended its plain meaning and enforce the statute as written. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). It is appropriate to refer to a dictionary to discern a statute's plain meaning. *State ex rel Wayne Co Prosecuting Attorney v Levenberg*, 406 Mich 455, 465-466; 280 NW2d 810 (1979).

II

Public school districts are expressly listed as public bodies under the statute. MCL 15.232(d)(iii). Moreover, the provision of interscholastic athletics has long been and now remains a proper function of public school districts, and the MHSAA's relationship with the public schools in the provision of interscholastic athletics is firmly established.

A

THE MHSAA IS "CREATED BY" SCHOOL DISTRICTS

Under 1923 PA 237, the superintendent of public instruction was delegated the authority to supervise and control interscholastic athletic activities. The MHSAA was first organized in 1924 for the purpose of coordinating and regulating interscholastic athletic activities.[1] Within the first year of its creation, the MHSAA presented a "Suggested Set of Standards and Practices

[1] Since the founding of the MHSAA the state superintendent of public instruction has been an ex-officio member of the Representative Council that governs the MHSAA. See, Lewis L. Forsythe, *Athletics in Michigan High Schools—The First Hundred Years*, (Prentice-Hall, Inc

of Athletic Administration." Regarding these standards, the superintendent of public instruction wrote:

> Any athletic program to be worth having at all must contribute something to the educational value to its board. To do that it must be the result of the cooperative effort on the part of the superintendent, principal, althletic director, and student body. Complete control of the program must remain in the school itself. Any set of standards and practices must guide all these various groups.[2]

Until 1972, the MHSAA was apparently "housed within the Michigan Department of Education, and its Executive Director was known as the 'State Director of Athletics.' " *Communities for Equity v Michigan High School Athletic Ass'n,* 178 F Supp 2d 805, 810-811 (WD Mich, 2001). The MHSAA's handbook, rules, and regulations were part of the Michigan Administrative Code. *Id.* at 811.

In 1972, the school code was amended and the authority over interscholastic athletics was moved from the State Board of Education to individual school districts. *Id.* The Legislature expressly provided that school districts could join "an organization, association or league which has as its object the promotion of sport . . . and regulation of athletic . . . contests . . . ." Former MCL 340.379. Although the statute did not expressly designate the MHSAA as the official organization for interscholastic athletics, it did provide that "*An association* established for the purpose of organizing and conducting athletic events, contests, or tournaments among schools shall be the official association of the state." *Id.* (emphasis added). It has been assumed

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1950), which documents the development of high school athletics and the creation of organizations to coordinate interscholastic athletics since 1848.

[2] *Id.* at 172.

that the Legislature was referencing the MHSAA. See *Communities for Equity, supra* at 811.

Also in 1972, the MHSAA reorganized as a private not-for-profit corporation. The MHSAA's purpose remained essentially unchanged after 1972. As stated in the 1972 articles of incorporation, the MHSAA was intended

> to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with the educational values of the high school curriculums [sic]. . . .[3]

As under the former law, membership in the MHSAA was voluntary. Nevertheless, once a school district joins the MHSAA, it was and is bound by the MHSAA's rules.[4]

There is no express mention of athletics in the school code as revised in 1995. The law now simply authorizes school districts to "join organizations *as part of performing the functions of the school district*." MCL 380.11a(4) (emphasis added). However, the Revised School Code further provides that the powers of school districts are not diminished "[u]nless expressly provided in the amendatory act . . . ." MCL 380.11a(9).

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[3] This description is from the MHSAA's April 18, 1972, articles of incorporation.

[4] When a school district joins the MHSAA, it must annually adopt the MHSAA membership resolution. That resolution provides that the school district:

> Accepts the Constitution and By-Laws of [MHSAA] and adopts as its own the rules, regulations and interpretations (as minimum standards), as published in the current *HANDBOOK* and qualifications as published in the *BULLETIN* as the governing code under which the said school(s) shall conduct its program of interscholastic activities and agrees to primary enforcement of said rules, regulations, interpretations and qualifications. In addition, it is hereby agreed that schools which host or participate in the association's meets and tournaments shall follow and enforce all tournament policies and procedures.

Thus, it can be concluded that the provision of athletics remains a proper function of school districts. It is also undisputed that the MHSAA remains the primary statewide organization that coordinates the interscholastic athletics for public school districts in Michigan.[5]

Given this history, the majority's suggestion that the MHSAA is "a wholly different organization from the entity that was at one time legislatively designated as the official organization for the regulation of interscholastic sports in Michigan and that was housed within the Michigan Department of Education," *ante* at 230, is inaccurate. As noted above, the MHSAA was not expressly named in the statute as the "official" state interscholastic organization after 1972. Further, the majority suggests that the "voluntary" nature of membership in the MHSAA is a new reality under the 1995 Revised School Code. This is not true. Membership has always been and remains voluntary. At any point since 1924, a school district could decide to not participate in interscholastic athletics and to not join the MHSAA.

School districts allow the MHSAA to coordinate sports events because the MHSAA is the dominant statewide organization of interscholastic athletics, and failure to join and comply with the MHSAA rules would effectively prevent the schools from participating in interscholastic athletics. Moreover, the MHSAA's written materials demonstrate that the MHSAA is intertwined with the school districts. Specifically included in the MHSAA's eligibility guidelines are requirements that the student athlete passes at least twenty credit hours and not have been enrolled in more than eight semesters in high

[5] The MHSAA's comprehensive control that it has retained over interscholastic athletics is reviewed in *Communities for Equity, supra* at 810-814.

school.[6] Thus, not only is the MHSAA involved in the athletic activities of the students, it also establishes rules concerning the scholastic performance of the student athletes.

As noted in *Communities for Equity, supra* at 811, the 1995 amendment of the Revised School Code, "resulted in no substantive changes in the structure or operation of the MHSAA or in its relationships with its member schools." The MHSAA was created by school districts that came together in 1924 to organize interscholastic athletics, and the organization of interscholastic athletics remains the MHSAA's purpose. When school districts join the MHSAA through annual resolutions passed by the school boards, they adopt the MHSAA's constitution, by-laws, rules and regulations "as their own."[7] Therefore, under the FOIA the MHSAA should be treated as a "public body" because it is "created by state or local authority."

The United States Supreme Court case of *Brentwood Academy v Tennessee Secondary School Athletic Ass'n,* 531 US 288; 121 S Ct 924; 148 L Ed 2d 807 (2001), supports the conclusion that the MHSAA is a public body that was created by state or local authority. In *Brentwood,* the United States Supreme Court held that the Tennessee Secondary School Athletic Association (TSSAA) was a state actor subject to constitutional limitations. While it is unnecessary to decide whether the MHSAA is a state actor to determine whether the MHSAA is subject to the FOIA, the *Brentwood* Court's discussion of the TSSAA is of interest and relevant to this case because of the TSSAA's similarities to the MHSAA. In *Brentwood*,

[6] <http://www.mhsaa.com/administration/eligibility.pdf> (accessed July 28, 2004).

[7] As we have noted before, the MHSAA is a "creature of its members." *Kirby v MHSAA*, 459 Mich 23, 39 n 17; 585 NW2d 290 (1998).

the TSSAA, like the MHSAA, was a not-for-profit corporation that was formed to oversee the interscholastic sports programs among public and private high schools in the state. The TSSAA imposed sanctions against plaintiff Brentwood Academy based on recruiting violations. In finding that the TSSAA was a state actor, the United States Supreme Court noted that "the nominally private character of the Association is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings . . . ." *Id*. at 298. *Brentwood* also noted the TSSAA's membership consisted of predominantly public schools, its revenue came from its membership dues and gate receipts from tournaments held at member schools, state officials were given ex officio status on the legislative council, and TSSAA employees were eligible for the state employees retirement system. *Id*. at 298-300.[8] It is notable that before the United States Supreme Court in *Brentwood*

[8] Interestingly, the United States District Court, in *Communities for Equity, supra* subsequently held that, under the United States Supreme Court decision in *Brentwood,* the facts presented in *Communities for Equity* necessitated a finding that the MHSSA was a state actor. *Id.* at 847.

The United States District Court explained:

> The purpose of the MHSAA—to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state—is virtually the same as its Tennessee counterpart. The MHSAA has a membership of predominantly public schools and almost every eligible public school belongs. Its revenue is derived from gate receipts from tournaments held at member schools and broadcast fees, among other items, revenues to which schools would otherwise be entitled. The membership of the MHSAA's Representative Council includes a representative of the superintendent of education and is comprised of mostly public school employees acting as representatives for their schools. Some MHSAA employees continue to be eligible for participation in the state employee retirement system. Moreover, the MHSAA exercises adjudicative power over the schools with its ability to investigate and determine rules violations and resultant sanctions.

reversed the Sixth Circuit's conclusion that the TSSAA was *not* a state actor, the MHSAA argued that it was "very similar in structure" to the TSSAA and "that the nature and function of the MHSAA is virtually identical to that of the TSSAA." See *Communities for Equity*, *supra* at 846-847. To suggest that an entity like the MHSAA could be a state actor, but not also a "public body" under the FOIA would undercut the stated purpose of the FOIA that "[a]ll persons . . . are entitled to full and complete information regarding the affairs of government . . . ." MCL 15.231(2).

B

THE MHSAA IS PRIMARILY FUNDED BY OR THROUGH SCHOOL DISTRICTS

The MHSAA is "primarily funded" as a result of its relationship with the public school districts. The majority definition of "funded" as narrowly pertaining only to "the receipt of a governmental grant or subsidy," *ante* at 224, 226-227, defies common sense. The majority's definition originates in a Court of Appeals decision[9] that first cites a dictionary definition of "fund" (as a verb), and then skips to a synonym, "subsidize," that the panel discovered in a thesaurus. Apparently preferring "subsidize" to "fund," even though the term "fund" was

> Just as the Supreme Court recognized that a mechanism is required to implement interscholastic sports schedules and competition rules governing Tennessee's schools, that mechanism in the State of Michigan takes the form of public school officials acting together under the auspices of the MHSAA. [*Id*. at 847.]

[9] For its definition of "funded," the majority relies on an interpretation conceived in *State Defender Union Employees v Legal Aid and Defender Ass'n of Detroit*, 230 Mich App 426; 584 NW2d 359 (1998), a decision written by the author of the majority opinion while serving on the Court of Appeals.

used by the Legislature,[10] the panel then turned to a dictionary definition of "subsidy" (a noun) and discovered that a "subsidy" is defined as "a direct financial aid furnished by a government . . . [or] any grant or contribution of money." Thus, by mixing verbs and nouns and substituting words for those employed by the Legislature, the panel creatively narrowed "is . . . funded" under the statute to mean the "receipt of a government grant or subsidy." While it is appropriate to refer to dictionary definitions to understand the ordinary meaning of words, it is not appropriate to pick and choose among synonyms that may only have "nearly the same" or "similar"[11] meaning and substitute those for the words specifically employed by the Legislature.

I would conclude, that a "fund" can be understood to be "money available for use" so that when something "is funded" it is provided for "by a fund," i.e. by "money available for use . . . ." *Webster's New World Dictionary* (3d ed). Michigan public schools represent eighty percent of the MHSAA's membership and approximately ninety to ninety-five percent of the MHSAA's funding is from gate receipts from postseason athletic tournaments for football and basketball involving public school teams. Without the voluntary participation of the public school districts in the MHSAA organized interscholastic athletic season and postseason tournaments, as well as the school districts' relinquishment of the gate receipts to MHSAA, it would cease to exist because its primary source of money available for its use would disappear.

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[10] Apparently the panel also preferred "subsidize" over other common synonyms of "fund" such as "endow" or "finance." *Webster's Collegiate Thesaurus* (1976).

[11] *Webster's, supra*, defining "synonym" and "synonymous."

However, the question remains whether the MHSAA's gate receipt funding is derived "by or through" public school districts. There are many inapplicable definitions of the terms "by" and "through." But in the context of MCL 15.232(d)(iv), the most applicable definition of "by" in *Webster's* addresses the term as used to express permission or sanction. In that sense, "by" is defined as "with the authority or sanction of [*by* your leave]."[12] The applicable definitions of "through" in *Webster's* are "by means of [*through* her help]" and "as a result of; because of [done *through* error]."[13] *Id.*

Thus, the plain meaning approach to "by" or "through" in the context of the statute at issue is whether the gate receipts amount to funding that the MHSAA receives with the authority or sanction of the school districts or by means of, as a result of, or because of the school districts.[14] I would hold that because the MHSAA receives its primary funding as with the authority of (by) and as a result of (through) the voluntary membership of public school districts in the MHSAA and the school districts' voluntary participation in the interscholastic athletic seasons and postseason tournaments organized by the MHSAA, the MHSAA is primarily

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[12] In Black's Law Dictionary (6th ed), "by" is similarly defined as "[t]hrough the means, act, agency or instrumentality of."

[13] In Black's, *supra,* "through" is defined similarly as "[b]y means of, in consequence of, by reason of [and] [b]y the intermediary of; in the name or as the agent of; by the agency of; because of."

[14] The terms "by" and "through" are often combined in the phrase "by and through." Garner, A Dictionary of Modern Legal Usage (2d ed), described "by and through" as "typical LEGALESE" that "can be replaced with either *by or through*." MCL 8.3a (emphasis added) provides that "[a]ll words *and phrases* shall be construed and understood according to the common and approved usage of the language . . . ." Thus, the majority's assertion that these words in this context must each be accorded "[its] unique meanin[g]," *ante* at 226, is incorrect.

funded "by or through" the schools and is a public body under MCL 15.232(d)(iii) of the FOIA.

Rather than look at the plain meaning of the words at issue, the majority suggests that the terms "by" and "through" must refer to different kinds of governmental authority. The majority adopts the analysis of the Court of Appeals and concludes that "by" refers to an entity that directly distributes its financial resources to the disputed organization. The majority then says "through" refers to the disputed organization indirectly receiving funds through some action or decision of the governmental body. *Ante* at 226. However, to understand the statute, it is not necessary to engraft concepts of direct and indirect funding or to conclude that the Legislature intended to reference different kinds of governmental authority when it only used the term authority once. The majority's approach defies the plain language of the statute and unduly constricts the definitions of "public body" and of "funded."

In *Brentwood*, the United States Supreme Court addressed the nature of gate receipts received by a similar state school athletic organization for its organization and sponsorship of public school athletic tournaments and stated:

> Unlike mere public buyers of contract services, whose payments for services rendered do not convert the service providers into public actors, . . . the schools here obtain membership in the service organization and give up sources of their own income to their collective association. The Association . . . exercises the authority of the predominantly public schools to charge admission to their games; the Association does not receive this money from the schools, but enjoys the moneymaking capacity as its own. [*Brentwood, supra* at 299.]

Like the TSSAA, the MHSAA is more than a public contractor exchanging payments for services. By collecting gate receipts at tournaments, the MHSAA enjoys the schools' moneymaking capacity as its own.[15]

This underscores the conclusion that the MHSAA receives its primary funding "by or through" the schools' authority. The majority argues that the MHSAA "creates its own 'market,' " and stresses that without the MHSAA's effort "no revenue from tournament games would be generated for any entity, including MHSAA member schools." *Ante* at 229. The majority thus concludes that the MHSAA is merely a service provider and that the gate receipts are simply fees paid for services.

However, as noted above, the MHSAA is not simply in a situation where the organization provides a particular service for a fee. True, the MHSAA does organize interscholastic seasons and postseason tournaments. It also provides medical insurance, publications, and training to its members. However, schools do not join the MHSAA or allow it to sell tickets to events featuring student athletes simply because the MHSAA provides medical insurance, publications, or training. As already explained, school districts allow the MHSAA to coordinate events and relinquish related gate receipts to the MHSAA because the MHSAA is the dominant statewide organization of interscholastic athletics, and failure to join and comply with MHSAA rules would effectively prevent the schools from participating in interscholastic athletics.

It should be noted that the MHSAA is distinguishable from ordinary service providers to the schools. The school districts have delegated the authority to the

[15] Justice Thomas's dissenting perspective regarding the relationship of the association to the schools in *Brentwood* did not prevail. The majority's citation of it, *ante* at 227 n 2, is not persuasive.

MHSAA to make policy decisions. These decisions are within the proper function of school districts to regulate athletics, MCL 380.11a(4); MCL 380.11a(9), such as athletic eligibility and training, participation in outside sports activities and required scholastic achievement for participating athletes. This intertwinement between the MHSAA and the school districts makes the MHSAA subject to the FOIA where an ordinary service provider would not be.

III

CONCLUSION

It has been and remains the submission of public school districts to the rules and regulations of the MHSAA that allows the MHSAA to exist. It can thus be concluded that the MHSAA was created by the school districts. MCL 15.232(d)(iv). It is similarly by and through the MHSAA's relationship with the schools that it may sell tickets for tournaments featuring public school athletes. It follows that the gate receipts the MHSAA receives for those events are received "by or through" the authority of the schools as those words are used in MCL 15.232(d)(iv). The purpose of the FOIA is to allow citizens to fully participate in the democratic process regarding the affairs of government and the official acts of those who represent them. MCL 15.231(2). The school districts have effectively delegated the responsibility for those official acts, as they pertain to school athletics, to the MHSAA by repeatedly adopting its rules as their own.

Thus, both to follow the language of the FOIA and remain true to the purpose behind its enactment, I would hold that the MHSAA is a public body that must comply with the disclosure requirements of the FOIA.

KELLY, J., concurred with WEAVER, J.

PEOPLE v MORSON

Docket No. 124083. Argued April 21, 2004 (Calendar No. 13). Decided July 30, 2004. Motion to file a supplemental brief granted *post*, 1201.

Latasha G. Morson was convicted in a bench trial in the Oakland Circuit Court of armed robbery and other felonies. At sentencing, the court, John James McDonald, J., assessed Morson twenty-five points for offense variable (OV) 1 and twenty-five points for OV 3, in spite of her accomplice having been assessed fifteen and zero points respectively. The court also determined that there were two victims, one who was robbed and another who was shot when he gave chase to Morson's accomplice. The Court of Appeals, WHITBECK, C.J., and WHITE and DONOFRIO, JJ., in an unpublished opinion per curiam, affirmed in part and reversed in part, determining that Morson must be assessed points equal to those of her accomplice for OV 1 and OV 3 pursuant to statute and that there was only one victim, the person who was robbed (Docket No. 238750). The prosecution appealed.

In an opinion by Justice WEAVER, joined by Chief Justice CORRIGAN, and Justices CAVANAGH and KELLY, the Supreme Court *held*:

The Court of Appeals was correct that the defendant must be assessed the same score on OV 1 and OV 3 in the sentencing guidelines calculation as her previously sentenced accomplice pursuant to the plain language of MCL 777.31(2)(b) and 777.33(2)(a). Because MCL 777.39 requires a determination of the number of victims on the basis of all who were placed in danger of injury or loss of life as a victim, the circuit court was correct that there were two victims in this case.

1. The defendant must be assessed the same score on OV 1 and OV 3 in the sentencing guidelines calculation as her previously sentenced accomplice pursuant to the plain language of MCL 777.31(2)(b) and 777.33(2)(a). The prosecution neither objected to the accomplice's scores on OV 1 and OV 3 at her sentencing, nor characterized them as inaccurate or erroneous in this case. Therefore, the court in the second offender's sentencing should have assessed the same number of points that were assessed for the accomplice. This conclusion does not read the "highest number of

points" requirement out of the statute because when the sentencing court assesses points for the first offender, it must assess the highest number of points.

2. MCL 777.39 requires the assessment of ten points for two victims and zero points for one victim. The plain language of the statute includes as victims each person who was placed in danger of injury or loss of life. MCL 777.39(2)(a). The person robbed was a victim, and the man standing nearby who responded to the robbed person's calls for help was also placed in danger of injury or loss of life. There were two victims requiring the court to assess ten points for OV 9.

Chief Justice CORRIGAN, concurring, stated that the "multiple offender" provision of OV 1 and OV 3 conflicts with the "highest number of points" provision of those variables. It is unclear whether the trial court assessed the proper number of points under each variable. Nevertheless, Chief Justice CORRIGAN concurred with the majority for the sake of reaching a clear rule and offering guidance to sentencing courts in implementing the legislative sentencing guidelines. The Legislature should amend those sentencing variables containing the conflicting provisions.

Armed robbery is a transactional offense that is not complete until the offender has escaped with the stolen property. Because armed robbery is a transactional offense, the trial court properly assessed the defendant ten points under OV 9.

Justice MARKMAN, joined by Justice TAYLOR, concurring in part and dissenting in part, agreed that the trial court improperly scored OV 1 and OV 3, but disagreed that the trial court properly scored OV 9.

In general, under MCL 769.31(d), when scoring offense variables, the trial court can only consider the offense for which the sentencing guidelines are being scored and those enumerated offenses that arose out of the same transaction as that offense and that resulted in convictions. In this case, the discharging of the firearm and the resulting injury to the person who was shot are not factors that relate to the robbery offense that was scored, but are instead factors that relate to the assault offense, an offense of which the defendant was neither charged nor convicted. The trial court erred when it considered these factors in scoring the defendant's robbery conviction. OV 1 should have been scored at fifteen points because the defendant's accomplice only pointed a firearm during the robbery; she did not discharge a firearm during the robbery. OV 3 should have been scored at zero points because the robbery victim did not suffer from a life-threatening injury; only the assault victim suffered from a life-threatening injury.

OV 9 should have been scored at zero points because there was only one robbery victim; the person who was shot was an assault victim, but not a robbery victim.

The judgment of the Court of Appeals, which concluded that the trial court erred in scoring OV 1, OV 3, and OV 9, should be affirmed, albeit on different grounds.

Justice YOUNG, concurring in part and dissenting in part, agreed with the majority that the trial court did not err when it assessed ten points for OV 9. MCL 777.39(2)(a) clearly states that each person placed in danger of injury or loss of life is to be counted as a victim. The person who was shot was such a victim.

Justice YOUNG, however, disagreed with the majority's holding that the trial court erred in assessing twenty-five points each for OV 1 and OV 3. The majority opinion rests upon the analytical assumption that the requirement of equal scores for multiple offenders means that identical crimes must be compared. The plain language of MCL 777.31(2)(b) and MCL 777.33(2)(a) clearly do not require that the convictions must be identical. Rather, the statutes contemplate the comparison of identical offense variable scores. The correct reading of the statutes requires that, to the degree that both defendants are convicted of crimes requiring the scoring of OV 1 and OV 3, the second defendant would get the same OV 1 and OV 3 scores as the first. Here, the defendant received the same OV 1 and OV 3 scores as her accomplice. Thus, the defendant is not entitled to resentencing.

Because the guidelines were correctly scored, the judgment of the Court of Appeals should be reversed and the sentence imposed by the trial court should be reinstated.

Affirmed in part, reversed in part, and remanded to the circuit court for resentencing.

1. SENTENCES — SENTENCING GUIDELINES — ACCOMPLICES — OFFENSE VARIABLE ONE — OFFENSE VARIABLE THREE.

The sentencing guidelines for offense variable 1 (aggravated use of a weapon) and 3 (physical injury to a victim) require a sentencing court to assess the same score for a defendant as for a previously sentenced accomplice in the absence of inaccurate or erroneous scoring with respect to the accomplice (MCL 777.31[2][b], 777.33[2][a]).

2. SENTENCES — SENTENCING GUIDELINES — VICTIMS — OFFENSE VARIABLE NINE.

For the purpose of scoring offense variable 9 (number of victims), a person who was shot by a perpetrator of armed robbery during a chase of the perpetrator is a victim, as is the person who was robbed, because both have been placed in danger of injury or loss of life (MCL 777.39[2][a]).

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, *Joyce F. Todd*, Chief, Appellate Division, and *Danielle DeJong*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Gary L. Rogers*) for the defendant.

WEAVER, J. Defendant Latasha Morson waited in a car while her friend, Iesha Northington, robbed Deborah Sevakis of her purse at gunpoint, using a gun obtained from defendant. As Northington fled the scene, she shot James Bish, who tried to stop her and recover Sevakis's purse. Following a bench trial, defendant was convicted of armed robbery,[1] conspiracy to commit armed robbery,[2] and two counts of possession of a firearm during the commission of a felony.[3] She was sentenced to concurrent terms of eight to thirty years for the armed robbery and conspiracy convictions,[4] to be served consecutively to the mandatory two-year sentence for felony-firearm.

The first issue to be addressed is how many points defendant could be properly assessed at sentencing under offense variables (OV) 1 and 3. OV 1, which considers aggravated use of a weapon, and OV 3, which considers physical injury to the victim, require both that the highest number of points be assessed and that multiple offenders be assessed the same number of points for these variables. When Iesha Northington's

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[1] MCL 750.529.

[2] MCL 750.157(a).

[3] MCL 750.227b.

[4] The Court of Appeals opinion incorrectly states the sentence as eight to *twenty* years. The sentencing transcript, sentencing information report, and judgment of sentence all state the term as eight to thirty years.

armed robbery conviction was scored on May 10, 2000, she was assessed fifteen points for OV 1 and zero points for OV 3. But when defendant's armed robbery conviction was scored on December 10, 2001, the sentencing court assessed defendant twenty-five points for OV 1 and twenty-five points for OV 3. The Court of Appeals reversed the decision of the sentencing court on this issue, concluding that the multiple offender provision required that defendant's scores on OV 1 and OV 3 be the same as those previously assessed to Iesha Northington for OV 1 and OV 3.

The second issue that must be decided is how many points defendant could be properly assessed under OV 9, which considers the number of victims. The sentencing court assessed ten points under this variable, concluding that there were two victims. The Court of Appeals reversed and concluded that defendant should be assessed zero points because there was one victim.

We affirm in part and reverse in part. The Court of Appeals correctly concluded that pursuant to the sentencing guidelines, defendant should have been assessed the same scores for OV 1 and OV 3 that Iesha Northington was assessed. But the Court of Appeals incorrectly held that under OV 9, defendant should have been assessed zero points because there was only one victim. Pursuant to the language of the guidelines, two people were placed in danger. Consequently, the sentencing court properly assessed defendant ten points under OV 9. We remand this case to the circuit court for resentencing consistent with this opinion.

FACTS

Deborah Sevakis was robbed of her purse at gunpoint by Iesha Northington as Sevakis was walking down Nine Mile Road in Ferndale at about 10:00 P.M. on May

29, 1999. Sevakis testified that someone tapped her on the shoulder and demanded her purse. When Sevakis initially refused to give up her purse, Northington pointed a gun at her. As Northington ran off with the purse, Sevakis yelled, "Call 9-1-1. I've been robbed." Immediately, James Bish, who was standing nearby and had witnessed the robbery, ran after Northington. When Bish told Northington to drop the purse, Northington shot him.

In her written statement to the police, defendant stated that as she and Northington were driving down Nine Mile Road, they observed a lady walking with her purse and discussed robbing her. Northington got out of the car while defendant drove to a gas station. Defendant next observed Northington running toward the car, carrying a black purse. She also saw a man running and holding his chest; Northington told her that she thought she had shot the man. Defendant admitted that she had given Northington the gun that Jermaine Calloway had given her. Defendant stated that she and Northington stopped to get gas, then went to a Kmart store, where they tried unsuccessfully to use Sevakis's credit card.

Following a bench trial, defendant was convicted of armed robbery, conspiracy to commit armed robbery, and two counts of felony-firearm.[5] Before defendant's sentencing, Northington, who was sentenced on May 10, 2000, was assessed fifteen points on OV 1 and zero points on OV 3. At defendant's sentencing on December 10, 2001, she asserted that she should be assessed the same number of points as Ms. Northington on OV 1 and OV 3 when defendant's armed robbery conviction was

[5] Defendant and Northington were tried separately and sentenced by different judges. Though Northington was also charged with and convicted of assault with intent to commit murder, defendant was not.

scored. But the court assessed defendant twenty-five points on OV 1 and twenty-five points on OV 3 when scoring defendant's armed robbery conviction. The trial court also assessed defendant ten points on OV 9.

Defendant appealed, and the Court of Appeals reversed and remanded for resentencing.[6] The Court of Appeals concluded that defendant should have been assessed the same scores as Northington on OV 1 and OV 3 for the armed robbery conviction. Additionally, the Court of Appeals concluded that defendant should have been assessed zero points on OV 9 because there was only one victim, not two.

This Court granted the prosecution's application for leave to appeal. [7]

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[6] Unpublished opinion per curiam, issued May 29, 2003 (Docket No. 238750).

[7] 469 Mich 966 (2003). The Court's grant order instructed the parties to include among the issues briefed:

> (1) how subsection 1 of MCL 777.31 (offense variable one [OV 1]), requiring that the "highest number of points" be assigned, should be applied in light of subsection 2(b), requiring that "all offenders" in multiple offender cases be assessed the same number of points; (2) similarly, how subsection 1 of MCL 777.33 (OV 3), requiring that the "highest number of points" be assigned, should be applied in light of subsection 2(a), requiring that "all offenders" in multiple offender cases be assessed the same number of points; (3) whether MCL 777.31(2)(b) and 777.33(2)(a) apply where all "offenders" have not been charged with identical crimes; (4) whether under MCL 777.31(2)(b) and 777.33(2)(a) the trial court is bound by a previously imposed sentence upon a codefendant where that sentence is based upon an erroneous offense variable score; (5) whether under MCL 777.39 (OV 9) the number of persons placed in danger includes only those persons who are placed in danger during the particular crime for which defendant is being scored (here, armed robbery), or whether that number includes all persons placed in danger at any point during the criminal episode; and (6) whether the due process clauses of the state and federal constitutions require that the prosecution prove the elements of a crime that someone else committed before a court can base a defendant's sentence on the actions of the other person. See *Harris v United States*, 536 US 545

STANDARD OF REVIEW

The issues in this case concern the proper interpretation and application of the legislative sentencing guidelines, MCL 777.11 *et seq.*, which are legal questions that this Court reviews de novo. *People v Perkins,* 468 Mich 448, 452; 662 NW2d 727 (2003). When construing a statute, this Court's primary goal is to give effect to the intent of the Legislature. We begin by construing the language of the statute itself. Where the language is unambiguous, we give the words their plain meaning and apply the statute as written. *People v Morey,* 461 Mich 325, 330; 603 NW2d 250 (1999).

ANALYSIS

Generally, to determine a minimum sentence range under the legislative sentencing guidelines, the sentencing court must first determine the offense category. MCL 777.21(1)(a). The sentencing court must then determine which offense variables (OV) are applicable, score those variables, and total the points to determine the offender's offense variable level. *Id*. The sentencing court also scores all prior record variables. MCL 777.21(1)(b). The offender's offense variables score and prior record variables score are then used with the sentencing grids to determine the recommended minimum sentence range under the guidelines. MCL 777.21(1)(c).

In this case, the sentencing issues presented arise out of defendant's armed robbery conviction, MCL 750.529. Under the guidelines, armed robbery is categorized as a

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(2002), *Apprendi v New Jersey*, 530 US 466 (2000), and *Washington v Blakely*, 111 Wash App 851 (2002), cert gtd sub nom *Blakely v Washington* [124 S Ct 429 (2003)].

crime against a person. MCL 777.16y. MCL 777.22(1), as amended by 2002 PA 143, provided:

> For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20. Score offense variables 5 and 6 for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. Score offense variable 16 under this subsection for a violation or attempted violation of . . . MCL 750.110a. Score offense variables 17 and 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive.

At issue are defendant's scores for OV 1, OV 3, and OV 9.

OV 1 AND OV 3

OV 1 assesses points for the aggravated use of a weapon, MCL 777.31, and OV 3 assesses points for physical injury to a victim, MCL 777.33. This case concerns how these two variables are to be scored in cases involving multiple offenders. MCL 777.31 provides in part:

> (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by *assigning the number of points attributable to the one that has the highest number of points*:
>
> (a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon.....25 points
>
> * * *
>
> (c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon.....15 points

(d) The victim was touched by any other type of weapon.....10 points

(e) A weapon was displayed or implied.....5 points

(f) No aggravated use of a weapon occurred.....0 points

(2) All of the following apply to scoring offense variable 1:

(a) Count each person who was placed in danger of injury or loss of life as a victim.

(b) In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.

(c) Score 5 points if an offender used an object to suggest the presence of a weapon.

(d) Score 5 points if an offender used a chemical irritant, chemical irritant device, smoke device, or imitation harmful substance or device.

(e) Do not score 5 points if the conviction offense is a violation of . . . MCL 750.82 and 750.529. [Emphasis added.][8]

MCL 777.33 provides in part:

(1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and *by assigning the number of points attributable to the one that has the highest number of points*:

(a) A victim was killed.....100 points

(b) A victim was killed.....50 points

(c) Life threatening or permanent incapacitating injury occurred to a victim.....25 points

(d) Bodily injury requiring medical treatment occurred to a victim.....10 points

(e) Bodily injury not requiring medical treatment occurred to a victim.....5 points

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[8] Some amendments were made to the statute after the crime in the present case occurred. Subsection 1(d) was added in 2001. In 2002, amendments added subsection 1(b), which scores twenty points for exposure to harmful substances or incendiary devices, and subsection 3, which defines harmful substances and incendiary devices.

(f) No physical injury occurred to a victim.....5 points

(2) All of the following apply to scoring offense variable 3:

(a) In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.

* * *

(d) Do not score 5 points if bodily injury is an element of the sentencing offense.

(3) As used in this section, "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment. [Emphasis added.][9]

When the sentencing court scored defendant's armed robbery conviction, it assessed defendant twenty-five points on OV 1 for the shooting of Bish. But when Iesha Northington had previously been sentenced for the armed robbery before defendant, she was assessed only fifteen points under OV 1. Similarly, on OV 3, defendant was assessed twenty-five points for the shooting of Bish, while Iesha Northington had been assessed zero points.

Focusing on subsection 1 of each statute, the prosecution contends that defendant may be assessed twenty-five points for OV 1 and OV 3 when scoring the armed robbery conviction because subsection 1 requires the sentencing court to assess the "highest number of points" and because the sentencing court should not be bound to apply "inaccurate" scores. Defendant, on the other hand, asserts that subsection 2 of each statute requires that defendant, for her armed robbery convic-

[9] This statute was revised in 2003, after the crime in this case was committed. The amendments, which increased the score imposed under 1(b) from thirty-five points to fifty points and made corresponding revisions to 2(c), do not affect the present case.

tion, be assessed the same scores for OV 1 and OV 3 that Iesha Northington was assessed when scored for armed robbery. On the facts before us, we agree with defendant that the plain language of subsection 2 requires that defendant, when scored on the armed robbery conviction, be assessed the same scores on OV 1 and OV 3 that Iesha Northington was previously assessed on those variables when she was scored for armed robbery.[10]

Each multiple offender provision states that if one offender is assessed points under the variable, "all offenders shall be assessed the *same number* of points." MCL 777.31(2)(b), MCL 777.33(2)(a) (emphasis added).[11] While we agree that the sentencing court should not be bound to apply an erroneous score in the multiple offender context, we note that the prosecution does not characterize Iesha Northington's scores on OV 1 and OV 3 of her armed robbery conviction as inaccurate or erroneous. In fact, the prosecution acknowledged in its brief that Northington's scores were not disputed by the prosecution at sentencing.[12] Rather, the prosecution's argument seems to be that whenever it appears

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[10] Because the scoring issues in this case can be resolved under the plain language of the statute, it is unnecessary to address, as do the concurring and concurring/dissenting opinions, whether armed robbery is a transactional offense. See concurring opinion of CORRIGAN, C.J., at 263-266, 270, and partially concurring and partially dissenting opinion of MARKMAN, J., at 275 n 2. Additionally, it is unnecessary to draw the sharp lines that Justice MARKMAN attempts to draw between "offenses" stemming from this event. See *post* at 272-275.

[11] We note that there is no language in either statute to suggest that the multiple offender provision applies only when "offenders" are charged with identical crimes. Thus, the fact that Northington was charged with additional crimes—namely, assault with intent to murder—does not mean that the multiple offender provisions do not apply to the armed robbery convictions arising from the incident.

[12] Compare *People v Libbett,* 251 Mich App 353, 366; 650 NW2d 407 (2002), in which it was "undisputed" that the first offender sentenced had been scored improperly on OV 1.

possible that a higher score could be argued for under the variables, a subsequent sentencing court is not bound by the prior score because the sentencing court is required to assess the "highest number of points." We find such analysis contrary to the plain language of the statute, which requires the sentencing court to assess the same number of points to multiple offenders.[13]

Further, we reject the argument that our conclusion would read the "highest number of points" requirement out of the statute. When the sentencing court assesses points for the first offender, it must assess the "highest number of points" that can be assessed under the statute. If Iesha Northington's scores were inaccurate or erroneous because the sentencing court failed to assess the highest number of points, the prosecution should have challenged the scores at Northington's sentencing. But the prosecution acknowledges that Northington's scores were not disputed and it does not argue to

[13] Justice YOUNG opines in his partially concurring and partially dissenting opinion that the multiple offender provision does not require a comparison of the OV scores for identical crimes (i.e., comparing Northington's armed robbery OV 1 score with defendant's armed robbery OV 1 score) but that the provision contemplates simply the comparison of OV *scores*. *Post* at 279-281. Not only is this inconsistent with MCL 777.21(2), which requires the sentencing court to score each offense, but such a reading may lead to illogical results. Suppose that defendant, like Northington, had also been convicted of assault with intent to commit murder. Under Justice YOUNG's theory, since the sentencing court would only compare the OV 1 *scores*, and not the OV scores received for a specific offense, presumably defendant could receive twenty-five points under OV 1 for *both* her assault with intent to murder conviction and her armed robbery conviction because the sentencing court, looking at only the OV 1 *scores*, could simply give defendant the highest OV 1 score—25 points—that Northington received under OV 1 when her offenses were scored. Or suppose that defendant was convicted of an additional crime that Northington was not. Under Justice YOUNG's theory, Northington's scores for an offense variable would be considered when defendant is subsequently scored and sentenced for the additional offense. This would be another illogical result of Justice YOUNG's theory.

this Court that the scores Northington received under OV 1 and OV 3 were erroneous. Consequently, in the absence of any clear argument that the scores assessed to Northington under OV 1 and OV 3 were incorrect, the sentencing court should have assessed defendant the same number of points that were assessed to Northington for OV 1 and OV 3 when her armed robbery conviction was scored: fifteen points and zero points.

For these reasons, we affirm the Court of Appeals conclusion concerning defendant's scores for OV 1 and OV 3.

OV 9

Offense variable 9 assesses points on the basis of the number of victims. MCL 777.39 provides:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Multiple deaths occurred.....100 points
>
> (b) There were 10 or more victims.....25 points
>
> (c) There were 2 to 9 victims.....10 points
>
> (d) There were fewer than 2 victims.....0 points
>
> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of injury or loss of life as a victim.
>
> (b) Score 100 points only in homicide cases. [Emphasis added.]

Defendant was assessed ten points by the sentencing court for two victims: Deborah Sevakis and James Bish. The Court of Appeals reversed that determination by the sentencing court, concluding that Sevakis was the

only victim of the armed robbery. We disagree with the Court of Appeals and therefore reverse its conclusion regarding OV 9.

Pursuant to the plain language of the statute, the sentencing court is to count "each person who was placed in danger of injury or loss of life" as a victim. Though Sevakis was the only person actually robbed, Bish, who was standing nearby and responded to Sevakis's call for help, was also "placed in danger of injury or loss of life" by the armed robbery of Sevakis.[14] Consequently, the sentencing court properly counted Bish as a victim and properly scored defendant under OV 9.

CONCLUSION

We conclude that pursuant to the language of the sentencing guidelines, defendant should have been assessed the same number of points on OV 1 and OV 3 that Iesha Northington was assessed when scored on the armed robbery conviction. Unless the prosecution can demonstrate that the number of points assessed to the prior offender was erroneous or inaccurate, the sentencing court is required to follow the plain language of the statute, which requires the court to assess the same number of points on OV 1 and OV 3 to multiple offenders. The prosecution has not alleged that Northington's score on these variables was in error. Consequently, we affirm the Court of Appeals conclusion that defendant should have been assessed the same number of points as Northington on OV 1 and OV 3.

Additionally, we conclude that defendant was properly assessed ten points by the sentencing court for OV 9

[14] Justice MARKMAN, in his concurring/dissenting opinion, fails to apply the plain language of the statute, which, as explained, requires the sentencing court to count "*each person* who was placed in danger of injury or loss of life" as a victim. MCL 777.39(2)(a).

because there were two people placed in danger of injury or loss of life: Sevakis, who was robbed, and Bish, a bystander who responded to Sevakis's call for help. Accordingly, the decision of the Court of Appeals is reversed on this point.[15]

We remand the case to the circuit court for resentencing consistent with this opinion.

CORRIGAN, C.J., and CAVANAGH and KELLY, JJ., concurred with WEAVER, J.

CORRIGAN, C.J. (*concurring*). I concur in the majority's result for the sake of reaching a clear rule regarding the legislative sentencing guidelines and providing direction to trial courts in implementing the guidelines. I believe that offense variables 1 (OV 1) and 3 (OV 3), however, contain language that may be contradictory in some cases, such as the instant case. I further believe that armed robbery is a transactional offense and thus concur with the majority's conclusion that the trial court properly assessed defendant ten points under OV 9.

I. ARMED ROBBERY IS A TRANSACTIONAL OFFENSE

At the time that defendant and Northington committed the armed robbery in this case, the armed robbery statute, MCL 750.529, provided, in part:[1]

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the

[15] Given our resolution of the sentencing issues in this case, it is unnecessary to address whether due process requires that the prosecution prove the elements of a crime that someone else committed before a court can base a defendant's sentence on the actions of the other person.

[1] The Legislature amended MCL 750.529 after the armed robbery in this case. This amendment is discussed in note 2, *infra*.

> subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

In *People v Randolph*, 466 Mich 532, 551; 648 NW2d 164 (2002), a majority of this Court rejected the "transactional approach" to unarmed robbery. Under the transactional approach, "a defendant has not completed a robbery until he has escaped with stolen merchandise. Thus, a completed larceny may be elevated to a robbery if the defendant uses force after the taking and before reaching temporary safety." *Id*. at 535 (citations omitted). A majority of this Court determined, on the basis of the language of the unarmed robbery statute in existence at that time and on the common-law history of unarmed robbery, that the force used to accomplish the taking must be contemporaneous with the taking. *Id*. at 536. In so holding, the majority overruled four Court of Appeals cases, including three involving armed robbery, *People v Tinsley*, 176 Mich App 119; 439 NW2d 313 (1989), *People v Turner*, 120 Mich App 23; 328 NW2d 5 (1982), and *People v Sanders*, 28 Mich App 274; 184 NW2d 269 (1970). *Randolph, supra* at 546.

The portion of the *Randolph* opinion overruling the above cases involving armed robbery is dicta because *Randolph* did not involve armed robbery. Further, the unarmed robbery statute at issue in *Randolph*, MCL 750.530, was significantly different than the armed robbery statute at issue in the instant case. The statute at issue in *Randolph* stated:

> Any person who shall, *by force or violence, or by assault or putting in fear,* feloniously rob, steal and take from the person of another, or in his presence, any money or other property which may be the subject of larceny, such robber

> not being armed with a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 15 years. [Emphasis added.]

The armed robbery statute at issue in this case, however, does not contain the above emphasized language that the *Randolph* majority found required a taking contemporaneous with the use of force, violence, or putting in fear. Rather, MCL 750.529 merely required an assault "and" a taking. Thus, the majority opinion in *Randolph* did not implicate armed robbery, and the armed robbery statute at issue in this case followed a transactional approach because nothing in the statute required that the use of force be contemporaneous with the taking.[2]

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[2] The Legislature effectively overruled *Randolph* after this Court released its decision in that case. MCL 750.530 now provides:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

Thus, effective July 1, 2004, the Legislature has explicitly stated that unarmed robbery is a transactional offense.

The Legislature also amended the armed robbery statute, MCL 750.529, which now provides:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years. If an

II. OV 1 AND OV 3

Because armed robbery is a transactional offense, and Northington shot Bish immediately after she stole Sevakis's purse and before she reached a place of temporary safety, the trial court's consideration of the shooting when determining defendant's score under OV 1 and OV 3 was arguably proper.[3] OV 1, MCL 777.31, involves the aggravated use of a weapon. At the

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aggravated assault or serious injury is inflicted by any person while violating this section, the person shall be sentenced to a minimum term of imprisonment of not less than 2 years.

This case involves the version of MCL 750.529 in existence before the amendment effective July 1, 2004.

[3] I disagree with Justice MARKMAN that once all the elements of the armed robbery were completed, no subsequent use of force to help Northington retain possession of Sevakis's purse could be considered a continuation of the armed robbery. See *post* note 1. Northington shot Bish in an attempt to retain possession of the purse. Thus, the shooting occurred in furtherance of the armed robbery and is properly considered a continuation of the robbery under the transactional approach. If, as recognized in Justice MARKMAN's *Randolph* dissent, "a defendant has not completed a robbery until he has escaped with stolen merchandise" and reached a place of temporary safety, *Randolph, supra* at 535, then, contrary to Justice MARKMAN's contention in note 1, *post*, the armed robbery in this case was not complete immediately after Northington acquired Sevakis's purse because Northington had not yet reached a place of temporary safety. Accordingly, the use of force subsequent to the actual taking itself committed in an attempt to retain possession of the purse was a part of the armed robbery. See *People v Velasquez*, 189 Mich App 14, 17; 472 NW2d 289 (1991) (use of force after taking in an attempt to retain possession of property constitutes force or coercion for armed robbery); *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989) (because robbery is a continuous offense, the use of force after a taking in order to retain stolen property constitutes force for purposes of armed robbery statute). In any event, the views expressed by Justice MARKMAN could not have survived the amendments of MCL 750.529 and MCL 750.530. Under those amendments, effective July 1, 2004, acts of force or violence during flight or attempted flight after acquiring the stolen property or in an attempt to retain possession of the stolen property occur during "the course of committing" the robbery. See note 2, *supra*.

time that defendant committed the armed robbery in this case, that section provided, in relevant part:[4]

> (1) Offense variable 1 is aggravated use of a weapon. *Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points*:
>
> (a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon.....25 points
>
> (b) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon.....15 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 1:
>
> (a) Count each person who was placed in danger of injury or loss of life as a victim.
>
> (b) *In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.* [Emphasis added.]

The trial court also assessed twenty-five points under OV 3. OV 3, MCL 777.33, involves physical injury to a victim. At the time that defendant committed the armed robbery in this case, MCL 777.33 provided, in relevant part:[5]

> (1) Offense variable 3 is physical injury to a victim. *Score offense variable 3 by determining which of the follow-*

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[4] The Legislature amended MCL 777.31 after the crime in this case, but the amendments are not relevant to this appeal. See *ante* note 8.

[5] Like OV 1, the Legislature amended MCL 777.33 after the armed robbery in this case. The amendments do not affect the result of this case. See Justice WEAVER's opinion, note 9.

ing apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) Life threatening or permanent incapacitating injury occurred to a victim.....25 points

(d) Bodily injury requiring medical treatment occurred to a victim.....10 points

(e) Bodily injury not requiring medical treatment occurred to a victim.....5 points

(f) No physical injury occurred to a victim.....0 points

(2) All of the following apply to scoring offense variable 3:

(a) *In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.* [Emphasis added.]

Subsection 1 of both OV 1 and OV 3 required the trial court to assess the highest number of points that it could assess for each variable. Following the transactional approach to armed robbery, the trial court did so by assessing defendant twenty-five points under OV 1 because Northington discharged a firearm toward Bish. The court also assessed defendant twenty-five points under OV 3 because Bish's gunshot wound to the chest was life-threatening. Thus, the trial court properly complied with subsection 1 of both variables and assessed the highest number of points possible under each variable.

Notwithstanding the above language of OV 1 and OV 3, subsection 2(b) in OV 1 and subsection 2(a) in OV 3 required the trial court to assess the same number of points under those variables as were assessed for Northington. The trial court assessed Northington fifteen points under OV 1 and zero points under OV 3. Thus,

the trial court did not assess Northington the highest number of points as subsection 1 of OV 1 and OV 3 directs. The question then is whether the trial court was obligated to assess defendant the same number of points as were assessed for Northington notwithstanding the fact that Northington was not assessed the highest number of points. The answer to this question is unclear. In these circumstances, the language of subsection 1 of OV 1 and OV 3 conflicts with the language of subsection 2(b) in OV 1 and subsection 2(a) in OV 3. The trial court could not have followed one provision without rendering the other nugatory.

Because it is the duty of the judiciary to interpret, not to write, our laws, we, as judges, are unable to correct the conflicting language of OV 1 and OV 3. Rather, that task is left to the Legislature. A practical approach to this problem would require trial courts to assess offenders in multiple offender cases the same number of *accurately scored* points. In that event, trial courts would be required to assess multiple offenders the same number of points only if the first offender's assessment of points was accurate. Otherwise, trial courts would be required to assess subsequently sentenced offenders "the highest number of points." Because the "highest number of points" provision of OV 1 and OV 3 conflicts with the "multiple offender" provision of those variables, and nothing directs which provision prevails, I concur with the majority that defendant was required to be assessed the same number of points as were scored for Northington.[6]

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[6] In his concurring and dissenting opinion, Justice YOUNG opines that the trial court properly scored defendant's OV 1 and OV 3 variables in the instant case because those scores coincided with Northington's OV 1 and OV 3 scores for her assault conviction. Even accepting Justice YOUNG's argument as correct, however, a conflict may still exist between the "highest number of points" provision and the "multiple offender" provi-

III. OV 9

I also concur with the majority that the trial court properly assessed defendant ten points under OV 9. OV 9, MCL 777.39, provides, in part:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Multiple deaths occurred.....100 points
>
> (b) There were 10 or more victims.....25 points
>
> (c) There were 2 to 9 victims.....10 points
>
> (d) There were fewer than 2 victims.....0 points
>
> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of injury or loss of life as a victim.

Because armed robbery is a transactional offense and Bish was placed in danger of injury or loss of life while the robbery was ongoing, the trial court properly considered him a victim of the armed robbery under subsection 2(a).[7] Accordingly, the trial court's assessment of ten points under this variable was correct.

IV. CONCLUSION

The "multiple offender" provision of OV 1 and OV 3 conflicts with the "highest number of points" provision

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sion in some cases. Although under Justice YOUNG's theory, defendant was properly scored in this case, the above provisions would still conflict in other cases if the first offender to be sentenced is not assessed the highest number of points.

[7] As discussed in note 3, *supra*, because Northington shot Bish in an attempt to retain possession of Sevakis's purse and before she reached a place of temporary safety, the shooting was a continuation of the robbery under the transactional approach to that offense. Thus, the trial court properly considered the shooting in scoring OV 9.

of those variables. Accordingly, it is unclear whether the trial court assessed the proper number of points under each variable. Nevertheless, I concur with the majority for the sake of reaching a clear rule and offering guidance to sentencing courts in implementing the legislative sentencing guidelines. I urge the Legislature to amend those sentencing variables containing the above conflicting provisions. Further, I concur with the majority's conclusion regarding OV 9. Because armed robbery is a transactional offense, the trial court properly assessed defendant ten points under OV 9.

MARKMAN, J. (*concurring in part and dissenting in part*). I concur in the conclusion of the majority opinion that the trial court improperly scored OV 1 and OV 3, although I reach this conclusion by a different analysis. I respectfully dissent from the conclusion of the majority opinion that the trial court properly scored OV 9.

Defendant and Iesha Northington robbed an elderly woman, Deborah Sevakis. Northington stole Sevakis's purse. James Bish, a bystander who witnessed the robbery, chased after Northington and Northington shot Bish. Defendant was the getaway driver. Northington pleaded guilty to armed robbery and assault with intent to murder, and defendant was convicted of armed robbery, but never charged with the assault.

OV 1 is to be scored at fifteen points for pointing a firearm at a person and twenty-five points for discharging a firearm at a person. MCL 777.31(1)(a) and (c). Although defendant's accomplice, Iesha Northington, was assessed twenty-five points for the assault conviction, she was assessed only fifteen points for the armed robbery conviction. Defendant was assessed twenty-five points for the armed robbery conviction. Defendant was never charged with an assault. The Court of Appeals

concluded that the trial court erred in assessing defendant twenty-five points for the armed robbery conviction because MCL 777.31(2)(b) provides that "[i]n multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points." The majority opinion agrees.

OV 3 is to be scored at twenty-five points if a victim suffered a life-threatening injury. MCL 777.33(1)(c). Clearly, James Bish suffered a life-threatening injury when he was shot in the chest and his lung was punctured. Although Northington was assessed twenty-five points for the assault conviction, she was assessed zero points for the armed robbery conviction. Defendant was assessed twenty-five points for the armed robbery conviction. Again, the Court of Appeals concluded that this was an error because MCL 777.33(2)(a) provides that "[i]n multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points." The majority opinion again agrees.

MCL 769.31(d) provides:

> "Offense characteristics" means the elements of the crime and the aggravating and mitigating factors relating to *the offense* that the legislature determines are appropriate. For purpose of this subdivision, an offense described in section 33b of 1953 PA 232, MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered as an aggravating factor. [Emphasis added.]

Therefore, in general, when scoring offense variables, the trial court can only consider the offense for which the sentencing guidelines are being scored and those

enumerated offenses that arose out of the same transaction as that offense and that resulted in convictions.[1]

In this case, the discharging of the firearm and the resulting injury to Bish are not factors that relate to the robbery offense—the offense for which the sentencing guidelines are being scored—but are, instead, factors that relate to the assault offense—an offense of which defendant was never convicted. Therefore, the trial court erred when it considered these factors in scoring defendant's robbery conviction.

MCL 777.31(1) and MCL 777.33(1) provide that OV 1 and OV 3 are to be scored "by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points." With regard to OV 1, defendant argues that fifteen points was the highest score attributable to either offender for the robbery because a weapon was pointed, but not discharged during the robbery. Northington did not discharge the weapon until after the robbery. Similarly, with regard to OV 3, defendant argues that zero points was the highest score attributable to either offender for the robbery because nobody was injured during the robbery. Northington did not shoot Bish until after the robbery.

MCL 769.31(d) explicitly states that "an offense described in section 33b of 1953 PA 232, MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered as an aggravating factor." This is clearly an exception to the general rule—the general rule being that the relevant

[1] Although the majority opinion believes that it is "unnecessary to draw . . . sharp lines . . . between 'offenses' stemming from [the same] event," a*nte* at 259 n 10, the Legislature, as evidenced by the express language of MCL 769.31(d), believes otherwise.

factors are those that relate to the offense being scored, and the exception being that, if the defendant is convicted of certain enumerated offenses that arose out of the same transaction as the offense being scored, these offenses can be taken into consideration in scoring. Although assault with intent to murder is one of the enumerated offenses and the assault arguably arose out of the same transaction as the armed robbery, defendant was not convicted of assault with intent to murder. Therefore, the fact that Northington shot Bish cannot be considered in scoring defendant's robbery conviction. The trial court took this shooting into consideration when it scored OV 1 and OV 3, and, thus, improperly scored OV 1 and OV 3.

That the general rule is that the relevant factors are those that relate to the offense being scored is further supported by the fact that some offense variables specifically provide otherwise. For instance, MCL 777.44(2)(a) provides that in scoring OV 14 (whether the offender was a leader in a multiple offender situation), "[t]he entire criminal transaction should be considered." In other offense variables, the Legislature unambiguously made it known when behavior outside of the scored offense is to be taken into account. OV 12, for example, applies to acts that occurred within twenty-four hours of the sentencing offense and have not resulted in separate convictions. MCL 777.42(2)(a). OV 13 explicitly permits scoring for "all crimes within a 5-year period, including the sentencing offense" regardless of whether they resulted in conviction. MCL 777.43(2)(a). OV 16 provides that "[i]n multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.46(2)(a). Finally, OV 8 (scoring for

victim asportation or captivity) specifically focuses on conduct "beyond the time necessary to commit the offense." MCL 777.38. That the Legislature has explicitly stated in some offense variables that conduct not related to the offense being scored can be considered strengthens the conclusion that, unless stated otherwise, only conduct that relates to the offense being scored may be considered.

OV 9 is to be scored at ten points if two to nine victims were involved. MCL 777.39(1)(c). "[E]ach person who was placed in danger of injury or loss of life" is to be counted as a victim. MCL 777.39(2)(a). OV 9 does not require multiple offenders to receive the same score. Both defendant and Northington were assessed ten points. The Court of Appeals concluded that this was error because only Deborah Sevakis was placed in danger during the robbery. I agree. The robbery was complete by the time Bish intervened. Bish was not the victim of the robbery; he was the victim of the assault.[2] Defendant was not charged with the assault.[3] For the

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[2] The majority opinion accuses me of "fail[ing] to apply the plain language of the statute." *Ante* at 262 n 14. However, with all due respect, I believe it is the majority opinion that fails to apply the clear language of the statute. MCL 769.31(d) specifically states that "the offense" and any enumerated offenses "that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored shall be considered . . . ." In this case, "the offense for which the sentencing guidelines are being scored" is armed robbery. Defendant was not convicted of assault, or any other offense. Under the express language of the statute, only the robbery, not the assault, can be considered.

[3] MCL 769.31(d) states that " '[o]ffense characteristics' means the elements of the crime and the aggravating and mitigating factors relating to the offense that the legislature determines are appropriate." Therefore, I agree with Justice YOUNG that the trial court can "consider not only the actual elements constituting the offense, but also any aggravating or mitigating factors *associated with* the offense . . . ." *Post* at 278 (emphasis in original). However, in this case, the disputed factors relate not to *the*

same reason that the assault cannot be considered when scoring OV 1 and OV 3, it cannot be considered when scoring OV 9.[4]

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offense—armed robbery—but to another offense—assault—that occurred after *the offense* [of armed robbery] was already completed and that defendant was never even charged with, let alone convicted of. As explained above, MCL 769.31(d) specifically states that only offenses that have resulted in convictions can be considered. Because defendant was not convicted of an assault, the assault cannot be considered in scoring the armed robbery offense. To allow the assault to be considered, even though it was not even charged, would be to circumvent the guidelines by scoring a defendant on the basis of circumstances constituting an offense that was never even charged. However, I do agree with Justice YOUNG that the assault may be considered by the court in imposing an upward departure as long as the standards articulated in *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), have been adhered to.

[4] Chief Justice CORRIGAN concludes that "[b]ecause armed robbery is a transactional offense, and Northington shot Bish immediately after she stole Sevakis's purse and before she reached a place of temporary safety, the trial court's consideration of the shooting when determining defendant's score under OV 1[,] OV 3," *ante* at 266, and OV 9, *ante* at 270, was proper. Assuming arguendo that armed robbery is a transactional offense, I still cannot agree that the trial court properly scored OV 1, OV 3, and OV 9. Under a transactional view, a person can be found guilty of armed robbery if, before reaching a place of temporary safety, all of the elements of armed robbery are completed. However, that does not mean that an armed robbery can *never* be completed until a person has reached a place of temporary safety. In other words, although it is possible that an armed robbery will not be completed until the defendant has reached a place of temporary safety, it is also possible that the crime will be completed before then. Here, all the elements of the armed robbery were completed before defendant reached a place of temporary safety. There cannot be two endings to a crime. In other words, it cannot be that the crime of armed robbery was completed once defendant stole the purse and it was also completed once she reached a place of temporary safety. The crime had to have been completed at either the latter or the former time. If all the elements had not been completed, we could look, under a transactional view, to defendant's conduct until she reached a place of temporary safety to establish all the elements of the armed robbery. Here, however, that is not necessary because all the elements were, in fact, completed before she reached a place of temporary safety. Because the assault occurred after the armed robbery and because defendant was never convicted of the assault, it cannot be considered when scoring OV 1, OV 3, and OV 9.

OV 1 should only have been scored at fifteen points because Northington only pointed a firearm during the robbery; she did not discharge a firearm during the robbery. OV 3 should have been scored at zero points because the robbery victim did not suffer from a life-threatening injury; only the assault victim suffered from a life-threatening injury. Finally, OV 9 should have been scored at zero points because there was only one robbery victim; Bish was an assault victim, but not a robbery victim. Therefore, I would affirm the judgment of the Court of Appeals, which concluded that the trial court erred in scoring OV 1, OV 3, and OV 9, albeit on different grounds.

TAYLOR, J., concurred with MARKMAN, J.

YOUNG, J. *(concurring in part and dissenting in part)*. I agree with the majority that the trial court did not err when it assessed ten points for offense variable (OV) 9. The language of MCL 777.39(2)(a) clearly states that *each* person "placed in danger of injury or loss of life" is to be counted as a victim. Because a gun was fired at him, James Bish was placed in danger even if he had not intervened or been injured.

However, I dissent from that portion of the majority opinion holding that the trial court erred in assessing twenty-five points each for OV 1 and OV 3. Because I believe that the guidelines were scored correctly, I would affirm the trial court's scoring of those guidelines.

I disagree with the majority's conclusion that defendant was entitled to have her armed robbery scores

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Contrary to the majority opinion's contention, I do not determine here whether armed robbery is a transactional offense. I simply note that, *even if* armed robbery is a transactional offense, the trial court erred in scoring OV 1, OV 3, and OV 9.

match Northington's armed robbery scores. I believe the majority's position is based on a flawed assumption regarding the "multiple offender" provision of OV 1 and OV 3.

When scoring the guidelines, the court is instructed by MCL 769.31(e)[1] to consider not only the *actual* elements constituting the offense, but also any aggravating or mitigating factors *associated with* the offense as designated in the guidelines:

> "Offense characteristics" means the elements of the crime and the aggravating and mitigating factors *relating to* the offense that the commission determines are appropriate and consistent with the criteria described in section 33(1)(e) of this chapter. For the purposes of this subdivision, an offense described in section 33b of 1953 PA 232, MCL 791.233b, that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored *shall be* considered as an aggravating factor. [Emphasis added.][2]

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[1] Redesignated as subsection d in a 2002 amendment. 2002 PA 31. The amendment also designated responsibility to the "legislature" instead of the "commission."

[2] The second sentence of MCL 769.31(e), which is not at issue in this case, *mandates* the trial court to consider certain convictions as aggravating factors when they result in a conviction and they arose out of the "same transaction" as the offense being scored. In instructing the sentencing court to view the entire "transaction," I do not believe that this phrase describes the transactional approach to robbery as recognized by this Court in *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). Rather, I believe that the plain meaning of the phrase "same transaction" refers to the entire criminal episode or event, not the term "transactional test," which is unique to robbery cases and has *never* received legislative recognition. In fact, when the Legislature recently amended the unarmed robbery statute in response to this Court's opinion in *Randolph*, the Legislature did not use the terms "transaction" or "transactional" in its amendment. See MCL 750.530 as amended by 2004 PA 128. In any event, the "transactional" analysis offered by Justices CORRIGAN and MARKMAN is irrelevant to the first sentence that applies in this case.

Therefore, an "offense characteristic" clearly encompasses more than merely the offense itself–it contemplates both positive and negative factors "related to," but not constituting, the charged offense.

When scoring OV 1, which takes into account the aggravated use of a weapon, MCL 777.31(2) specifically requires a trial court to:

> (a) Count each person who was placed in danger of injury or loss of life as a victim.
>
> (b) In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.

Likewise, when scoring OV 3, which assesses physical injury to a victim, MCL 777.33(2)(a) requires that:

> In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.

The majority opinion rests upon the analytical assumption that the requirement of equal scores for "multiple offenders" means that identical crimes must be compared to identical crimes. However, as illustrated above, the plain language of MCL 777.31(2)(b) and MCL 777.33(2)(a) clearly does not require that the convicted *offenses* must be identical. Rather, the statutes contemplate the comparison of identical *offense variable scores*. I believe that the correct reading of the statutes requires that, to the degree that both defendants are convicted of crimes requiring the scoring of OV 1 and OV 3, the second defendant would get the same OV 1 and OV 3 scores as the first defendant.

Here, defendant was scored twenty-five points for her armed robbery OV 1 score. This score is supported by the evidence because a firearm was discharged at or toward James Bish, and the discharge of the firearm

was an aggravating factor *related to* the armed robbery. Defendant's OV 1 score for use of a weapon coincides with Northington's OV 1 score for use of a weapon, as shown in the table below.

Additionally, defendant was scored twenty-five points for her OV 3 score. This score is supported by the evidence because of the life-threatening gunshot injury suffered by James Bish, which was an aggravating factor *related to* the armed robbery. Defendant's OV 3 score of twenty-five points for physical injury to a victim is identical to Northington's OV 3 score for physical injury to a victim, as shown in the table below:

DEFENDANT & OFFENSE	OV 1 Aggravated use of weapon	OV 3 Physical injury to victim
Northington Assault with intent to murder	25 points	25 points
Northington Armed robbery	15 points	0 points
Morson Armed robbery	25 points	25 points

The majority errs in simply comparing identical convictions. However, as noted above, the directives contained in OV 1 and OV 3 do not require equality of criminal convictions—they merely necessitate that the offense variables be scored identically. Because defendant received the same OV 1 and OV 3 scores as her

cohort, I do not believe that defendant is entitled to resentencing.[3]

As Chief Justice CORRIGAN notes in her concurring opinion, there is an arguable tension between the sentencing instructions requiring assessment of the highest number of points shown by the evidence and the instruction included in some offense variables directing the court to assess equal OV points in multiple offender situations. However, I believe that enforcing the statute as written, which instructs a sentencing court to compare offense variable to like offense variable, promotes both accuracy and equality in the scoring of the guidelines.[4]

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[3] Contrary to the majority's conclusion, the analysis I advocate is not inconsistent with MCL 777.21(2). The trial court is still required to score each convicted offense, but is permitted, under the clear language of the statute, to consider aggravating factors "related to" the convicted charge. In addition, the Legislature specifically contemplated different defendants being convicted of different offenses, as evidenced by the instruction that offense variables be scored the same for "multiple offenders," rather than limiting its instruction to offenders convicted of identical offenses.

While my approach is considered "illogical" by the majority, I believe that it best adheres to the plain language of the statute. When the language is clear, it is my responsibility to simply apply the facts to the law. The genesis of the error in this case is the trial court's decision to disregard the law when it sentenced Iesha Northington. The trial court failed to consider the facts of both convictions under the second sentence of MCL 769.31(e) when sentencing Northington, and failed to assess the highest number of points for OV 1 and OV 3 that the evidence supported. See MCL 777.31(1) (OV 1); MCL 777.33(1) (OV 3). When the trial court failed to follow the law, it injected an error that defendant now seeks to perpetuate.

[4] While my interpretation and application of the statute does not prevail in this case, I note that, if factors arising before or after the offense cannot be calculated in the guidelines, they are certainly relevant sentencing factors not adequately contemplated by the guidelines. If these factors are substantial and compelling, a sentencing court may utilize those factors in imposing an upwardly departing sentence. *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

For the reasons stated herein, I dissent from that portion of the majority opinion holding that the trial court erred in scoring offense variables 1 and 3. Because I believe that the guidelines were scored correctly, I would reverse the Court of Appeals judgment and reinstate the sentence imposed by the circuit court.

ALLSTATE INSURANCE COMPANY v MCCARN (AFTER REMAND)

Docket No. 122849. Argued March 9, 2004 (Calendar No. 8). Decided July 30, 2004. Rehearing denied *post*, 1201.

Allstate Insurance Company brought an action in the Shiawassee Circuit Court, seeking a declaration that it had no duty to defend or indemnify Robert McCarn or Ernest and Patricia McCarn, its insureds and the defendants in an underlying wrongful death suit brought by Nancy S. LaBelle for the shooting death of her son, Kevin LaBelle, by Robert McCarn. The court, Gerald D. Lostracco, J., granted summary disposition for the defendants. The Court of Appeals, ZAHRA, P.J., and HOEKSTRA, J. (WHITE, J., dissenting), reversed and remanded in an unpublished opinion per curiam for entry of judgment in favor of Allstate (Docket No. 213041). Nancy LaBelle appealed to the Supreme Court, which reversed after determining that the shooting death was accidental and thus was an occurrence as defined in the insurance policy, giving rise to Allstate's liability under the policy, and remanded to the Court of Appeals for a determination whether the criminal-acts exclusion in the policy precluded coverage. 466 Mich 277 (2002). On remand, the same panel of the Court of Appeals divided in the same manner and, in an unpublished opinion per curiam, precluded coverage as a matter of law because it determined that the applicability of the exclusionary clause from the policy was grounded in whether the death was reasonably expected to result from Robert's criminal act and that a person who points a gun at another's face and intentionally pulls the trigger without checking to see whether the gun is loaded could reasonably expect that injury will result. The dissenting judge concluded that reasonable minds could differ regarding whether the death occurred as the natural, foreseeable, expected, and anticipated result of Robert's acts (Docket No. 213041). Nancy LaBelle appealed.

The Supreme Court *held*:

The policy's clause excluding bodily injury or property damage caused by criminal or intentional acts is not effective in this case.

Justice TAYLOR, joined by Justices KELLY and MARKMAN, stated that the policy's clause excluding bodily injury or property damage

caused by criminal or intentional acts is not effective in this case, although the insured did act criminally or intentionally. There is no question regarding the insured's belief that the gun was not loaded, so there is no question whether the decedent's death was the reasonably expected result of the act of the insured in pulling the trigger.

The test for coverage is controlled by a two-pronged test in the "criminal-acts exclusion" in the insurance policy. The first is whether the insured acted either intentionally or criminally. The second is whether the resulting injuries were the reasonably expected result of the insured's intentional or criminal act. In this case, the Court of Appeals was correct that the first prong was met. The second prong is determined by whether a reasonable person possessed of the totality of the facts possessed by the insured would have expected the resulting injury. Because there is no disputed issue of fact that the insured was of the belief that the gun was unloaded, he could not have expected the resulting injury. The policy calls for a reasonable expectation of bodily injury, not a reasonable belief that the gun was unloaded.

A reasonable expectation is an objective expectation of a reasonable person possessed, in this case, of the same totality of the facts and circumstances. While the pointing of a gun at another person's face and pulling the trigger may be unreasonable, the policy asks whether there was a reasonable expectation that there would be bodily injury by these acts, not whether there was a reasonable belief that the gun was loaded. There would not be a reasonable expectation of an injury from pulling the trigger of an unloaded gun.

Justice CAVANAGH, concurred in the result only.

Reversed and remanded to the circuit court.

Justice WEAVER, joined by Chief Justice CORRIGAN, dissenting, stated that the intentional and criminal acts exclusion in the homeowner's insurance policy excludes coverage in this case. The intentional and criminal acts exclusion of the homeowner's insurance policy at issue in this case plainly and unambiguously excludes coverage under these facts because bodily injury can reasonably be expected to result when, without first determining that a gun is unloaded, a person points the gun at another and pulls the trigger. The "reasonably to be expected" language in the policy exclusion requires that the Court employ an objective standard to determine whether any bodily injury or property damage could reasonably be expected from the defendant's actions. Justice WEAVER dissents because the lead opinion abandons the objective standard in favor of McCarn's subjective belief. By

focusing on McCarn's belief that the gun was unloaded, Justice TAYLOR abandons the objective standard in favor of the subjective beliefs of a teenager who had used an unlawful controlled substance.

The decision of the Court of Appeals that the policy excludes coverage under these facts should be affirmed.

Justice YOUNG, joined by Chief Justice CORRIGAN, dissenting, stated that he concurred fully with Justice WEAVER. Despite the explicit contract language at issue, the lead opinion, which has no precedential value, obliterates the legal distinction between a subjective and objective standard in insurance contracts. The lead opinion errs in requiring that the insured's subjective belief be accepted as a determinative fact, then evaluating whether a reasonable person, sharing the insured's subjective belief, would expect the same result. This standard violates every known formulation or application of the traditional objective standard. Under the standard articulated in the lead opinion, an insurance company would be required to provide coverage even where, for example, an insured claimed to believe that his gun had magical powers at the time the trigger was pulled.

Collison & Collison, P.C. (by *Joseph T. Collison*), for the plaintiff.

Sinas, Dramis, Brake, Boughton & McIntyre, P.C. (by *Timothy J. Donovan*), for defendant Nancy S. LaBelle.

AFTER REMAND

TAYLOR, J. This case is before us for the second time. In *Allstate Ins Co v McCarn*, 466 Mich 277; 645 NW2d 20 (2002) (*McCarn I*), we held that the shooting death of Kevin LaBelle was "accidental" and, thus, an "occurrence" within the meaning of the insurance policy at issue. Because the shooting was an "occurrence" covered under the policy, it gave rise to Allstate's potential liability. However, because the Court of Appeals had not addressed whether the criminal-acts exception in the

policy precluded coverage,[1] we remanded the matter to that Court. On remand, the Court of Appeals held that the criminal-acts exception precludes coverage in this case.[2] We disagree and reverse the decision of the Court of Appeals. We remand to the trial court for further proceedings.

I. FACTS AND PROCEEDINGS

We set forth the facts in our previous opinion, *McCarn I* at 279-280:

> This case arises out of the death of sixteen-year-old Kevin LaBelle on December 15, 1995, at the home of defendants Ernest and Patricia McCarn, where their grandson, then sixteen-year-old defendant Robert McCarn, also resided. On that day, Robert removed from under Ernest's bed a shotgun Robert's father had given him the year before. The gun was always stored under Ernest's bed and was not normally loaded. Both Robert and Kevin handled the gun, which Robert believed to be unloaded. When Robert was handling the gun, he pointed it at Kevin's face from approximately one foot away. Robert pulled back the hammer and pulled the trigger and the gun fired, killing Kevin.
>
> Nancy LaBelle, representing Kevin's estate, brought the underlying action against Robert and his grandparents, Ernest and Patricia McCarn, who had a homeowners insurance policy with plaintiff Allstate. Allstate brought the present action, seeking a declaratory judgment that it had no duty to indemnify defendants Robert, Ernest, or Patricia McCarn.
>
> Plaintiff and defendants moved for summary disposition in the declaratory action. The trial court granted defendants' motions for summary disposition and denied plaintiff's, holding that the events constituted an "occurrence"

[1] Unpublished opinion per curiam, issued October 3, 2000 (Docket No. 213041).

[2] Unpublished opinion per curiam, issued November 15, 2002 (Docket No. 213041).

within the meaning of Allstate's policy. The trial court also held that Robert McCarn's conduct was not intentional or criminal within the meaning of Allstate's policy.

Allstate appealed to the Court of Appeals, which reversed the trial court in an unpublished opinion.[1] The Court attempted to apply our recent decisions in *Nabozny v Burkhardt*[2] and *Frankenmuth Mut Ins Co v Masters*[3] and concluded that "Robert's intentional actions created a direct risk of harm that precludes coverage."

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[1] Issued October 3, 2000 (Docket No. 213041).

[2] 461 Mich 471; 606 NW2d 639 (2000).

[3] 460 Mich 105; 595 NW2d 832 (1999).

This Court reversed the decision of the Court of Appeals, holding that the "accident" was an "occurrence" as defined in the insurance policy at issue, thus giving rise to Allstate's potential liability. *Id*. at 291. Once a court decides that liability may exist under an insurance policy, it may then determine whether coverage is precluded by an exception. *Allstate Ins Co v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1989). Because the Court of Appeals originally found no liability, it did not determine whether the criminal-acts exclusion precluded coverage under the policy. Because the Court of Appeals had not addressed this exclusion, we remanded the issue to that Court to determine if it applied. *McCarn I* at 291.

On remand, the Court of Appeals, in a split opinion, applied the two-pronged test from *Freeman* and concluded that Robert acted criminally under the first prong of the test because his actions constituted manslaughter under MCL 750.329. Slip op at 2-4. The Court of Appeals determined that the applicability of the exclusionary clause "turns on whether LaBelle's death was reasonably expected to result from Robert's crimi-

nal act." Slip op at 3. The panel then concluded that "a person who points a gun at another person's face and intentionally pulls the trigger without checking to see whether the gun is loaded can reasonably expect that injury will result." Slip op at 4. The dissenting judge also applied the two-pronged test from *Freeman*, but concluded that "reasonable minds could differ regarding whether Kevin's death occurred as the natural, foreseeable, expected, and anticipated result of Robert's" acts. Slip op at 3 (WHITE, J., dissenting). We granted defendants' application for leave to appeal. 469 Mich 947 (2003).

II. STANDARD OF REVIEW

To determine whether Allstate is obligated to indemnify the McCarns, we examine the insurance policy at issue. Issues involving the proper interpretation of insurance contracts are reviewed de novo. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001).

An insurance policy must be enforced in accordance with its terms, which are given their "commonly used meaning" if not defined in the policy. *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 112, 114; 595 NW2d 832 (1999).

III. ANALYSIS

When this case was last before us, in interpreting the following language, "Allstate will pay damages . . . arising from an occurrence," we concluded that, on the basis of undisputed facts, the shooting was an accident triggering Allstate's liability. Justice CAVANAGH, writing for the Court, said:

> [T]his case does not present a question of fact. The fact that Robert believed the gun was unloaded is a matter about which there is no genuine issue of material fact. This is because there is nothing in the record to reasonably support a conclusion that, contrary to Robert's testimony that he believed the gun was unloaded, he consciously believed the gun was loaded, or even contemplated that there was any possibility that it was loaded when he pulled the trigger. Even plaintiff, the insurer, acknowledged that Robert believed the firearm was unloaded when he pulled the trigger . . . . [*McCarn I, supra* at 285-286.]

To this set of facts we then applied the requisite subjective test and concluded that Robert's expectation that no bodily harm would result from an unloaded gun was reasonable. *Id*. at 291. The wisdom of shooting even an unloaded gun at another in the first place was, and is, not before us.

In this case, we deal with other policy language, which is commonly described as the criminal-acts exclusion. It states:

> We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:
>
> a) such insured person lacks the mental capacity to govern his or her conduct;
>
> b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or
>
> c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.
>
> This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

This language directs us to apply a two-pronged test. There is no insurance coverage if, first, the insured acted either intentionally or criminally, and second, the

resulting injuries were the reasonably expected result of an insured's intentional or criminal act. We agree with the Court of Appeals that the first prong of this test—that there was an intentional or criminal act—has been met.

Answering the second prong of the test, whether the resulting injury was the reasonably expected result of this criminal act, requires this Court to engage in an objective inquiry. *Allstate Ins Co v Freeman*, 432 Mich 656, 688; 443 NW2d 734 (1989) (opinion by RILEY, J.). That is, we are to determine whether a reasonable person, possessed of the totality of the facts possessed by Robert, would have expected the resulting injury. This requirement to base the objective reasonability test on all the facts has been discussed by scholars of tort law: "The conduct of the reasonable person will vary with the situation with which he is confronted. The jury must therefore be instructed to take the circumstances into account . . . ." Prosser & Keeton, Torts (5th ed), § 32, at 175. We have held similarly in our cases, "[T]he reasonable person standard examines the totality of the circumstances to ensure a fair result." *Radtke v Everett*, 442 Mich 368, 391; 501 NW2d 155 (1993). This means that here we must consider not just that Robert, as the Court of Appeals described it, "point[ed] a gun at another person's face and intentionally pull[ed] the trigger," but also, as Allstate itself acknowledges, that Robert thought the gun that he pointed was unloaded. Slip op, November 15, 2002, p 4; *McCarn I, supra* at 286.[3] Thus, we are called on to

[3] That Robert believed the gun was unloaded is uncontested. Allstate has never argued, as it might have, that Robert did not believe the gun was unloaded. To the contrary, Allstate's brief in support of its motion for summary disposition notes that Robert pulled the trigger even though "he thought the gun was unloaded." Even when arguing most recently before this Court, counsel for Allstate said, "It is a fact that he

determine if a reasonable person would have expected bodily harm to result when the gun, in the unloaded state Robert believed it to be, was "fired." The answer is no because, obviously, an unloaded gun will not fire a shot. As this Court explained in *McCarn I, supra* at 290-291:

> [No] bodily harm could have been foreseen from Robert's intended act, because he intended to pull the trigger of an unloaded gun, and, thus, it was not foreseeable, indeed it was impossible, under the facts as Robert believed them to be, that shot would be discharged.

To recapitulate, the proper test is that we are to first determine what Robert actually believed about the gun being loaded, not what a reasonable third party would have believed on that issue. Then, using that belief as a starting point, we are to determine in the second step if a reasonable person, possessed of Robert's belief, would have expected bodily harm to result from pulling the trigger. In fact, because reasonable minds could not differ that an unloaded gun will not fire a shot, it is appropriate under MCR 2.116(C)(10) to grant summary disposition to defendants.

IV. RESPONSE TO DISSENTS

The dissent of Justice WEAVER is predicated on the notion that insurance policies should not cover the acts of foolish, reckless, or even lawless people. This is a peculiar view because these are among the very people that society wishes to be insured and, in some circumstances, such as motor vehicle insurance, even requires to be insured. MCL 500.3101. She seems to regard

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subjectively believed that the gun was unloaded," and, "Subjectively he believed it wasn't loaded." Because Allstate did not contest this issue, there is no disputed issue of fact regarding his belief.

insurance as solely benefiting the insured and thus when it pays out it is a form of reward. This overlooks, however, the societal benefit that insurance provides to those injured or damaged by the acts of insured but otherwise uncollectible individuals. The true beneficiary of liability insurance is not the insured, but his injured victim. The Court of Appeals said this aptly twenty years ago:

> [I]t is unlikely that [an] insured [is] induced to engage in the unlawful conduct by reliance upon the insurability of any claims arising therefrom or that allowing insurance coverage . . . would induce future similar unlawful conduct . . . . Nor does it appear that the policy was obtained in contemplation of a violation of the law. Furthermore, coverage does not allow the wrongdoer unjustly to benefit from his wrong. It is not the insured who will benefit, but the innocent victim who will be provided compensation for her injuries. [*Vigilant Ins Co v Kambly*, 114 Mich App 683, 687; 319 NW2d 382 (1982) (citations omitted).]

As for Justice YOUNG's dissent, he posits that the majority opinion is based on the majority's public policy notions. We disagree. Rather, our decision is based entirely on the language of the insurance policy at issue here. The policy excludes coverage of injuries which "may reasonably be expected to result from the intentional or criminal acts" of the insured. Because one would not reasonably expect injury to result from pulling the trigger of an unloaded gun, coverage is not excluded.

He further indicates that the majority has conflated the subjective and objective inquiries called for by the policy and has gutted the exclusion of any use to the insurer. We again disagree. We have simply drawn the line the policy calls for between what the insured believed at the point of the intentional or criminal act and applied to that belief what a reasonable person

could expect to result from that act. Thus if, as here, an insured believes a gun is unloaded, and in this case it is conceded by the insurer that Robert indeed did believe that, then no reasonable person could believe, given that starting point, that a shot would come from the gun when fired. On the other hand, if an insured believes a gun is loaded and operable when he points it at someone and pulls the trigger but, for whatever reason, expects no shot to come from it and thus does not expect harm to result, there would be no coverage because a reasonable person would expect a shot to come from a loaded, operable gun and that harm would result from that.[4] The point is the insured's expectations of what will result from his act are irrelevant.

It should also be pointed out that we believe that the effect of Justice YOUNG's position would be that if a harm or injury results from an intentional or criminal act it will almost never be covered under a policy with this exclusion. This result can be seen in his approach to this case. Because he can reason back and know that the gun was loaded, he concludes that the policy exclusion dictates that there is no insurance coverage. Yet, we believe such hindsight reasoning is an improper mode of analysis for this accident. In hindsight, an insurer might always be able to reason backwards from an accident and conclude that, by definition, a reasonable person would not have done whatever precipitated such accident.

The dissents' approaches would eviscerate insurance policies of much of their value to insureds, leaving only "occurrences that were truly unexplainable" covered. *McCarn I*, *supra* at 289. Yet, unforeseen, unfortunate consequences of explicable or even intentional acts are "the very purpose of insurance . . . ." *Id*. at 288. As this

[4] This is essentially what happened in *Freeman*.

Court stated in *McCarn I, supra* at 288, "We must be careful not to take the expectation of harm test so far that we eviscerate the ability of parties to insure against their own negligence." "Otherwise, liability insurance coverage for negligence would seem to become illusory." *Id.* "The problem, as we see it, with the dissent's opinion is that it undermines the ability of insureds to protect themselves against their own foolish or negligent acts." *Id.* "However, the impetus for insurance is not merely, or even principally, to insure oneself for well thought out and reasoned actions that go wrong, but to insure oneself for foolish or negligent actions that go wrong. Indeed, it is obviously the latter that are more likely to go astray and to precipitate the desire for insurance." *Id.* To the extent that the dissents would erode the ability of insureds to protect themselves against theirs—or their family members'—foolish or stupid acts, they would eviscerate insurance contracts of much of their purpose and value. This is simply to say that with Justice YOUNG's approach there would be seemingly no coverage for any intentional or criminal act where there was injury resulting from the act. This would narrow those having insurance in such circumstances greatly and perhaps entirely. This disturbing outcome cannot be what this policy provision intended, nor is it what the policy language calls for.

V. CONCLUSION

We hold that there is no question of fact whether Kevin's death was the reasonably expected result of Robert's act. Accordingly, we reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings.

KELLY and MARKMAN, JJ., concurred with TAYLOR, J.

CAVANAGH, J., concurred in the result only.

WEAVER, J. (*dissenting*). I would hold that the intentional and criminal acts exclusion of the homeowner's insurance policy at issue excludes coverage in this case. I would remand this case to the trial court for entry of summary judgment for plaintiff. I, therefore, dissent from both the result and reasoning of the lead opinion.

After sharing a bowl of marijuana, Robert McCarn intentionally aimed a shotgun at Kevin LaBelle's face without checking whether the shotgun was loaded. McCarn's testimony revealed that he was horse playing, but intended to frighten LaBelle into sharing some crackers with him. When McCarn pulled the trigger, the gun discharged and LaBelle was killed. McCarn pleaded nolo contendere to a charge of manslaughter, MCL 750.321.

The intentional or criminal acts exclusion of the policy now at issue unambiguously states:

> We do not cover any bodily injury or property damage intended by, or which may reasonably be expected to result from the intentional or criminal acts or omissions of, any insured person. This exclusion applies even if:
>
> a) such insured person lacks the mental capacity to govern his or her conduct.
>
> b) such bodily injury or property damage is of a different kind or degree than intended or reasonably expected; or
>
> c) such bodily injury or property damage is sustained by a different person than intended or reasonably expected.
>
> This exclusion applies regardless of whether or not such insured person is actually charged with, or convicted of a crime.

Unambiguous insurance policy language must be enforced as written. *Farm Bureau Ins Co v Nikkel*, 460 Mich 558, 570; 596 NW2d 915 (1999).

This Court addressed a similar exclusionary clause in *Allstate Ins Co v Freeman*, 432 Mich 656, 685; 443 NW2d 734 (1989). The exclusion at issue in *Freeman* provided:

> We do not cover any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person. [*Freeman* at 685.]

Freeman held that the exclusionary clause at issue in that case relieved the insurer of liability if "(1) the insured acted *either* intentionally *or* criminally, and (2) the resulting injuries occurred as the natural, foreseeable, expected, and anticipated result of an insured's intentional or criminal acts." *Id.* at 700 (emphasis in original).

Though similar to the policy at issue in *Freeman*, there are important differences to the policy language at issue in this case. The criminal acts exclusion of the homeowner's insurance policy at issue in this case is broader than that in *Freeman*. It includes three subsections that expressly expand the scope of the exclusion. Relevant to this case, subsection b provides

> "[t]his exclusion applies even if . . . Such bodily injury or property damage is of a different kind or degree than intended or reasonably expected . . . ."

Subsection b applies because "even if" indicates that the subsections are included in and help define the policy exclusion. Thus, consideration of the specific policy language at issue in this case requires some adjustment to *Freeman's* second prong for this case. Subsection b shifts the inquiry away from the actual injury that resulted from intentional or criminal actions, to whether *any* bodily injury or property damage could be reasonably expected to result from the actions.

Nevertheless, to the extent the policy at issue in this case is similar to the policy at issue in *Freeman, Freeman's* two-pronged objective test is instructive. *Freeman, supra* at 700, correctly identified the first question under policy language before the Court as whether "the insured acted *either* intentionally *or* criminally." I agree with the lead opinion that the policy requirement that McCarn acted intentionally or criminally is met. McCarn acted intentionally when he pulled the trigger of a gun while pointing it at LaBelle's face. As correctly explained by the Court of Appeals, McCarn's actions were also criminal.

Regarding whether it was reasonable to expect injury or property damage would result from the intentional or criminal act, it is the consensus of this Court *Freeman* correctly employed an objective inquiry. The dispositive question under the language of this policy and the facts of this case should be, therefore, whether a reasonable person would expect bodily injury or property damage to result when a person points a gun at another person's face without determining whether the gun was loaded and then pulls the trigger.

While the lead opinion acknowledges that the language "may reasonably be expected" dictates an objective standard, *ante* at 290, the lead opinion's rationale only pretends to be objective. By focusing on McCarn's belief that the gun was unloaded, *ante* at 290-291, the lead opinion abandons the objective standard in favor of the subjective belief of a teenager under the influence of marijuana. Fortunately, the lead opinion's rationale will not bind future decisions, because it was joined by only two other justices. One justice joins the lead opinion in result only. Three justices agree that the lead opinion incorrectly transforms the objective standard into a subjective standard.

An established rule in construing insurance contracts is that "[a]n insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy." *Heniser v Frankenmuth Mut Ins Co*, 449 Mich 155, 161; 534 NW2d 502 (1995). The lead opinion implies that it is against public policy to deny coverage in this case. *Ante* at 290-291. To indirectly support this suggestion, the lead opinion vaguely alludes to the no-fault act, MCL 500.3101 *et seq*. *Ante* at 291. However, the lead opinion utterly fails to understand that the no-fault act is irrelevant to this case because there is an important difference between no-fault insurance and the homeowner's insurance. In the no-fault act, the Legislature expressly requires that the insurer provide residual coverage for intentionally caused damages. MCL 500.3135(3)(a). There is no such requirement imposed on homeowner's insurance providers by any statute. Had the Legislature intended to require homeowner's insurance providers to cover criminal and intentional acts it could have done so. Thus the lead opinion has not established that the homeowner's insurance policy exclusion at issue is against public policy.[1] The lead opinion twists the objec-

[1] Not only is the no-fault act irrelevant to this case, the lead opinion's citation of *Vigilant Ins Co v Kambly,* 114 Mich App 683, 687; 319 NW2d 382 (1982), is also entirely irrelevant and inapplicable. *Vigilant* involved whether a medical malpractice insurer was required to provide coverage for a malpractice claim against a doctor who engaged in sexual activity with a patient under the guise of medical treatment. It should be noted that medical malpractice is governed by different statute than homeowner's insurance. Moreover, the malpractice insurance policy in that case contained no criminal or intentional acts exclusion. Thus, the Court of Appeals panel declined to read a criminal and intentional acts exclusion into the policy. The panel concluded, *supra* at 687-688, that the doctor's actions were a covered form of malpractice and noted "[i]n this instance, there is great public interest in protecting the interests of the injured party." Nevertheless, the panel noted, *id*. at 687, that there are

tive standard required by the policy exclusion at issue in this case into a subjective standard in order to justify holding "an insurer liable for a risk it did not assume."[2]

In this case, interpreting the unambiguous terms of this homeowner's insurance policy exclusion, the relevant focus is on whether *any* bodily injury or property damage could reasonably be expected from McCarn's intentional or criminal act. The intentional and criminal acts exclusion of the homeowner's insurance policy at issue in this case plainly and unambiguously excludes coverage under these facts since bodily injury can reasonably be expected to result when, without first determining that a gun is unloaded, a person points the gun at another person and pulls the trigger.

For these reasons, I dissent from the lead opinion and would affirm the decision of the Court of Appeals excluding coverage under the intentional and criminal acts exclusion of the homeowner's policy at issue.

CORRIGAN, C.J., concurred with WEAVER, J.

YOUNG, J. (*dissenting*). I concur fully in the dissenting opinion of Justice WEAVER, but write separately to highlight the import of Justice TAYLOR'S lead opinion: Today, the members of the lead opinion,[1] for unarticulated policy reasons of their own, ignore the explicit

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"public policy considerations raised by [the medical malpractice insurer] which prohibit the insurability of criminal or intentionally tortuous conduct" which were not present on the facts of that case. Thus, *Vigilant* does not support the lead opinion's policy-making intentions.

[2] *Farm Bureau, supra* at 568, citing *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992).

[1] I note that the lead opinion has garnered only three votes for its rationale; Justice CAVANAGH has concurred only in the result. Therefore, the lead opinion has no precedential value. *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973).

contract language at issue and obliterate the distinction recognized in our law between subjective and objective standards in insurance exclusion provisions.[2]

In an apparent policy-driven view that even the most fanciful beliefs merit insurance coverage, the standard articulated by the lead opinion conflates any meaningful distinction between a subjective and objective contractual standard. The lead opinion cites no precedent or other legal authority for its position. There is none. The new alleged "objective standard" announced in the lead opinion today leaves an insurer unable to exclude even the most dangerous intentional or criminal behavior from coverage as a matter of law, so long as an insured *claims* to believe that something innocuous would result from his dangerous conduct.[3] The policy language of exclusion at issue here could not more explicitly preclude coverage for the intentional or criminal conduct of an insured. I believe it to be the view of those joining the lead opinion that it would violate an as yet unarticulated "public policy" if an insurer could by contract preclude coverage under the facts of this case. Indeed, the lead opinion (and its bastardization of the

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[2] I can only hope that this departure from the general principle that contracts are to be enforced as written is a limited one that will not recur. Compare, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003), wherein this Court reinforced the "bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy."

[3] I do not believe that it is possible for Allstate to disprove Robert's claimed beliefs regarding the status of the gun. Allstate could prove that the belief was not reasonable under the circumstances, but I am unsure how they could prove that the belief did not in fact exist. Moreover, the evidence does not support a finding that Allstate *conceded* that Robert thought the gun was unloaded. At most, Allstate merely agreed that Robert *said* he believed the gun to be unloaded. Conceding that Robert made a statement and conceding that his statement was true are entirely different matters.

traditional objective standard that should be applied here) seems driven by its concern that "an intentional or criminal act . . . will almost never be covered by a policy with this exclusion." My response is that I am prepared to enforce the contract the parties have made as written.[4]

Insurance contracts generally provide indemnity against injuries caused by "accidents." When they expressly exclude coverage for injuries caused by *intentional* or *criminal* behavior as determined by a "reasonable person" objective standard, I am prepared to apply the traditional, unvarnished objective standard Michigan courts have employed in assessing whether the injury was *"reasonably expected."*

The intentional or criminal acts exclusion of the policy at issue precludes coverage for injuries or damage "which may reasonably be expected to result" from the intentional or criminal acts or omissions of an insured. For time out of mind until now, common law courts have understood the distinction between subjective and objective standards.[5] An objective test assesses what a reasonable person would have believed, while a subjective test is concerned about determining what the

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[4] The lead opinion suggests that I conclude that an intentional or criminal act "will almost never be covered under a policy with this exclusion". I do not. I *do* believe that each case will turn on its facts and that what is "reasonable" may have to be determined by a trier of fact. I am agnostic regarding whether all, a majority or no cases involving a criminal act are covered under policy language at issue here so long as the policy language is given meaning. I will not, as the lead opinion does, ignore the contract language and "direct the verdict" as a matter of law by manipulating the traditional objective standard of review.

[5] For an example of how we have consistently described the reasonable person objective standard in Michigan, *Radtke v Everett*, 442 Mich 368, 390-391; 501 NW2d 155 (1993), describes the standard as follows:

> As described by Dean Prosser, the reasonable person standard has been carefully crafted to formulate one standard of conduct for society:

actual actor believed. In this context, where all members of this Court agree the contract requires application of an objective standard, I contend that what may "reasonably be expected to result" from an insured's acts is the conclusion a reasonable person reaches after examining all of the pertinent information available to the insured. See footnote 5. The belief of the insured, on the other hand, is the *subjective* conclusion reached *by the insured* armed with the same information. While the belief of the insured may be a fact, it is not an

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> "The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites.
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> * * *
>
> "The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard. . . . He is rather a personification of a community ideal of reasonable behavior, determined by the jury's social judgment."
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> The "chief advantage of this standard" is that it enables triers of fact "to look to a community standard rather than an individual one, and at the same time to express their judgment of what that standard is in terms of the conduct of a human being."
>
> *Furthermore, the reasonable person standard examines the totality of the circumstances to ensure a fair result*. Hence, the reasonable person standard is sufficiently flexible to incorporate gender as one factor, without destroying the vital stability provided by uniform standards of conduct. [Emphasis added; internal citations omitted.]

Justice TAYLOR approvingly cited to this passage in his concurring statement in *Sidorowicz v Chicken Shack, Inc*, 469 Mich 912; 673 NW2d 106 (2003). Thus, his position in the present case is hard to reconcile with his previous position regarding the correct application of the objective reasonable person standard.

ultimate fact[6] essential to determining what may reasonably be expected to result from an insured's actions.

The lead opinion errs in using the insured's subjective belief (purportedly) "as a starting point," then insisting that the "objective" evaluation proceed by determining whether a reasonable person, *sharing the insured's subjective belief*, would expect the same result. Requiring that the reasonable person take as a determinative fact the insured's subjective beliefs about his acts violates every known formulation or application of the traditional objective standard. The majority cites no authority for its contrary and idiosyncratic formulation of its "objective" standard. It is noteworthy that, in other contexts, this Court has expressly repudiated similar efforts to make subjective an objective standard.[7]

Thus, it is unclear why (and on what authority) the lead opinion concludes that a reasonable person should be required to possess the same (and entirely subjective) belief as the insured.

As I argued in *McCarn I*, a reasonable person could certainly come to a different belief regarding the expected consequences under the known and undisputed facts of this case.[8] Under the standard announced by

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[6] Black's Law Dictionary defines ultimate facts as those "facts essential to the right of action or matter of defense; facts necessary and essential for decision by court."

[7] See *Radtke v Everett,* 442 Mich 368; 501 NW2d 155 (1993).

[8] It is important to recall that all of the facts and circumstances known about this shooting were provided by McCarn's deposition testimony. McCarn owned the shotgun and admitted that he did not check to see whether the gun was loaded before he deliberately pulled the trigger when the barrel of the gun was one foot away from his friend's face. He also admitted to being the last person to use the gun, and could not recall whether he unloaded the gun on that occasion because he put the gun away "hot"—hurriedly in order to avoid being caught using the weapon without adult supervision. He further admitted to intentionally pulling the

the lead opinion, I cannot envision a single scenario where a "reasonable person" expectation could *ever* diverge from the insured's expectation.[9] More critically, I am at a loss to determine any difference, much less a qualitative one, between the purported objective standard articulated in the lead opinion today and the policy exclusion language found to require a subjective determination in *Metropolitan Ins v DiCicco*.[10] There, a policy which excluded damage "expected or intended from the *standpoint of the insured*" was found to require a subjective standard of expectation.[11]

I note that, had the views of the lead opinion garnered majority support, the subjective standard would have become the uniform standard for all insurance policies, no matter what language was actually used. Under the standard articulated by the lead opinion, an insurance company would be required to provide coverage even where, for example, an insured believes that his gun was magical and would only play "The Star Spangled Banner" when the trigger was pulled. After all, using the insured's claimed belief as a starting point, no reasonable person would expect that bodily harm would result from a rousing rendition of our national anthem.[12] I

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trigger of the gun in an effort to frighten the victim into sharing crackers. According to the lead opinion, none of these undisputed facts provided by McCarn himself are relevant in evaluating how a reasonable person would have assessed the circumstances of the shooting because it concludes that the *only* relevant fact is the insured's stated subjective belief that his gun was unloaded.

[9] Indeed, the lead opinion incentivizes insureds to manufacture their "beliefs" about insurance controversies because, no matter how incompatible with the circumstances or logic, the insured's belief is the one that *must* be assumed by the "reasonable person" when applying the lead opinion's so-called "objective" test.

[10] 432 Mich 656; 443 NW2d 734 (1989).

[11] *Id*., 672. Had the policy language in this case been similar to that found in *DiCicco*, I might agree with the lead opinion's resolution.

[12] The majority disclaims that its new objective test is anything novel and that all it is doing is drawing a "line . . . between what the insured

invite those justices joining the lead opinion to explain why its analysis today would permit a contrary result.

For these reasons, I would affirm the judgment of the Court of Appeals.

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

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believed at the point of the intentional or criminal act and applied to that belief what a reasonable person could expect to result *from that act*." *Ante* at 292-293 (emphasis added). In actuality, the lead opinion is not considering what a reasonable person would expect to *result* from the insured's act, but the insured's stated *subjective belief* about the consequences of his act. This is the "Russian Roulette" theory of objective standards: "if I think the bullet is in another chamber, I'm covered."

Consequently, I see nothing inconsistent with my hypothetical example (using an insured's absurd belief that his gun would play the national anthem when discharged as a basis for recovery under this policy) and the lead opinion's application of its so-called objective standard to the known facts of this case. *Id.* And the lead opinion is especially hard pressed to explain why an insured's absurd beliefs should not be given absolute credence when it applies its version of the objective standard when the insured says he thought the gun was inoperable, unloaded, or simply magical.

TAXPAYERS OF MICHIGAN AGAINST CASINOS v
STATE OF MICHIGAN

Docket No. 122830. Argued March 11, 2004 (Calendar No. 6). Decided July 30, 2004.

Taxpayers of Michigan Against Casinos and State Representative Laura Baird brought an action in the Ingham Circuit Court against the state of Michigan, seeking to have declared unconstitutional compacts between the state and Indian tribes concerning class III casino gaming on tribal lands in Michigan. The compacts were negotiated by the Governor on behalf of the state, were concluded pursuant to the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*., and were approved by the Michigan House of Representatives and Senate by joint resolution. The court, Peter D. Houk, J., ruled that legislative approval of the compacts by resolution violated Const 1963, art 4, § 22 (which provides that all legislation shall be by bill), that compact provisions allowing the Governor to amend the compacts without legislative approval violated art 3, § 2 (separation of powers), but that the compacts do not implicate art 4, § 29 (which prohibits local or special acts where a general act can be made applicable) and therefore did not violate that provision. The Court of Appeals, HOOD, P.J., and HOLBROOK, JR., and OWENS, JJ., affirmed in part and reversed in part, holding that legislative approval of the compacts by joint resolution rather than by bill enactment did not violate art 4, § 22, that the issue whether the separation of powers doctrine is violated by allowing the Governor to amend the compacts without legislative approval is not ripe for review because the Governor had not yet attempted to amend the compacts, and that the local acts clause is not implicated by the compacts. 254 Mich App 23 (2002). The plaintiffs appealed.

In separate opinions, the Supreme Court *held*:

The Court of Appeals judgment holding that the compacts are constitutional is affirmed. Given the terms of the compacts involved, the Legislature was not required to approve the compacts through legislation; therefore, approval by resolution did not violate the Michigan Constitution. Further, the joint resolution that approved the compacts is not a local act and so does not

violate Const 1963, art 4, § 29. The issue whether gubernatorial amendment of the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2 is now ripe for review. The Court of Appeals, however, has not had the opportunity to consider the issue. Accordingly, this case is remanded to the Court of Appeals for consideration of that issue.

Chief Justice CORRIGAN, joined in full by Justices TAYLOR and YOUNG, joined by Justice CAVANAGH only with respect to part IV (*Blank*/*Chadha* factors), and joined by Justice MARKMAN only with respect to part VI (local acts issue), stated that at issue in this case is class III gaming under IGRA. Tribes may engage in class III gaming only pursuant to a tribal-state compact that is approved by the Secretary of the Interior. 25 USC 2710(d).

Legislation is unilateral regulation: the Legislature is never required to obtain consent from those who are subject to its legislative power. This unilateral action distinguishes legislation from contract. The Legislature could not have unilaterally extended its will over the tribes involved because IGRA only grants the states bargaining power, not regulatory power, over tribal gaming. In this case, the compacts therefore can only be described as contracts, not legislation. Each compact provided that it would take effect after endorsement by the Governor and concurrence in that endorsement by resolution of the Legislature. Thus, legislative approval of the compacts was required only as the result of negotiations between sovereigns. The compacts have no application to those subject to legislative power; rather, they only set forth the parameters within which the tribes, as sovereign nations, have agreed to operate their gaming facilities. The Legislature has no obligation regarding the regulation of tribal gaming. Further, in approving the compacts, the Legislature had not dictated the rights or duties of those other than the contracting parties. The compacts do not obligate local units of government to create local revenue sharing boards. The Legislature's approval of the compacts has not affected the rights of state citizens by setting age limitations for gaming or employment in the tribal casinos, nor did it create any affirmative state obligations.

The Michigan Constitution contains no limits on the Legislature's power to bind the state to a contract with a tribe. Therefore, because nothing prohibits it from doing so, the Legislature has the discretion to approve the compacts by resolution. This Court should not interfere with the Legislature's discretionary decision to approve the compacts by resolution.

The analysis from *Blank v Dep't of Corrections*, 462 Mich 103 (2000), as adopted from *Immigration & Naturalization Service v*

Chadha, 462 US 919 (1983), which concerned the Legislature's power to alter or amend a statute delegating rule-making authority without doing so by statute, does not apply to this case. The Constitution is silent regarding the proper form of legislative approval of tribal-state gaming compacts under IGRA and the people have not expressed a view on this question.

The recent amendment of the compacts by the Governor makes the separation of powers issue ripe for review. This case must be remanded to the Court of Appeals so that it may consider whether the provisions in the compacts empowering the Governor to amend the compacts without legislative approval violate the separation of powers doctrine. Const 1963, art 3, § 2. The Court of Appeals should remand to the trial court if it determines that further fact-finding is necessary to resolve the issue.

The approval of state compacts regarding Indian casinos pursuant to IGRA constitutes a unique state function with interests international in character, rather than a function of a local unit of government with predominantly local interest. The compacts are not local acts within the meaning of Const 1963, art 4, § 29. Furthermore, tribal lands subject to compact negotiations are declared as such by the Department of the Interior, which has granted to the tribes lands located in the counties specified in the compacts. If the department were to grant to a tribe lands located outside such counties, IGRA would direct the state to reach a compact applicable to that land as well.

Justice KELLY, joined by Justice CAVANAGH, concurring, stated that the tribal-state gaming compacts at issue are not legislation. They are appropriately viewed as agreements between sovereign entities. They do not impose duties on or restrict the people of the state. They create no duty to enforce state laws on tribal lands. They do not mandate the creation of local revenue sharing boards. They are applicable only to the tribes, who are generally not subject to the legislative power of the state. Instead, the compacts are contractual in nature, conveying the rights and obligations of the parties, the state, and the various tribes. Because the compacts are not legislation, the Legislature was not required to approve them by bill. Nothing in the state or federal constitutions prohibits the Legislature from approving intergovernmental agreements by concurrent resolution. Therefore, a concurrent resolution of the Legislature was appropriate to validate them.

Because the compacts at issue are not legislation, the local acts provision of the Michigan Constitution, Const 1963, art 4, § 29, does not apply to the compacts and cannot be violated by the compacts.

In the absence of a fully developed record, the issue whether the Governor's recent amendments of the compacts violate the separation of powers clause should be remanded to the Court of Appeals.

Justice WEAVER, concurring in part and dissenting in part, would hold that the compacts are void, because the state can be bound to a tribal-state compact under the federal Indian Gaming Regulatory Act only when the Legislature has enacted a bill adopting the compacts.

The first question in this case is who, under Michigan law, has the authority to bind the state of Michigan to a compact negotiated under IGRA. Binding the state to a compact with an Indian tribe requires determinations of public policy and the exercise of law-making powers that are within the exclusive purview of the Legislature. Therefore, under Michigan's constitutional separation of powers, the Governor does not have the authority to bind the state to a compact with an Indian tribe; only the Legislature has that authority.

The Legislature attempted to approve the compacts by a joint resolution. But Mich Const 1963, art 4, § 22 requires that all legislation shall be by bill. A resolution is not a constitutional method of expressing the legislative will where that expression, as here, is to have the force of law and bind people other than the legislators adopting it. To exercise its power to bind the state to a tribal-state compact under IGRA, the Legislature must enact a bill, not pass a joint resolution. Because the state of Michigan did not adopt the compacts, the compacts are void.

Because Justice WEAVER would hold that the compacts are void, she would hold moot the issue whether the compact provisions permitting the Governor to amend the compacts without legislative approval violate the separation of powers doctrine and would not remand on this issue. Const 1963, art 3, § 2.

Justice WEAVER concurred in the determination that the compacts at issue do not violate Const 1963, art 4, § 29, the local acts clause.

Justice MARKMAN, dissenting except as to part VI of the lead opinion, states that this Court has been asked to determine what the constitutional procedures are by which the state of Michigan properly ratifies tribal-state casino gambling compacts. He concludes that the compacts at issue here constitute legislation and, thus, are subject to legislative approval consistent with the law-making procedures of Const 1963, art 4, §§ 22 and 26, and that the provision in the compacts that purports to give the Governor sole

amendatory power over their covenants violates the separation of powers doctrine of Const 1963, art 3, § 2.

The tribal-state compacts in this case constitute legislation. In reaching this conclusion, Justice MARKMAN states that this Court should consider the language of the Constitution, whether the compacts had the purpose and effect of generally altering the legal rights and duties of the people of Michigan, whether the Governor's action in negotiating the compacts and the Legislature's action in conducting a resolution vote effectively substituted for legislative action, and whether the compacts constituted formulations of public policy. Because the Constitution requires that all legislation be done by bill, and that no bill may become law without the concurrence of a majority of the elected members in each house, the compacts here were not properly adopted by the Legislature by only a resolution vote.

The majority, by concluding that the compacts do not constitute legislation, alters the constitutional relationship in Michigan between the branches of government. As a result of the majority's holding, in the future, the Legislature's role in approving not only tribal-state compacts, but compacts of all kinds, will exist essentially at the sufferance of the Governor.

The provision in the tribal-state compacts that purports to grant the Governor sole amendatory power over their covenants violates the separation of powers doctrine of Const 1963, art 3, § 2. No person exercising the powers of one branch of the government shall exercise powers properly belonging to another and, therefore, any amendment to legislation, including a tribal-state compact, must be effected by both the legislative and executive branches and is subject to the enactment requirement of Const 1963, art 4, § 26.

For the reasons set forth in part VI of the lead opinion, the tribal-state compacts do not violate the local acts provision of Const 1963, art 4, § 29.

Affirmed; remanded to the Court of Appeals.

INDIANS — CASINOS — TRIBAL-STATE GAMING COMPACTS — CONSTITUTIONAL LAW.

Given the terms of the compacts involved, the approval by joint resolution of the Michigan House of Representatives and Senate of the tribal-state gaming compacts at issue does not constitute legislation, is not a local act, and therefore does not violate state constitutional provisions requiring legislation by bill and prohibiting local or special acts where a general act can be made applicable (Const 1963, art 4, §§ 22, 29; 25 USC 2701 *et seq.*).

Warner Norcross & Judd LLP (by *Robert J. Jonker, William C. Fulkerson, Norbert F. Kugele*, and *Daniel K. DeWitt*) for the Taxpayers of Michigan Against Casinos.

Barris, Sott, Denn & Driker, P.L.L.C. (by *Eugene Driker* and *Thomas F. Cavalier*), for the state of Michigan.

Dykema Gossett PLLC (by *Richard D. McLellan, Bruce G. Davis, R. Lance Boldrey*, and *Kristine N. Tuma*) for intervening defendant Gaming Entertainment, LLC.

Amici Curiae:

Rhoades McKee (by *Bruce W. Neckers* and *Bruce A. Courtade*) for the Grand Rapids Area Chamber of Commerce.

Senate Majority Counsel (by *Alfred H. Hall, Michael G. O'Brien, Phillip A. Hendges*, and *Pamela S. Haynes*) for Senate Majority Leader Ken Sikkema and Senator Shirley Johnson.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Kevin J. Moody* and *Jaclyn Shoshana Levine*), for the Sault Ste. Marie Tribe of Chippewa Indians.

Kanji & Katzen, PLLC (by *Riyaz A. Kanji*), and *Drummond, Woodsum & MacMahon* (by *Kaighn Smith* and *Robert Gips*) for the Little River Band of Ottawa Indians, the Little Traverse Bay Bands of Odawa Indians, and the Pokagon Band of Potawatomi Indians of Michigan.

James A. Bransky, General Counsel, for the Little Traverse Bay Bands of Odawa Indians.

Michael G. Phelan for the Pokagon Band of Potawatomi Indians.

Wheeler Upham, P.C. (by *Geoffrey L. Gillis*), and *Sonosky, Chambers, Sachse, Endreson & Perry, LLP* (by *William R. Perry* and *Mary P. Pavel*), for the Nottawaseppi Huron Band of Potawatatomi.

William Brooks for the Little River Band of Ottawa Indians.

Schuitmaker, Cooper & Schuitmaker, P.C. (by *Harold Schuitmaker*), for the city of New Buffalo.

Dewane, Peterson, McMahon & Cullitan, P.L.C. (by *David M. Peterson*), for the New Buffalo Township.

CORRIGAN, C.J. In this declaratory action, we must determine: (1) whether House Concurrent Resolution (HCR) 115 (1998), the Legislature's approval by resolution of tribal-state gaming compacts, constituted "legislation" and therefore violated Const 1963, art 4, § 22; (2) whether the compacts' amendatory provision providing that the Governor may amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2; and (3) whether HCR 115 is a local act in violation of Const 1963, art 4, § 29.

We hold that the Legislature's approval of the compacts through HCR 115 did not constitute legislation. In approving those compacts by resolution, the Legislature did not modify Michigan law in any respect; instead, the Legislature simply expressed its approval of valid contracts between two independent, sovereign entities. Although Michigan's gaming law would have applied to gaming on tribal lands in the absence of a tribal-state compact, it applied only as a matter of

federal law. Compacts establishing the terms of class III gaming on tribal lands modified only federal law. Therefore, our Constitution does not require that our Legislature express its approval of these compacts through bill rather than resolution.

We further hold that although the issue of the amendment provision in the compacts may now be ripe for review, the lower courts have yet to review this issue and make any specific findings regarding whether the amendatory provision in the compacts, as now invoked by Governor Granholm, violates the separation of powers provisions found in Const 1963, art 3, § 2. Finally, we hold that HCR 115 is not a "local act" and therefore does not violate Const 1963, art 4, § 29. Accordingly, we remand the amendment provision issue to the Court of Appeals for consideration, but otherwise affirm the decision of the Court of Appeals.

I. FACTUAL HISTORY AND PROCEDURAL POSTURE

A. BACKGROUND: FEDERAL LAW REGARDING TRIBAL GAMING

Knowledge of the underlying federal law is necessary to understand the factual posture of this case. In *California v Cabazon,* 480 US 202, 207; 107 S Ct 1083; 94 L Ed 2d 244 (1987), the United States Supreme Court held that state laws may only be applied to tribal lands "if Congress has expressly so provided." The Court held that because Congress had not provided for the regulation of tribal gaming, a state could only prohibit gaming on tribal lands if the state completely prohibited all gaming within its borders.

In response to *Cabazon,* Congress passed the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*., which divides gaming activities into three classes. Class I gaming consists of "social games solely for prizes of

minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 USC 2703(6). Class II gaming includes bingo and card games (but not banking card games) that are played in conformance with state laws and regulations regarding hours of operation and limitations on wagers or pot sizes. 25 USC 2703(7). Class III gaming includes all other forms of gambling, including casino gaming. 25 USC 2703(8).

At issue in this case is class III gaming. Under IGRA, tribes may engage in class III gaming only pursuant to a tribal-state compact that is approved by the Secretary of the Interior. 25 USC 2710(d) provides, in relevant part:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are—
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> * * *
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.
>
> * * *
>
> (3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.[1]

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[1] In *Seminole Tribe of Florida v Florida*, 517 US 44; 116 S Ct 1114; 134 L Ed 2d 252 (1996), the United States Supreme Court held that 25 USC

* * *

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to —

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

* * *

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

Through § 2710(d), Congress expressly provided for tribal-state negotiations regarding class III gaming.

2710(d)(7), which permits Indian tribes to sue a state in federal court when that state has refused to negotiate in good faith for a tribal-state compact, was an unconstitutional violation of state sovereign immunity as preserved by the Eleventh Amendment of the United States Constitution.

Through this compacting process, the tribes and the states may agree to the terms governing such gaming.

B. FACTUAL HISTORY

The compacts at issue in this case were first signed by Governor Engler and four Indian tribes[2] in January of 1997. Each compact provided that it would take effect after "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature."[3] The compacts were modified and re-executed in December 1998, and the Legislature then approved the compacts by resolution through HCR 115.[4]

The validity of the 1998 compacts was challenged through several lawsuits.[5] Plaintiffs filed this suit against defendant in the Ingham Circuit Court, seeking a declaratory judgment that the compacts do not comport with various constitutional provisions. Plaintiffs

[2] These tribes are the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Nottawaseppi Huron Potawatomi. The Little Traverse Bay Band and the Little River Band currently operate casinos.

[3] See § 11 of the compacts.

[4] Although a bill must be passed by a majority of elected and serving members of the Legislature, a resolution may be passed by a majority vote of those legislators present at the time, provided a quorum is present. The House of Representatives approved the compacts by a resolution vote of 48 to 47, and the Senate followed suit by a resolution vote of 21 to 17.

[5] The Sault Ste. Marie Tribe of Lake Superior sued in federal court to enjoin the operation of the new casinos, but the United States Court of Appeals for the Sixth Circuit dismissed this suit on standing grounds. *Sault Ste Marie Tribe v United States*, 288 F3d 910 (CA 6, 2002). Two state legislators also challenged the approval of the Secretary of Interior of Michigan's 1998 compacts, but that suit was also dismissed on standing grounds by the United States Court of Appeals for the Sixth Circuit. *Baird v Norton,* 266 F3d 408 (CA 6, 2001).

argue that the compacts amount to legislation and, therefore, pursuant to Const 1963, art 4, § 22 the Legislature was required to adopt them by bill rather than approve them by resolution. The circuit court held that the compacts should have been approved by bill. The Court of Appeals reversed the circuit court decision, concluding that the compacts do not constitute legislation because they contain no enforcement provision that would ensure that their terms are satisfied and because the power of the state to legislate in this area is preempted by federal law. The Court of Appeals opined that the compacts constitute mere contracts and, therefore, approval by resolution was not constitutionally infirm.

Plaintiffs also contend that the provision in the compacts that purports to empower the Governor to amend them without legislative approval violates Const 1963, art 3, § 2, the "separation of powers" doctrine. The circuit court agreed with plaintiffs. The Court of Appeals, however, reversed the decision of the circuit court on the basis that the amendatory provision issue was not ripe for review because the Governor had not yet attempted to amend the compacts.

Plaintiffs further argue that the compacts violate Const 1963, art 4, § 29, the "local acts" clause. The circuit court disagreed, holding that art 4, § 29 is not implicated. The Court of Appeals agreed and affirmed the circuit court on this issue.

This Court granted leave to appeal.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). The

constitutionality of a legislative act is a question of law that is reviewed de novo. *DeRose v DeRose*, 469 Mich 320, 326; 666 NW2d 636 (2003).

III. THE LEGISLATURE'S APPROVAL OF THE COMPACTS WAS NOT LEGISLATION

Resolution of whether HCR 115 constituted legislation necessarily turns on the definition of "legislation." Plaintiffs argue that the Legislature's approval of the compacts must be legislation because HCR 115 had the effect of altering legal rights and responsibilities. We find this definition of "legislation" overly simplistic. Although it is true that legislation alters legal rights and responsibilities, not everything that alters legal rights and responsibilities can be considered legislation. Legal rights and responsibilities may also be altered through contracts. Therefore, the fact that the legal rights or responsibilities of the parties involved may have been altered in some way is not dispositive.

We hold that a more accurate definition of "legislation" is one of unilateral regulation. The Legislature is never required to obtain consent from those who are subject to its legislative power. *Boerth v Detroit City Gas Co*, 152 Mich 654, 659; 116 NW 628 (1908). This unilateral action distinguishes legislation from contract: " 'The power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two.' " *Detroit v Michigan Pub Utilities Comm*, 288 Mich 267, 288; 286 NW 368 (1939), quoting *City of Kalamazoo v Kalamazoo Circuit Judge*, 200 Mich 146, 159-160; 166 NW 998 (1918).

Here, the Legislature was required to approve the compacts only as the result of negotiations between two

sovereigns: the Legislature could not have unilaterally exerted its will over the tribes involved. Because the tribes' consent is required by federal law, the compacts can only be described as contracts, not legislation.

A. THE STATE'S LIMITED ROLE UNDER IGRA

In order to understand the contractual nature of the compacts, it is essential to understand the state's limited role under federal law generally, as well as IGRA. Since at least 1832, the United States Supreme Court has recognized tribal sovereignty. In *Worcester v Georgia*, 31 US 515, 557; 8 L Ed 483 (1832), the United States Supreme Court noted that the tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." This tribal sovereignty is limited only by Congress: "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance." *United States v Wheeler*, 435 US 313, 323; 98 S Ct 1079; 55 L Ed 2d 303 (1978). Similarly, only the federal government or the tribes themselves can subject the tribes to suit; tribal immunity "is not subject to diminution by the States." *Kiowa Tribe of Oklahoma v Mfg Technologies, Inc*, 523 US 751, 754, 756; 118 S Ct 1700; 140 L Ed 2d 981 (1998). Through IGRA, however, Congress has permitted the states to negotiate with the tribes through the compacting process to shape the terms under which tribal gaming is conducted. The states have no authority to regulate tribal gaming under the IGRA unless the tribe explicitly consents to the regulation in a compact.

Although 25 USC 2710(d)(1)(C) provides that class III gaming activities are only lawful if conducted in conformance with a tribal-state compact, that does not mean the states have any authority to regulate class III gaming activities in the absence of a compact. States may not enforce the terms of IGRA; rather, the only enforcement provided for in the IGRA is through the federal government. The IGRA provides that civil enforcement lies only with the tribes themselves or with the National Indian Gaming Commission, which was created by IGRA. 25 USC 2713. Judicial review of the Commission's decision may only be obtained in federal court. 25 USC 2714. Similarly, criminal enforcement is left solely to the federal government under 18 USC 1166(d). See also *Gaming Corp of America v Dorsey & Whitney*, 88 F3d 536, 545 (CA 8, 1996) ("Every reference to court action in IGRA specifies federal court jurisdiction. . . . State courts are never mentioned."). In other words, although it may be "unlawful" for the tribes to engage in class III gaming absent a compact, the Legislature is powerless to regulate or prohibit such gaming. State legislatures have no regulatory role under IGRA aside from that negotiated between the tribes and the states.

In *Gaming Corp, supra* at 546-547, the court explained:

> Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes. They are a creation of federal law, and IGRA prescribes "the permissible scope of a Tribal-State compact, see § 2710(d)(3)(C)." *Seminole Tribe of Florida v Florida* [517 US 44; 116 S Ct 1114; 134

> L Ed 2d 252 (1996).] Such compacts must also be approved by the Secretary of the Interior. § 2710(d)(3)(B).
>
> * * *
>
> Congress thus chose not to allow the federal courts to analyze the relative interests of the state, tribal, and federal governments on a case by case basis. Rather, it created a fixed division of jurisdiction. If a state law seeks to regulate gaming, it will not be applied. If a state law prohibits a class of gaming, it may have force. The courts are not to interfere with this balancing of interests, they are not to conduct a *Cabazon* balancing analysis. This avoids inconsistent results depending upon the governmental interests involved in each case. With only the limited exceptions noted above, Congress left the states without a significant role under IGRA unless one is negotiated through a compact.

The only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact.

In fact, our Legislature has recognized that the state's regulatory authority cannot extend to tribal gambling. MCL 432.203(5) provides that state regulation of tribal casinos can only occur "[i]f a federal court or agency rules or federal legislation is enacted that allows a state to regulate gambling on Native American land." Absent such federal authorization, MCL 432.203(2)(d) acknowledges that the state's gambling regulatory requirements do *not* apply to "[g]ambling on Native American land and land held in trust by the United States for a federally recognized Indian tribe on which gaming may be conducted under [IGRA]."

Further, contrary to plaintiffs' contentions, 18 USC 1166 does not change this analysis. Section 1166 provides:

(a) Subject to subsection (c), *for purposes of Federal law*, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include—

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USC 2710(d)(8)] that is in effect.

(d) *The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act [25 USC 2710(d)(8)], or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe*. [Emphasis added.]

Section 1166 does *not* grant the state regulatory authority over tribal gaming; rather, it simply incorporates state laws as the federal law governing nonconforming tribal gaming. Thus, although a state's gaming laws apply in the absence of a tribal-state compact, they

apply only *as federal law*. It follows that when the Legislature approves a tribal-state compact, it approves a change in *federal* law rather than its own.

Moreover, this "federalization" of state law regulating gambling does not give a state enforcement power over violations of state gambling laws on tribal lands because "the power to enforce the incorporated laws rests solely with the United States." *United Keetoowah Band of Cherokee Indians v Oklahoma*, 927 F2d 1170, 1177 (CA 10, 1991). The state remains powerless to assert any regulatory authority over tribal gaming *unless* the tribes have assented to such authority in a compact under IGRA. *AT&T Corp v Coeur D'Alene Tribe*, 295 F3d 899, 909 (CA 9, 2002).

Although 18 USC 1166(d) effectively "borrows" Michigan law for purposes of federal law, it does not delegate any regulatory power to the states. Section 1116(d) is not a way to extend the state's power to regulate tribes through the federal government. Rather, the federal government may conclude at any time that it will no longer apply state law and so amend the IGRA. In other words, the fact that, for purposes of expediency, the federal government has currently chosen to apply Michigan law for purposes of federal law does not mean that it will always choose to do so. Therefore, § 1166(d) cannot be viewed as a delegation of regulatory power to the states.

B. THE CONTRACTUAL NATURE OF COMPACTS

As explained above, IGRA only grants the states bargaining power, not regulatory power, over tribal gaming. The Legislature is prohibited from unilaterally imposing its will on the tribes; rather, under IGRA, it must negotiate with the tribes to reach a mutual

agreement.[6] As further noted above, the hallmark of legislation is unilateral imposition of legislative will. Such a unilateral imposition of legislative will is completely absent in the Legislature's approval of tribal-state gaming compacts under IGRA. Here, the Legislature's approval of the compacts follows the assent of the parties governed by those compacts. Thus, the Legislature's role here requires mutual assent by the parties—a characteristic that is not only the hallmark of a contractual agreement but is also absolutely foreign to the concept of legislating. *Rood v Gen Dynamics Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993). See *Confederated Tribes of the Chehalis Reservation v Johnson*, 135 Wash 2d 734, 750; 958 P2d 260 (1998) ("Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts.").

Further, the compacts approved by HCR 115 do not apply to the citizens of the state of Michigan as a whole; they only bind the two parties to the compact. Legislation " 'looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.' " *Dist of Columbia Court of Appeals v Feldman*, 460 US 462, 477; 103 S Ct 1303; 75 L Ed 2d 206 (1983), quoting *Prentis v Atlantic Coast Line Co*, 211 US 210, 226; 29 S Ct 67; 53 L Ed 150 (1908). Here, the compacts approved by HCR 115 have no application to those subject to legislative power; rather, they only set forth the parameters within which the tribes, as sovereign nations, have agreed to operate their gaming facilities. Under the

[6] IGRA even prohibits the state from frustrating the tribe's desire to enter into class III gaming by refusing to negotiate. In the event that a state will not negotiate or an agreement cannot be reached, although under *Seminole Tribe* the state may not be sued, it appears that the tribe may approach the Secretary of the Interior, who can approve a compact under 25 USC 2710(d)(8).

terms of the compacts, the tribes themselves, not the state, regulate the conduct of class III gaming on tribal lands. The Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the state unilaterally rectify a violation of the compacts.

Similarly, in approving the compacts at issue here, the Legislature has not dictated the rights or duties of those other than the contracting parties. Despite plaintiffs' arguments to the contrary, we find that § 18 of the compacts does not obligate local units of government to create local revenue sharing boards. Indeed, because the local government units are not parties to the contract, it would not be possible for the compacts to impose *any* obligations on the local governments. Third parties cannot be bound by the terms of the compacts. Instead, the compacts make local units of government third-party beneficiaries of the compacts, with the creation of the revenue sharing boards simply a condition precedent to receiving those benefits. A party is a third-party beneficiary if the promisor "has undertaken to give or do or refrain from doing something directly to or for said person." MCL 600.1405(1). Here, the tribes have promised to give 2% of their net earnings to local communities, provided those communities create the revenue sharing boards to receive and disburse the payments. If the local governments choose not to create the sharing boards, they simply can no longer receive the benefit of the funds. But they are under no *obligation* to create the revenue sharing boards and receive the benefit granted by the tribes.

Further, we reject plaintiffs' argument that the Legislature's approval by resolution has affected the rights of state citizens by setting age limitations for gaming or employment in the tribal casinos. These restrictions are not restrictions on the citizens of Michigan; rather, they

are restrictions only on the *tribes*. The compacts provide the minimum requirements that the *tribes* agree to use in hiring and admitting guests to the casinos. The state has no power to regulate the casinos or enforce violations of the compact, but must use the dispute resolution procedure provided in the compacts if a violation occurs.

Finally, we hold that the Legislature's approval of the tribal-state compacts does not create any affirmative state obligations. The compacts do not create any state agencies or impose any regulatory obligation on the state. The state also has no responsibility to enforce the compacts' requirements—that responsibility falls on the tribes alone. In this way, the compacts here can be distinguished from those at issue in the cases relied upon by plaintiffs. In *Kansas v Finney*, 251 Kan 559; 836 P2d 1169 (1992), the compact at issue created a state gaming agency responsible for monitoring the tribe's compliance with the contract, and the compact was not submitted to the legislature for any form of approval. The court found that, under Kansas law, the creation of a state agency was a legislative function. Absent an appropriate delegation of power by the legislature or legislative approval of the compact,[7] the compacts could not bind the state to the increased obligations. Unlike the compact in *Finney,* however, the compacts at issue here do not create any state agencies and were presented to the Legislature for approval.

Similarly, in *New Mexico v Johnson*, 120 NM 562; 904 P2d 11 (1995), the compacts authorized more forms of gaming than were otherwise permitted in New Mexico. As in *Finney*, the compacts were not presented to the state legislature for any form of approval. The court

[7] The court did not specify what form that legislative approval would have to take.

held that the governor could not enter into the compacts and thereby create new forms of gaming without "any action on the part of the legislature." *Id.* at 574. Unlike the compacts in *Johnson*, the compacts here do not create new forms of gaming and were presented to the Legislature for approval. Thus, the compacts do not impose new obligations on the citizens of the state subject to the Legislature's power; they simply reflect the contractual terms agreed to by two sovereign entities.

C. LEGISLATIVE APPROVAL VIA RESOLUTION WAS APPROPRIATE

Once it is determined that HCR 115 did not constitute legislation, we must then determine whether resolution was an appropriate method of legislative approval of the compacts. We therefore turn to our Constitution. Our Constitution does not prohibit the Legislature from approving contracts, such as the compacts at issue here, by concurrent resolution. Unlike the federal constitution, our Constitution "is not a grant of power to the legislature, but is a limitation upon its powers." *In re Brewster Street Housing Site*, 291 Mich 313, 333; 289 NW 493 (1939). Therefore, "the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States." *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936). This has been discussed by this Court in the past by analogizing our Legislature to the English Parliament. See *Young v City of Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934), in which this Court stated:

> A different rule of construction applies to the Constitution of the United States than to the Constitution of a State. The Federal government is one of delegated powers,

> and all powers not delegated are reserved to the States or to the people. When the validity of an act of congress is challenged as unconstitutional, it is necessary to determine whether the power to enact it has been expressly or impliedly delegated to congress. The legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the State itself.[8]

Regarding any limitations in our constitution, art 4, § 22 only requires the approval of *legislation* by bill, but is silent regarding the approval of contracts.

We have held that our Legislature has the general power to contract unless there is a constitutional limitation. *Advisory Opinion on Constitutionality of 1976 PA 240*, 400 Mich 311; 254 NW2d 544 (1977). It is acknowledged by all that our Constitution contains no limits on the Legislature's power to bind the state to a contract with a tribe; therefore, because nothing prohibits it from doing so, given the Legislature's residual power, we conclude that the Legislature has the discretion to approve the compacts by resolution.[9]

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[8] See also *Thompson v Auditor General*, 261 Mich 624, 642; 247 NW 360 (1933), in which the Court stated:

> The power of the legislature of this State is as omnipotent as that of the parliament of England, save only as restrained by the Constitution of the United States and the Constitution of this State. . . . 1 Cooley, Constitutional Limitations (8th Ed.), p. 354.

[9] In fact, action by concurrent resolution is common when the Constitution is silent regarding the appropriate procedure. Various constitutional provisions require legislative action but fail to specify its form: Const 1963, art 4, § 53 (appointment of auditor general), Const 1963, art 11, § 5 (approval of certain civil service pay increases), Const 1963, art 4, § 17 (establishing special legislative committees), and Const 1963, art 10,

This understanding of legislative power is well-established. Our Legislature has in the past used the resolution process to ratify amendments of the federal constitution. This Court has declared the resolution process proper in such a circumstance because the Legislature did not engage in a legislative act that enacted a law, but merely expressed its assent to the proposed amendment. *Decher v Secretary of State*, 209 Mich 565, 571; 177 NW 388 (1920). In the same way, the Legislature here is merely expressing its "assent" to the compacts through HCR 115.

More importantly, because our Legislature had the discretion to approve the compacts by resolution rather than by bill, the courts cannot interfere with that legitimate exercise of legislative discretion. As this Court recognized long ago in *Detroit v Wayne Circuit Judge*, 79 Mich 384, 387; 44 NW 622 (1890):

> It is one of the necessary and fundamental rules of law that the judicial power cannot interfere with the legitimate discretion of any other department of government. So long as they do no illegal act, and are doing business in the range of the powers committed to their exercise, no outside authority can intermeddle with them . . . .

Therefore, this Court should not interfere with the Legislature's discretionary decision to approve the compacts by resolution.

IV. THE *BLANK*/*CHADHA* FACTORS

For the above reasons, we are not persuaded by plaintiffs' argument that the factors set forth in the lead opinion in *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000), adopted from *Immigration*

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§ 5 (designation of land as part of state land reserve). In such situations, the Legislature has historically acted by concurrent resolution.

& Naturalization Service v Chadha, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1983), apply to this case. *Blank* and *Chadha* involved the Legislature's power to alter or amend the statute delegating rule-making authority without doing so by statute. *Blank* held that once the Legislature grants power to an agency by statutory action, it cannot then diminish or qualify that power except by further statutory action. This "legislative veto" practice at issue in *Blank* also had a significant state constitutional history. Const 1963, art 4, § 37 allowed temporary legislative vetoes of agency regulations between legislative sessions. In 1984, the people rejected a proposal to amend § 37 and permit the type of permanent legislative veto at issue in *Blank*. The fact that the legislative veto at issue in *Blank* was not permitted by the Constitution and had been rejected by the people further illuminates the *Blank* decision.

No such environment exists here, however, as our Constitution is silent regarding the proper form of legislative approval of tribal-state gaming compacts under IGRA and the people have not expressed a view on this question. Therefore, we do not believe that the *Blank*/*Chada* analysis should be applied here.

In response to Justice MARKMAN's dissent, however, we note that even were the *Blank*/*Chadha* analysis to be applied, the factors do not demonstrate that the Legislature's approval of the compacts was an act of legislation.

A. THE COMPACTS DO NOT ALTER THE LEGAL RIGHTS, DUTIES, AND RELATIONS OF PERSONS OUTSIDE THE LEGISLATIVE BRANCH

To make sense, this factor must apply to persons outside the legislative branch who are subject to the Legislature's authority. Here, the compacts do not give the state the power to alter the rights, duties, or

relations of anyone subject to the Legislature's authority. Rather, the compacts only set forth the parameters the tribes agree will apply to their operation of gaming facilities. The Legislature has no regulatory duty under the compacts, nor do the compacts confer any "rights" upon the state other than contractual rights. For example, although the state may inspect tribal facilities and records, it has no power to enforce those provisions. Any contractual disputes under the compacts must be submitted to the dispute resolution procedure outlined in the compacts. All duties and restrictions in the compacts fall on the tribes themselves, who are sovereign entities and have consented to the restrictions and additional duties.

B. THE RESOLUTION DID NOT SUPPLANT LEGISLATIVE ACTION

Unlike the actions taken in *Blank*, HCR 115 did not have the effect of amending or repealing existing legislation when it approved the compacts. As noted above, given the Constitution's silence regarding the form of approval necessary for tribal-state gaming compacts, the Legislature had the discretion to approve the compacts by resolution. Further, as explained above, the compacts do not impose any affirmative obligations on the state, create rules of conduct for Michigan citizens, or create new state agencies. Such changes would require legislation, but are absent from the compacts. Therefore, legislation is not required and this Court should not interfere with the Legislature's discretion in approving the compacts by concurrent resolution.

C. THE COMPACTS DO NOT INVOLVE POLICY DETERMINATIONS REQUIRING LEGISLATION

First, it must be remembered that not all policy decisions made by the Legislature are required to be in

the form of legislation. See *Blank*, *supra* at 170 (CAVANAGH, J.). As the United States Supreme Court explained in *Yakus v United States*, 321 US 414, 424; 64 S Ct 660; 88 L Ed 834 (1944), "[t]he essentials of the legislative function are the determination of legislative policy *and its formulation and promulgation as a defined and binding rule of conduct* . . . ." (Emphasis added.) Here, HCR 115 neither promulgated a legislative policy as a defined and binding rule of conduct nor applied it to the general community. Instead, HCR 115 simply assented to the negotiated contract between two sovereign entities, recognizing that the compacts created no new legal rights or duties for the state or its citizens. Indeed, HCR 115 could never be considered a "promulgation of a legislative policy as a defined and binding rule of conduct" because the Legislature lacks the authority to bind the tribes at all. Without the tribes' approval, the compacts have no force. Through IGRA, Congress has determined that states may not unilaterally impose their will on the tribes regarding gaming; rather, the states may only negotiate with the tribes through the compacting process.

D. *CHADHA*'S CONSTITUTIONAL FACTOR IS NOT APPLICABLE GIVEN THE NATURE OF OUR STATE CONSTITUTION

As noted above, our Constitution differs from the federal constitution: the federal constitution *grants* Congress its power, while our Constitution *limits* the plenary power of our Legislature. As this Court has recognized:

> A different rule of construction applies to the Constitution of the United States than to the Constitution of a state. The federal government is one of delegated powers, and all powers not delegated are reserved to the states or to the people. When the validity of an act of Congress is challenged as unconstitutional, it is necessary to determine

> whether the power to enact it has been expressly or impliedly delegated to Congress. The legislative power, under the Constitution of a state, is as broad, comprehensive, absolute, and unlimited as that of the Parliament of England, subject only to the Constitution of the United States and the restraints and limitations imposed by the people upon such power by the Constitution of the state itself. [*Young v Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934).]

Thus, the fourth *Chadha* factor, which was not applied in *Blank*, is inapplicable here because our Constitution does not *grant* authority to the Legislature, but instead limits the Legislature's plenary authority. As explained above, our Constitution's silence regarding the form of approval needed for tribal-state gaming compacts, therefore, does not lead to the conclusion that the Legislature is prohibited from approving the compacts by resolution; rather, it leads to the conclusion that the form of the approval is within the discretion of the Legislature.

V. THE AMENDMENT PROVISION ISSUE SHOULD BE REMANDED

Although we agree with plaintiffs that Governor Granholm's recent amendments make the amendment provision issue ripe for review, the lower courts have not yet been able to assess this issue since the amendments. It is not proper for us to do so now. Therefore, we remand this issue to the Court of Appeals to consider whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2. The Court of Appeals should remand to the trial court if it determines that further fact-finding is necessary to resolve the issue.

VI. HCR 115 DOES NOT VIOLATE CONST 1963, ART 4, § 29

The "local act" provision of art 4, § 29 of Michigan's Constitution provides:

> 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 shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected.

In *Hart v Wayne Co*, 396 Mich 259; 240 NW2d 697 (1976), this Court considered whether a provision of the municipal courts of record act requiring Wayne County to supplement salaries for recorder's court judges constituted a "local act" subject to Const 1963, art 4, § 29. We held that the provision did not constitute a "local act" because a recorder's court performs state functions and the funding of such a court is a state function. *Id*. at 272. In *Attorney General ex rel Eaves v State Bridge Comm*, 277 Mich 373; 269 NW 388 (1936), this Court considered whether state legislation authorizing a bridge to Canada located at Port Huron constituted a local act. We held again that it did not, stating: "The bridge in question is international in character and will be used by those from all parts of both nations who desire to enter or leave the United States through Port Huron." *Id*. at 378.

Hart and *Eaves*, applied to the facts of this case, lead to the same conclusion: tribal-state compacts are not "local acts." In the absence of express congressional consent, the Legislature has no authority to regulate casino gambling on Indian lands. Like the bridge in *Eaves*, Indian casinos, located as they are on tribal lands, are "international in character" and are likely to be frequented by Michigan citizens from throughout

the state as well as by members of various Indian tribes. Therefore, the approval of state compacts regarding Indian casinos pursuant to IGRA constitutes a unique state function with interests "international in character," rather than a function of a local unit of government with predominantly local interests. Thus, we hold that the compacts are not "local acts."

Further, tribal lands subject to compact negotiations are declared as such not by the state or even by the tribes, but by the Department of the Interior. The Department of the Interior has thus far granted to the tribes lands located in the counties specified in the compacts.[10] If, however, the department were to grant to a tribe lands located outside such counties, IGRA would direct the state to negotiate in good faith with the tribe to reach a compact applicable to that land as well. For this additional reason, we are not persuaded that the compacts are "local acts" merely because they reference those specific counties in which the tribes have thus far been granted lands by the department.

Accordingly, we affirm the decision of the Court of Appeals that the compacts do not violate Const 1963, art 4, § 29, albeit for the reasons expressed above.

VII. CONCLUSION

We hold that HCR 115 was a valid method of approving the compacts. The compacts, and hence the Legis-

[10] The mere fact that Indian land is located in a specific county does not give that county jurisdiction over that land, just as Michigan does not have absolute jurisdiction over all tribal lands located within its borders. As already noted, absent express congressional consent, neither the state nor a local unit of government may regulate tribal affairs. Thus, the compacts are not "local acts" because the tribal lands that they regulate are not subject to local jurisdiction as contemplated by Const 1963, art 4, § 29.

lature's approval of those compacts, do not alter the legal rights or duties of the state or its citizens, nor do they create any state agencies. Therefore, no legislation is required to approve them. Rather, the compacts are simply contracts between two sovereign entities. Without the compacts, the state is prohibited under IGRA from unilaterally regulating tribal gaming in any manner. Further, our Constitution does not limit the Legislature's discretion regarding the proper approval method for tribal-state gaming compacts. Absent a constitutional limitation, the Legislature has discretion to determine the appropriate method for approving a contract. Moreover, we hold that HCR 115 is not a "local act" and so does not violate Const 1963, art 4, § 29. Finally, because no lower courts have had the opportunity to consider the issue of the amendment provision in the compacts since the issue became ripe for review, we remand that issue to the Court of Appeals for consideration. In all other respects, we affirm the decision of the Court of Appeals.

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

CAVANAGH, J., concurred only with respect to part IV.

MARKMAN, J., concurred only with respect to part VI.

KELLY, J. (*concurring*). In 1997 and 1998, Governor John Engler negotiated tribal-state gaming compacts with four west Michigan tribes. Under their terms, the compacts would become effective only when all of the following occurred:

> (A) Endorsement by the tribal chairperson and concurrence in that endorsement by resolution of the Tribal Council;

> (B) Endorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature;
>
> (C) Approval by the Secretary of the Interior of the United States; and
>
> (D) Publication in the Federal Register. [Compact with Little Traverse Bands of Odawa Indians, § 11.]

The compacts met all four requirements and became effective on February 18, 1999.

The Legislature approved the compacts by concurrent resolution. The plaintiffs then filed suit asserting that the compacts are legislation. Consequently, they argue, the Michigan Constitution requires that they be approved only by bill. Const 1963, art 4, § 22. At issue in this appeal is whether the approval process used by the Michigan Legislature was constitutional.

A majority of justices, myself included, hold that the tribal-state gaming compacts at issue are not legislation. They are more appropriately viewed as a communication between sovereign entities. The compacts do not impose duties on or restrict the people of the state. Instead, they are contractual in nature, conveying the rights and obligations of the parties, the state, and the various tribes. Therefore, the Legislature's approval by concurrent resolution was appropriate.

We find unpersuasive Justice MARKMAN's reliance on this Court's decision in *Blank*[1] to reach a contrary conclusion. *Blank* is inapplicable to this case. Because the tribal-state gaming compacts are valid, a majority affirms the decision of the Court of Appeals in favor of

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[1] *Blank v Dep't of Corrections*, 462 Mich 103; 611 NW2d 530 (2000). The *Blank* plurality adopted the United States Supreme Court's test regarding legislative veto enunciated in *Immigration & Naturalization Service v Chadha*, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1983). 462 Mich at 115.

defendants with the exception of the issue regarding the governor's recent compact amendment. On that issue, a majority agrees to remand the case to the Court of Appeals for consideration of the plaintiffs' argument.

I. STANDARD OF REVIEW

The circuit court ruled for plaintiffs on cross-motions for summary disposition. Decisions on motions for summary disposition are reviewed de novo. *American Federation of State, Co and Muni Employees v Detroit*, 468 Mich 388, 398; 662 NW2d 695 (2003). The question presented is whether the legislative action was constitutional. Similarly, issues of constitutionality are reviewed de novo. *Harvey v Michigan*, 469 Mich 1, 6; 664 NW2d 767 (2003).

II. THE ROLE OF FEDERAL LAW

Through the Commerce Clause, the United States Constitution grants the federal government exclusive jurisdiction over relations with Indian tribes. US Const, art I, § 8, cl 3. The clause gives Congress the power "[t]o regulate commerce with foreign nations, and among the several States, and with the Indian Tribes." *Id*. The so-called Indian Commerce Clause places relations with Indian tribes within "the exclusive province of federal law." *Oneida Co v Oneida Indian Nation of New York*, 470 US 226, 234; 105 S Ct 1245; 84 L Ed 2d 169 (1985). Given the existence of the Indian Commerce Clause, state law generally is not applicable to Indians on tribal reservations unless Congress has specifically made it applicable. *McClanahan v Arizona State Tax Comm*, 411 US 164, 170-171; 93 S Ct 1257; 36 L Ed 2d 129 (1973).

In recognition of this principle, the United States Supreme Court has held that, if state gambling policy is regulatory rather than prohibitory, then state law is inapplicable to Indian gaming on Indian lands. *California v Cabazon Band of Indians*, 480 US 202, 209; 107 S Ct 1083; 94 L Ed 2d 244 (1987). If state law allows gaming but seeks to regulate it, the state is not authorized to enforce that law on Indian reservations. The *Cabazon* Court made clear that regulation of Indian gaming is fundamentally the province of federal law. Tribes retain the exclusive right to regulate gaming on their lands in states where all gaming activity is not prohibited. *Id.* at 207.

In response to the *Cabazon* decision, Congress passed the Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*. With this act, Congress has provided a comprehensive federal regulation of tribal gaming. This framework allows state regulation only to the extent that it is negotiated into the terms of a tribal-state compact. Such a compact must set forth the parameters under which an Indian tribe will establish and operate casino-style gaming facilities. 25 USC 2710(d)(3).

IGRA provides that Indian tribes may engage in class III gaming only if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 USC 2710(d)(1)(C). Because it is not classified as class I or class II style gaming, the casino-style gambling at issue in this case involves class III gaming. 25 USC 2703(8).

By allowing the states to play a role through the compacting process, IGRA "extends to the States a power withheld from them by the Constitution." *Seminole Tribe of Florida v Florida*, 517 US 44, 58; 116 S Ct 1114; 134 L Ed 2d 252 (1996). IGRA does not furnish states with the ability to unilaterally regulate tribal gaming.

Rather, it provides them an opportunity to oversee tribal gaming. The role of the state is limited to the terms the state is able to negotiate with a tribe.

IGRA requires a tribe to obtain a compact with a state in order to engage in casino-style gambling. A compact is

> [a]n agreement or contract between persons, nations or states. Commonly applied to working agreements between and among states concerning matters of mutual concern. A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties, in their distinct and independent characters. [Black's Law Dictionary (6th ed).]

States cannot prevent tribal gaming by refusing to negotiate or by demanding unreasonable conditions. They must negotiate in good faith upon a request by the tribe for such negotiation. 25 USC 2710(d)(3)(A). While *Seminole* held that Eleventh Amendment immunity protects states from suit by Indian tribes, it did not eliminate a state's duty to negotiate in good faith.

If a state refuses to engage in good-faith negotiations, it can lose its ability to influence the regulation of casino gaming on tribal land. The *Seminole* Court expressly refused to comment on substitute remedies tribes might seek for a state's failure to negotiate in good faith. *Seminole, supra* at 76 n 18.[2]

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[2] I note that 25 USC 2710(d)(8) does not, as Chief Justice CORRIGAN suggests, allow the tribe to go directly to the Secretary of Interior who can then approve the compact. The section simply gives the secretary the authority to approve a gaming compact entered into between an Indian tribe and a state. It does not authorize the secretary to approve a compact to which either side has not manifested its assent. After the *Seminole* case, the remedy for a tribe is unclear. Before *Seminole*, it was clear that the remedy was that each side would submit a proposed compact to a mediator, who would choose one of the two. 25 USC 2710(d)(7)(B)(iii). This remedy was available only after issuance of a federal district court

According to IGRA:

> Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity. [25 USC 2701(5).]

Michigan allows various forms of gambling. They include horse racing,[3] a state lottery,[4] and voter-approved casino gambling in the city of Detroit.[5] It cannot reasonably be argued that Michigan prohibits, rather than regulates, gambling. Therefore, Michigan's direct power with respect to gambling in Indian country is the bargaining power given to it by the federal government through IGRA.

Relying on *Blank*, Justice MARKMAN argues that the subject of the compacts, state oversight of tribal gaming, can be achieved only through legislation. This misconstrues the state's ability to pass laws applicable to Indians. It is a unique situation. "State law is generally not applicable to Indian affairs within the territory of an Indian tribe, absent the consent of Congress." Cohen's Handbook of Federal Indian Law, § 5.A.

The Michigan Gaming Control and Revenue Act[6] recognized this principle and provided that, in the future, Congress could delegate to the state jurisdiction over Indian gaming on Indian lands. But until or unless that occurs, the only way the parties can authorize

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order. *Id*. Because *Seminole* affirmed a state's immunity from federal suit, it is unclear if this remedy is still available.

[3] MCL 431.301 *et seq*.

[4] MCL 432.9.

[5] See MCL 432.201 *et seq*.

[6] MCL 432.201 *et seq*.

Indian gaming is by mutually agreeing to a compact. Were this untrue, the Legislature could simply amend the gaming control act to unilaterally regulate gaming on tribal land.

Plaintiffs argue that 18 USC 1166 gives the state a regulatory role in tribal gaming without the need for a negotiated compact in which the tribe has ceded jurisdiction. Plaintiffs misconstrue 18 USC 1166. This federal statute provides that state laws with respect to gambling apply in Indian country in the same manner in which they apply throughout the rest of the state. 18 USC 1166(a). At 18 USC 1166(d), it provides that

> [t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior . . . has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Section d retains federal jurisdiction over Indian gaming unless a tribe negotiates it away in a compact. Without a compact, a state has no jurisdiction over gaming on Indian land. Hence, 18 USC 1166 does nothing more than adopt state law as the governing federal law for purposes of Indian gaming. *United Keetoowah Band of Cherokee Indians v Oklahoma*, 927 F2d 1170, 1177 (CA 10, 1991). Plaintiffs' arguments to the contrary are misguided.

IGRA allows tribes to engage in some forms of gambling. However, in recognition of the state's interest in the issue, IGRA requires a tribe to have a valid tribal-state gaming compact in place before it can engage in class III gambling. In exchange for giving states this power, IGRA requires the states to negotiate with tribes

in good faith. While IGRA provides for the negotiation of tribal-state compacts, it does not specify the manner in which a state must approve a compact. Therefore, one must consult state law to make this determination.

III. THE ROLE OF STATE LAW

The Michigan Constitution requires that "All legislation shall be by bill and may originate in either house." Const 1963, art 4, § 22. It further provides that, "No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. According to the Legislature's internal rules, concurrent resolutions need be approved only by a majority of those present at the time they are voted on. See *Mason's Manual of Legislative Procedure*, § 510(1), p 338.

If only a concurrent resolution is required, the tribal-state gaming compacts were properly approved and are valid. However, if the compacts are legislation, they were not properly approved by the Legislature, because a majority of those elected and serving did not approve them.

While the Michigan Constitution requires that all legislation be passed by bill, it does not define legislation. The dictionary defines "legislation" as "the act of making or enacting laws." *Random House Webster's College Dictionary* (2000). "Law" is defined as "the principles and regulations established by a government or other authority and applicable to a people, whether by legislation or by custom enforced by judicial decision." *Id*.

A similar definition is found in Black's Law Dictionary (6th ed), which describes "legislation" as "[t]he act of giving or enacting laws. . . . Formulation of rule for

the future." "Law" is further defined as "[t]hat which must be obeyed and followed by citizens subject to sanctions or legal consequences . . . ." *Id*.

These definitions suggest that legislation involves the Legislature's power to formulate rules applicable to its people. The central characteristic of legislation is the ability of the Legislature to act unilaterally in creating rules applicable to those subject to its power. In *Westervelt*,[7] a plurality of this Court stated, "[T]he concept of 'legislation', in its essential sense, is the power to speak on any subject *without any specified limitations*." (Emphasis in original). Where Indian gaming is concerned, the Legislature has no such power. According to IGRA, the Legislature must obtain tribal consent before the tribe will be bound by state law.

The compacts are not legislation. They place no restrictions or duties on the people of the state of Michigan. They create no duty to enforce state laws on tribal lands. Sale of liquor to Indian casinos is subject to the same requirements as sales to other Michigan businesses.

The compacts do not impose duties, responsibilities, and costs on the state. They do not force the state to assume the obligation to oversee and implement the unemployment and worker's compensation statutes. The compacts merely obligate *the tribes* to provide the same benefits to their employees as those employees would be entitled to if they worked for an off-reservation business. A representative provision reads:

> The tribe shall provide to any employee who is employed in conjunction with the operation of any gaming establishment at which Class III gaming activities are operated

[7] *Westervelt v Natural Resources Comm*, 402 Mich 412, 440; 263 NW2d 564 (1978) (opinion by WILLIAMS, J.).

> pursuant to this Compact, such benefits to which the employee would be entitled by virtue of the Michigan Employment Security Act, and the Worker's Disability Compensation Act of 1969, if his or her employment services were provided to an employer engaged in a business enterprise which is subject to, and covered by, the respective Public Acts. [Compact with Little Traverse Band Bands of Odawa Indians, § 5. (Internal citations omitted.).]

There is no requirement in that representative provision that the tribe fulfill this obligation through state agencies. It is entirely possible that the tribe has its own system for providing such benefits.

Justice WEAVER claims that the tribes have the authority to tax gaming activity under the IGRA. Opinion of WEAVER, J., post at 357. We find the claim to be of no consequence in this case. That tribes may have relinquished certain rights as part of the bargaining process has no effect on the proper characterization of the compacts during review of the Legislature's actions.

A higher tax is not placed on Indian gaming proceeds. There is no restriction on advertising related to Indian casinos. The compacts do not give special treatment to Indian casino suppliers. No burden is placed on the people of the state of Michigan through the negotiated compacts.

Plaintiffs argue that the compacts mandate the creation of local revenue sharing boards. However, local governments are not obliged to create these boards unless they wish to take advantage of the monetary contribution the tribes have voluntarily agreed to provide. The compacts essentially assign third-party beneficiary status to local governments. In order to accept the benefits of a compact, a local government must comply with the conditions set out in the compact. The

compact, however, does not force a local government either to share in the benefits of the compact or to create a local board.

The compacts essentially advise local governments that, to exercise local control over the payments that the compacts obligate the tribes to disburse to them, they must establish a board. The board must be given the authority to accept the payments. The fact that local governments may exhibit rational self-interest and proceed to set up such boards does not render the compacts legislation. Nor does the fact that new businesses will be located on reservations near these communities render the subject of the compacts legislative. Any large business that locates a branch near a small community might increase local governmental expenses due to the enhanced economic activity that the branch occasions.

The compacts are applicable only to the tribes. The tribes are generally not subject to the legislative power of the state. To the extent that the compacts delineate rules of conduct applicable to tribal gaming, they do not do it through the use of the Legislature's unrestricted power. They do it through the affirmative choice of the tribes. The compacts are government-to-government agreements. Black's, *supra* at 6. Each explicitly acknowledges that it is between two sovereigns.

Accordingly, the compacts are not legislation. They are more closely analogous to contracts and have been so treated by other states. The Washington Supreme Court has held that "Tribal-state gaming compacts are agreements, not legislation, and are interpreted as contracts." See *Confederated Tribes of the Chehalis Reservation v Johnson*, 135 Wash 2d 734, 750; 958 P2d 260 (1998). See also *Confederated Tribes of Siletz Indians of Oregon v Oregon*, 143 F3d 481 (CA 9, 1998); *Gallegos v Pueblo of Tesque*, 132 NM 207, 218; 46 P3d 668 (2002).

As explained previously, the state does not possess the power to apply its law unilaterally to gaming on tribal land. The state and a tribe must negotiate a mutual agreement describing the regulations that may be applied to class III gaming on Indian lands.

The power to legislate is distinct from the power to contract. Whereas, normally, legislation requires only the agreement of a majority of the lawmakers, a contract must have the agreement of all its parties to all its terms. *Boerth v Detroit City Gas Co*, 152 Mich 654, 659; 116 NW 628 (1908). The compacts explicitly provide that they do not take effect unless all parties, the state and the tribes, agree to them. The compacts are not a product of the unilateral action or unrestricted power of the Legislature, but, instead, result from negotiations between sovereign entities, the state and the tribes.

Because the compacts are not legislation, the Legislature was not required to approve them by bill. In Michigan, the " 'legislative authority of the State can do anything which it is not prohibited from doing by the people through the Constitution of the State or of the United States.' " *Huron-Clinton Metro Auth v Bds of Supervisors of Five Cos*, 300 Mich 1, 12; 1 NW2d 430 (1942), quoting *Attorney General v Montgomery*, 275 Mich 504, 538; 267 NW 550 (1936).

Nothing in the federal or state constitutions prohibits the Legislature from approving intergovernmental agreements by concurrent resolution. The Legislature's internal rules allow for this form of approval. Negotiated compacts might involve legislation, for example, where they require the state to create a new agency or extend state jurisdictional authority to tribal land. However, the compacts at issue do not involve these concerns.

The Legislature was not restricted in its approval process by IGRA or by the state Constitution. Contrary to

Justice MARKMAN's position,[8] our state Constitution is unlike the federal constitution in this respect: whereas the power of the federal government is provided for and limited by the United States Constitution, the power of state government is inherent in the state. This distinction is well-recognized:

> The government of the United States is one of enumerated powers; the national Constitution being the instrument which specifies them, and in which authority should be found to the exercise of any power which the national government assumes to possess. In this respect, it differs from the constitutions of the several States, which are not grants of powers to the States, but which apportion and impose restrictions upon the powers which the States inherently possess. [Cooley, Constitutional Limitations, vol I, p 12.]

There is no provision in the state constitution indicating how the Legislature should address an executive agreement negotiated by the Governor and presented to the Legislature for its approval. Because there was no restriction on its ability to act, the Legislature followed its internal procedure, one that it used when approving compacts that the Governor negotiated in 1993. We conclude that, given the unique nature of tribal-state gaming compacts and the content of the particular compacts at issue, this form of legislative approval was appropriate.

IV. SEPARATION OF POWERS

At the time that plaintiffs filed suit, no amendment of the compacts had been made. For that reason, it is arguable that plaintiffs' separation of powers claim is not ripe for review. If that is the case, plaintiffs' challenge is a facial challenge only.

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[8] Opinion of MARKMAN, J., *post* at 389.

To establish that an act is facially unconstitutional, the challenging party must show that " 'no set of circumstances exists under which the [a]ct would be valid.' " *Straus v Governor*, 459 Mich 526, 543; 592 NW2d 53 (1999), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). Plaintiffs cannot meet this burden.

The amendment provision of the compacts survives a facial challenge to the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § 2. There are many conceivable amendments that a governor might make to these compacts. For example, a governor could amend the provision relating to dispute resolution or the provision about the timing of payments.

Because there was no amendment to challenge at the time plaintiffs brought suit, arguably the issue is not ripe for review. Admittedly, the jurisprudence in this area is unclear. No controlling state precedent exists regarding when a court is to analyze the ripeness issue. Federal secondary authority suggests that a suit must be ripe when it is instituted: "[t]he doctrines of standing and ripeness focus on aspects of justiciability at the time the action is commenced." Moore's Federal Practice, vol 15, §101.05. In addition:

> The burden is on the plaintiff to allege in the complaint sufficient facts to establish the court's jurisdiction. The court will review the issue for ripeness as of the time the litigation is commenced. The matter must have been ripe for review at that time; subsequent ripening . . . is not sufficient to confer the court with jurisdiction that did not originally exist when the action was initiated. [*Id.* at § 101.74.]

Unfortunately, Moore's offers no authority for this proposition.

Clearly, during the pendency of this litigation, Governor Granholm made amendments to the gaming compacts at issue. It is argued that these render the issue ripe for this Court's review. However, the amendments were made after the opinions from the lower courts were released. This Court has consistently declined to entertain constitutional questions where it lacks the benefit of a fully developed lower court record. *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003); *Jenkins v Patel,* 471 Mich 158; 684 NW2d 346 (2004).

We may possess jurisdiction to decide the issue. However, the parties addressed the issue only in a cursory fashion, each premising its argument on its characterization of the original compacts as either legislation or contract. Also, the Court of Appeals did not address the issue. Absent a more developed record, in the exercise of judicial restraint, we decline to decide it.

Consistent with our practices, a majority of the Court agrees that the issue whether the Governor's recent amendments violate the Separation of Powers Clause should be remanded for Court of Appeals consideration.

V. LOCAL ACTS PROVISION

Finally, because the compacts at issue are not legislation, they do not violate the local acts provision of the Michigan Constitution. Const 1963, art 4, § 29. We disagree with Chief Justice CORRIGAN's local acts analysis. The local acts provision reads:

> 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. [Const 1963, art 4, § 29.]

An act is legislation. Black's Law Dictionary defines a legislative act as: "[a]n alternative name for statutory law. A bill which has been enacted by the legislature into law." Black's Law Dictionary (6th ed). Since tribal-state gaming compacts are not legislation, as discussed *supra*, the local acts provision of our Constitution is not applicable to them.

VI. A RESPONSE TO THE DISSENTS

We are unpersuaded by Justice MARKMAN's argument which has as its premise that *Blank* is applicable to the facts of this case. *Blank* involved a case where the Legislature delegated power to an administrative agency but attempted to retain a legislative veto. 462 Mich at 113. In contrast, the present case involves two separate branches of government approving agreements with sovereign Indian tribes. The question presented is whether the Legislature's ratification of the agreements by concurrent resolution was the appropriate manner in which to manifest its assent.

The extra-jurisdictional cases that the dissents rely on are distinguishable from the present case. In each, the governor of the state acted unilaterally to bind the state to the compact. While those cases hold that legislative approval is required, no case suggests the form that such approval must take. See *State of Kansas ex rel Stephan v Finney*, 251 Kan 559; 836 P2d 1169 (1992); *Narragansett Indian Tribe of Rhode Island v Rhode Island*, 667 A2d 280 (1995). In the present case, the Michigan Legislature expressed its approval of the compacts. The unique question before us is whether that Legislature's approval was sufficient under the Michigan Constitution. We hold that it was.

Both Justice MARKMAN and Justice WEAVER rely on *Becker v Detroit Savings Bank*, 269 Mich 432; 257 NW

853 (1934). *Becker* is inapplicable to this case. It dealt with a legislative resolution that purported to convey to the courts the Legislature's intent in passing a certain law. The Court held that, while the resolution was entitled to "respectful consideration," it was not the law. *Id.* at 436. *Becker* concluded that the courts are bound to apply the law as written. *Id*.

The question here is not whether the compacts must be followed in light of conflicting statutory authority. It is whether the Legislature was required to voice its approval in the form of a bill that is passed into law. *Becker* notes that "[j]oint resolutions * * * are often used to express the legislative will in cases not requiring a general law." *Id.* at 435, quoting *Hoyt v Sprague*, 103 US 613, 636; 26 L Ed 585 (1880). *Becker* does not aid in determining whether the compacts at issue require a general law.

VII. CONCLUSION

A majority of justices, myself included, hold that the tribal-state gaming compacts at issue are not legislation. They are appropriately viewed as agreements between sovereign entities. They do not impose duties on or restrict the people of the state. Instead, they are contractual in nature, conveying the rights and obligations of the parties, the state, and the various tribes. Therefore, a concurrent resolution of the Legislature was appropriate to validate them.

For these reasons, a majority affirms the Court of Appeals decision in favor of defendants, except as to the recent amendments made by Governor Granholm. On that issue, a majority agrees to remand the case to the Court of Appeals for consideration of plaintiffs' separation of powers claim.

CAVANAGH, J., concurred with KELLY, J.

WEAVER, J. *(concurring in part and dissenting in part).* I concur with the majority's holding that the compacts do not violate Const 1963, art 4, § 29, the "local acts" clause.[1] But I dissent from the majority's decision that the tribal-state gaming compacts at issue, entered into and signed by various Indian tribes and Governor Engler on behalf of the state pursuant to the federal Indian Gaming Regulatory Act (IGRA), 25 USC 2701 *et seq*., were validly approved by a joint resolution of the Legislature. Accordingly, I would hold that the compacts are void because they are legislation that is required to be enacted by bill, not passed by issuing a joint resolution, and I therefore would reverse the Court of Appeals decision on this issue.

I would also hold that the power to bind the state to a compact with an Indian tribe is an exercise of the legislative power, and that the Governor does not have the authority to bind the state to such a compact. Art 4, § 22 of the Michigan Constitution requires that "[a]ll legislation shall be by bill . . . ." A resolution is not a constitutional method of expressing the legislative will where that expression is to have the force of law and bind people other than the members of the house or houses adopting it. *Becker v Detroit Savings Bank,* 269 Mich 432, 434-435; 257 NW 855 (1934). The tribal-state compacts have the force of law and bind people other than the legislative members who adopted them. Therefore, the Legislature must exercise its power to bind the state to a compact with an Indian tribe by enacting a

[1] The majority correctly holds that the "local act" provision of the Michigan Constitution, art 4, § 29, is not implicated by the compacts; I concur in the majority's decision to affirm the decision of the Court of Appeals on this issue.

bill, not by passing a joint resolution. I would reverse the Court of Appeals on this issue and hold that the compacts at issue are void.

Because I would hold that the compacts are void, it is unnecessary to remand to the trial court for consideration of whether the provision in the compacts that permits the Governor to amend the compacts without legislative approval violates Const 1963, art 3, § 2, the separation of powers doctrine. Such an issue is moot in light of my conclusion that the compacts are void.

I

The compacts at issue were signed by Governor Engler and the various Indian tribes, and approved by the Legislature pursuant to a joint resolution.[2] Appellants argue that the Legislature's approval by joint resolution was not valid. Appellants assert that the policy determinations in deciding whether and how to allow Indian tribes to operate casinos in Michigan are legislative in nature, and therefore the compacts must be approved by bill, not joint resolution, because the Michigan Constitution, art 4, § 22 requires that "[a]ll legislation shall be by bill."

Underlying the issue whether the compacts were validly approved is a more fundamental question: who, under Michigan law, has the authority to bind the state of Michigan to a compact negotiated under IGRA. If the authority is vested in Michigan's Governor, the Governor's approval alone would be sufficient to render the compacts valid, there would be no requirement that the Legislature approve the compacts at all, and the man-

[2] See House Concurrent Resolution (HCR) 115 (1998). While a bill must be passed by a majority of elected and serving members of the Legislature, a resolution may be passed by a majority vote of those legislators present at the time, as long as a quorum is present.

ner in which the Legislature approved the compact would not be governed by the Constitution. See *Panzer v Doyle,* 271 Wis 2d 295, 338-341; 680 NW2d 666 (2004). But if the authority to approve a compact is vested in Michigan's Legislature, then it is necessary to determine whether approval by resolution was a valid exercise of the Legislature's power under Michigan's Constitution.

II

IGRA does not specify which branch of a state government should bind the state to a compact with Indian tribes.[3] Rather, the determination whether a state has validly bound itself to a compact is a matter of state sovereignty and left to state law. *Saratoga Co Chamber of Commerce Inc v Pataki,* 100 NY2d 801, 822; 798 NE2d 1047 (2003). For the reasons set forth below, I would hold that it is the Legislature that has the authority to bind the state to a compact under IGRA and that the Governor does not have the authority to bind Michigan to a compact under IGRA.

Michigan's Constitution separates the powers of government: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The executive power is vested in the Governor, Const 1963, art 5, § 1, and the legislative power is vested in a senate and a house of representatives. Const

[3] The IGRA provides, in pertinent part: "Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities." 25 USC 2710(d)(3)(A).

1963, art 4 § 1. The executive power is, first and foremost, the power to enforce the laws or to put the laws enacted by the Legislature into effect. *The People ex rel Sutherland v Governor,* 29 Mich 320, 324-325 (1874), *People ex rel Attorney General v Holschuh,* 235 Mich 272, 274-275; 209 NW 158 (1926); 16A Am Jur 2d, Constitutional Law, § 258, p 165 and § 275, p 193. The legislative power is the power to determine the interests of the public, to formulate legislative policy, and to create, alter, and repeal laws. *Id.* The Governor has no power to make laws. *People v Dettenthaler,* 118 Mich 595; 77 NW 450 (1898). "[T]he executive branch may only apply the policy so fixed and determined [by the legislative branch], and may not itself determine matters of public policy or change the policy laid down by the legislature. 16 CJS, Constitutional Law, § 216, p 686.

As explained below, I conclude that binding the state to a compact with an Indian tribe involves determinations of public policy and the exercise of powers that are within the exclusive purview of the Legislature.

IGRA itself contemplates that states will confront several policy choices when negotiating tribal gaming compacts. *Saratoga Co Chamber of Commerce Inc v Pataki, supra* at 822. Under IGRA, a compact may include provisions relating to: (i) the application of directly related criminal and civil laws and regulations of the tribe or the state; (ii) the allocation of jurisdiction between the state and the tribe to permit enforcement of such laws; (iii) state assessments to defray the costs of regulating gaming; (iv) taxation by the tribe of such activity; (v) remedies for breach of contract; (vi) standards of operation for gaming and maintenance of gaming facilities; and (vii) "any other subjects that are directly related to the operation of gaming activities." 25 USC 2710(d)(3)(C)(i)-(vii).

The Little River Band compact contains examples of policy decisions made for each of the seven issues recognized in 25 USC 2710(d)(3)(C)(i-vii). (i) Tribal law and regulations, not state law, are applied to regulate gambling.[4] But the compact applies state law, as amended, to the sale and regulation of alcoholic beverages encompassing certain areas. (Section 10 [a], p 13.) (ii) The tribe, not the state, is given responsibility to administer and enforce the regulatory requirements. (Section 4[m][1], p 9.) (iii) To allow state assessments to defray the costs of regulating gaming, the compact states that the tribe shall reimburse the state for the costs up to $50,000 it incurs in carrying out functions that are authorized within the compact. (Section 4[m][5], p 10.) Also, the compact states that the tribe must pay 2% of the net win at each casino derived from certain games to the county treasurer.[5] (Section 18[a][i], p 18.) (iv) Under IGRA the tribe could tax the gaming activity, but the compact does not allow such taxation. (v) The compact provides for dispute resolution procedures in the event there is a breach of contract. (*Id*., p 11.) (vi) The compact includes standards for whom a tribe can license and hire in connection with gaming (section 4[d], p 6), sets accounting standards the gam-

[4] The compact states, "Any limitations on the number of games operated or played, their location within eligible Indian lands as defined under this Compact, hours or period of operation, limits on wages or potsize, or other limitations shall be determined by duly enacted tribal law or regulation. Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the tribe pursuant to this compact." (Section 3[a][8], p 5 of the Little River Band compact.)

[5] The compact states that it is the "States intent, in this and its other compacts with federally recognized tribes, that the payments to local governments provided for in this section provide financial resources to those political subdivisions of the State which actually experience increased operating costs associated with the operation of the class III gaming facility." (Section 18[a][ii], p 18.)

ing operation must follow (*Id*., p 7), and stipulates that gaming equipment purchased by the tribe must meet the technical standards of the state of Nevada or the state of New Jersey. (Section 6[a], p 11.) (vii) The compact addresses the "other subjects that are directly related to the operation of gaming facilities" throughout the document. For example, it allows for additional class III games to be conducted through the agreement of tribe and the state. (Section 3[b], p 5.) Also, the compact states that the tribe must purchase the spirits it sells at the gaming establishments from the Michigan Liquor Control Commission and that it must purchase beer and wine from distributors licensed by the Michigan Liquor Control Commission. (Section 10[b], p 13.)

These compact provisions necessarily require fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation, criminal and civil jurisdiction, and standards of operation and maintenance require a balancing of differing interests, a task the multi-member, representative Legislature is entrusted to perform under the constitutional separation of powers. See *Saratoga Co Chamber of Commerce v Pataki*, 100 NY2d 801, 822-823; 798 NE2d 1047; 766 NYS2d 654 (2003).

To date, every other state supreme court that has addressed whether the governor or the legislature of a state has the authority to bind the state to a compact with an Indian tribe under IGRA has concluded that the state's governor lacks the power unilaterally to bind the state to tribal gaming compacts under IGRA. See *State ex rel Stephan v Finney,* 251 Kan 559; 836 P2d 1169 (1992); *State ex rel Clark v Johnson,* 120 NM 562; 904 P2d 11 (1995); *Narragansett Indian Tribe of Rhode Island v Rhode Island,* 667 A2d 280 (RI, 1995); *Pataki,*

supra; *Panzer, supra*.[6] These cases concluded that entering into a tribal-state compact under IGRA, and thereby committing the state to a particular position with respect to Indian gaming, involves subtle and important decisions regarding state policy that are at the heart of legislative power. *Panzer, supra* at 62. Further, the cases have relied on the fact that their state constitutions, like Michigan's, provide for separation of powers, vesting the legislative power in the legislature and vesting the executive power in the governor. *Finney, supra* at 577; *Clark, supra* at 573; *Narragansett Indian Tribe, supra* at 280; *Pataki, supra* at 821-822; *Panzer, supra* at 331-334. The cases recognized that the legislature creates the law, that the governor executes the laws, and that a compact with an Indian tribe did not execute existing law, but was, instead, an attempt to create new law. *Finney, supra* at 573, and *Clark, supra* at 573. The courts also focused on the balance that the compact struck on matters of policy such as the regulation of class III gaming activities, the licensing of its operators, and the respective civil and criminal jurisdictions of the state and the tribe necessary for the enforcement of state or tribal laws or regulations. *Clark, supra* at 574*; Pataki, supra* at 822; *Panzer, supra* at 338-341.

The approval of a compact with an Indian tribe involves numerous policy decisions. The executive branch does not have the power to make those deter-

[6] A federal district court held that the governor of Mississippi did have the authority to bind the state to a compact with the Indian tribes, based on a Mississippi statute which authorizes the governor to transact business with other sovereigns, such as other states, territories, or the United States Government. *Willis v Fordice,* 850 F Supp 523 (1994). Unlike Mississippi, Michigan has no statutory or constitutional provision giving the Governor authority to bind the state in a compact with an Indian tribe.

minations of public interest and policy, but may only apply the policy as fixed and determined by the legislature. I would agree with the other state courts that have examined this issue, and hold that committing the state to the myriad policy choices inherent in negotiating a gaming compact constitutes a legislative function. Thus, the Governor does not have the authority to bind the state to a compact with an Indian tribe; only the Legislature does.

III

Having determined that binding the state to a compact is a legislative function, the question then becomes whether the Legislature may do so by a joint resolution. I would conclude that it may not because under the Michigan Constitution a resolution is not a valid exercise of the legislative power.

The Michigan Constitution requires that "[a]ll legislation shall be by bill . . . ." Const 1963, art 4, § 22. This Court has previously recognized that "[a] mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it." *Becker v Detroit Savings Bank,* 269 Mich 432, 434-435; 257 NW 855 (1934).

In the 1997-1998 term there were 117 concurrent resolutions introduced in the House of Representatives. Approximately 23 concurrent resolutions were adopted, including HCR 115, which approved the compacts at issue. The other 22 concurrent resolutions adopted included resolutions commemorating the 150th anniversary of the selection of the city of Lansing as the permanent capital of the state of Michigan [HCR 24]; urging the President of the United States to designate the Detroit River as an American Heritage River [HCR

69]; prescribing the legislative schedule [HCR 74 & HCR 113]; and renaming the Michigan Civilian Conservation Corps' Camp Vanderbild in the honor of State Representative Tom Mathieu [HCR 117].

A joint resolution is not an act of legislation, and it cannot be effective for any purpose for which an exercise of legislative power is necessary. *Cleveland Terminal & Valley RR Co v State,* 85 Ohio St 251, 293; 97 NE 967 (1912). In issuing the joint resolution approving of the compacts in the instant case, the Legislature purported to bind the entire state to the policy decisions of and the terms set forth in the compacts, which would be in place for at least twenty years. This was not a valid exercise of the legislative power, because art 4, § 22 requires that legislation be by bill.

CONCLUSION

I would hold that the power to bind the state to a compact with an Indian tribe is an exercise of the legislative power, and that the Legislature must exercise its power to bind the state by enacting a bill, not by passing a joint resolution. Accordingly, I would conclude that the compacts are void, and I would reverse the decision of the Court of Appeals on that issue. Because I would hold that the compacts are void, it is unnecessary to address whether the provision that permits the Governor to amend the compacts is unconstitutional.

MARKMAN, J. (*concurring in part and dissenting in part).* I respectfully dissent from the lead opinion, except as to part VI thereof, in this declaratory action in which we granted leave to appeal to consider: (1) whether the tribal-state gaming compacts at issue, entered into and signed by various Indian tribes and

Governor Engler on behalf of the state pursuant to the federal Indian Gaming Regulatory Act, 25 USC 2701 *et seq*., constitute "legislation" such that Michigan's Legislature violated Const 1963, art 4, § 22 when it approved them by resolution rather than by bill; (2) whether the provision in the compacts that purports to empower the Governor to amend them without legislative approval violates Const 1963, art 3, § 2, the separation of powers doctrine; and (3) whether the compacts violate Const 1963, art 4, § 29, the "local acts" clause.

Regarding the first issue, the circuit court concluded that the compacts constitute legislation and, therefore, the Legislature was required to adopt them by bill. The Court of Appeals disagreed and reversed the decision of the circuit court. In my judgment, the compacts constitute legislation and, therefore, the Legislature violated art 4, § 22 when it adopted them by a resolution vote. Accordingly, I dissent from the lead opinion, and I would reverse the decision of the Court of Appeals on this issue and reinstate the decision of the circuit court.

Regarding the second issue, the circuit court concluded that the compacts violate art 3, § 2. The Court of Appeals reversed the decision of the circuit court on the basis that this issue was not ripe for review because the Governor had not yet attempted to amend the compacts. However, Governor Granholm recently sought to amend one of the four compacts and, therefore, in my judgment, this issue is ripe. I conclude that the amendatory provision violates art 3, § 2 and, therefore, I dissent from the lead opinion on this issue.

Regarding the third issue, the circuit court concluded that art 4, § 29 is not implicated. The Court of Appeals agreed and affirmed the decision of the circuit court. I concur with the analysis set forth in part VI of the lead

opinion finding that art 4, § 29 is not implicated and, accordingly, I would affirm the decisions of the lower courts on this issue.

I. BACKGROUND

In *California v Cabazon,* 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987), the United States Supreme Court considered whether California could legally enforce its regulatory gambling laws on Indian reservations if the state did not completely prohibit such gambling.[1] While the Court affirmed that it "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' . . . and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,' " it also acknowledged that "[i]t is clear . . . that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Id.* at 207.[2] Thus, the question to resolve in *Cabazon* was whether the Congress had expressly provided that state laws that regulate, but do not prohibit, gambling may be applied on Indian reservations. The Court answered that question in the negative and, accordingly, held that California had no legal right to enforce those laws on reservations.

In response to *Cabazon,* the Congress, in 1988, passed the Indian Gaming Regulatory Act, 25 USC 2701

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[1] If the state *prohibited* class III gaming within its borders, *Cabazon* held that California could enforce its criminal laws relating to that prohibition on Indian lands through 18 USC 1162.

[2] Additionally, the Court in *Cabazon* held that "[under] . . . exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members" even absent express Congressional consent. *Cabazon, supra* at 215. However, the Court resolved that tribal gambling was not an area encompassing such "exceptional circumstances" so as to "escape the preemptive force of federal and tribal interests . . . ." *Id.* at 221.

et seq. (IGRA). The United States District Court for the District of South Dakota in *Cheyenne River Sioux Tribe v South Dakota,* 830 F Supp 523, 526 (D SD, 1993), aff'd 3 F3d 273 (CA 8, 1993), stated:

> The IGRA was enacted in response to the Supreme Court's decision in *Cabazon.* Congress wished to give states a certain amount of input into gambling on Indian reservations. S. Rep. No. 446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071.
>
> The IGRA gives states the right to get involved in negotiating a gaming compact because of the obvious state interest in gaming casino operations within the state boundaries . . . .[3]

IGRA divides gaming activities into three classes. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 USC 2703(6). Class II gaming includes bingo and card games —other than banking card games—that are played in conformance with state laws and regulations regarding hours of operation and limitations on wagers or pot sizes. 25 USC 2703(7). Class III gaming includes all other forms of gambling. 25 USC 2703(8).

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[3] See also *United States v Santa Ynez Band of Chumash Mission Indians*, 983 F Supp 1317, 1323 (CD Cal, 1997) ("In [*Cabazon*], the Supreme Court sharply limited the power of states to apply their gambling laws to Indian gaming. An essential element of its decision was that Congress had not acted specifically to make state gambling laws applicable in Indian country. This decision made clear that it would require a new act of Congress for states to have any effective ability to prevent or regulate Indian gaming. IGRA was enacted in direct response to *Cabazon*. . . . Subsection (a) of § 1166 expressly makes state gambling laws applicable in Indian country.") See also *Confederated Tribes of Siletz Indians of Oregon v United States,* 110F3d 688, 692 (CA 9, 1997); *Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1548 n 3 (CA 10, 1997); *Cheyenne River Sioux Tribe v South Dakota,* 830 F Supp 523, 525-526 (D SD, 1993), aff'd 3 F3d 273 (CA 8, 1993).

At issue in this case is class III gaming, referred to throughout the remainder of this opinion as "gambling" or "casino gambling." 18 USC 1166 provides a starting point to IGRA as it relates to gambling. It states:

> (a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
>
> (b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.
>
> (c) For the purpose of this section, the term "gambling" does not include—
>
> (1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or
>
> (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under [25 USC 2710(d)(8)] of the Indian Gaming Regulatory Act that is in effect.
>
> (d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country . . . .

Thus, IGRA generally provides that in the absence of a tribal-state compact, for purposes of federal law, all state gambling laws, including regulatory, as well as prohibitory, laws and regulations and any relevant criminal punishments, apply on Indian land just as they

apply elsewhere in the state, albeit with the proviso that criminal prosecutions are within the jurisdiction of the federal government.[4]

If a tribe wishes to "opt-out" of the default federal law rule of § 1166 and to lawfully engage in casino gambling on its Indian land, it may do so in accordance with 25 USC 2710(d) of IGRA. That section provides, in relevant parts:

> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are—
>
> * * *
>
> (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
>
> (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

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[4] It appears that states have some enforcement powers under § 1166(a) —civil enforcement powers. See *Santa Ynez Band, supra* at 1322:

> Consideration of the structure of § 1166 suggests strongly that Congress intended to distinguish civil enforcement to prevent future acts of non-conforming gaming from criminal enforcement efforts to punish past acts. As to the latter, § 1166(b) and (d) leave no doubt that criminal enforcement is the exclusive province of the United States. The United States contends that Congress also intended for it to have the same exclusive power to bring civil enforcement actions under § 1166(a). The statute says nothing at all to suggest this. On the contrary, the more natural inference to be drawn from Congress' decision to make state law applicable, as such, in § 1166(a), rather than to convert it to federal law as in § 1166(b), is that Congress intended to divide the enforcement of the two subsections between the states and the United States.
>
> If Congress had not intended § 1166(a) to be used by the states for civil enforcement of the state laws made applicable by it, there was no need first to make all state gambling laws applicable, as such, and then to carve out only those acts which would be punishable under state law and redefine them as identical, independent federal offenses [under § 1166(b)].

* * *

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.[5]

* * *

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

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[5] In 1996, the United States Supreme Court somewhat limited the reach of IGRA in *Seminole Tribe of Florida v Florida*, 517 US 44; 116 S Ct 1114; 134 L Ed 2d 252 (1996). In *Seminole Tribe*, the Court considered 25 USC 2710(d)(7) of IGRA, a provision that permits Indian tribes to sue a state in federal court when that state has refused to negotiate in good faith for a tribal-state compact. The Court ruled that this provision violates state sovereign immunity as preserved by the Eleventh Amendment of the United States Constitution and is therefore unconstitutional.

(vii) any other subjects that are directly related to the operation of gaming activities.

* * *

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal—State compact entered into by the Indian tribe under paragraph (3) that is in effect.

Thus, under § 2710(d), a state and a tribe are encouraged to negotiate with one another with the ultimate goal of entering into a mutually agreeable tribal-state compact that makes gambling on that tribe's lands lawful and that may alter the general gambling laws and regulations and enforcement procedures that otherwise apply to that tribe through § 1166.

In essence, by providing under § 1166 that, in the absence of a compact, state gambling laws and regulations apply on Indian land, the Congress provided the consent to the states that was found lacking in *Cabazon* to regulate tribal gambling in the same manner and to the same extent that states regulate gambling elsewhere within their borders.[6] However, to maintain the

[6] For example, if state law provides that casino gambling anywhere in the state is prohibited and punishment for illegal casino gambling is imprisonment of five years and a fine of $10,000, that is the law that applies to tribal lands under § 1166 in the absence of a compact. If the state decides at some later point, perhaps because of a large illegal gambling problem specifically on tribal lands, to amend its laws to hold that gambling is still entirely prohibited, but that the punishment is now imprisonment of twenty-five years and a $200,000 fine, *that* amended law becomes the law that is applicable to tribal lands under § 1166 in the absence of a compact. Thus, by making state gambling laws—whatever those laws are at a given time—applicable to Indian land in the absence of a compact, IGRA gives states meaningful regulatory authority over

proper balance between Indian and state affairs, the Congress further provided under § 1166 that the federal government is charged with enforcing state criminal gambling laws and regulations on Indian land.

This point was succinctly made by the United States Court of Appeals for the Ninth Circuit in *Artichoke Joe's California Grand Casino v Norton,* 353 F3d 712, 721-722 (CA 9, 2003). There, the court addressed the role of IGRA and, of particular relevance, 18 USC 1166, insofar as that provision grants states the power to generally regulate gambling on Indian land. The court stated:

> IGRA changed the landscape . . . . [I]t devised a method to give back some of the *regulatory* [italics in original] authority that the Supreme Court had held inapplicable to Indian lands in *Cabazon*. One of the bases of the holding in *Cabazon* was that Congress had not explicitly ceded regulatory authority for gaming to the states in Public Law No. 280 or otherwise. IGRA responded by creating a statutory basis for gaming regulation that introduced the compacting process as a means of sharing with the states the federal government's regulatory authority over class III gaming. Simultaneously, IGRA put into effect 18 USC 1166, which provides that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 USC 1166(a). The federal government retained the power to prosecute violations of state gambling laws in Indian country, so as to preserve the delicate balance of power between the States and the tribes. *However, the fact that the federal government retained that power does not change the fact that California may enact laws and regulations concerning gambling that have an effect on Indian lands via*

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casino gambling on Indian land. Therefore, Chief Justice CORRIGAN is incorrect when she states that "states have no authority to regulate tribal gaming under the IGRA unless the tribe explicitly consents to the regulation in a compact." *Ante* at 319.

§ 1166. [*Artichoke Joe's, supra* at 721-722 (citations omitted; emphasis added).][7]

Moreover, through § 2710(d), the Congress provided the states with a direct means of "escap[ing] the preemptive force of federal and tribal interests"[8] regarding class III gaming on Indian land by granting states the power to *specifically* make lawful and regulate casino gambling on particular Indian land, as long as such actions arise from the negotiation process and are otherwise in accordance with IGRA.

In 1993, Governor Engler, pursuant to § 2710(d) of IGRA, entered into tribal-state compacts with seven Michigan tribes that were already conducting class III gambling before the Congress's passage of IGRA.[9] As required by the terms of a consent judgment that resolved a federal lawsuit filed by the tribes against the Governor to compel negotiations, the compacts were approved by the Legislature by resolution and became effective.[10] Additional state court litigation followed in

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[7] See also S*ycuan Band of Mission Indians v Roache*, 788 F Supp 1498, 1506 (SD Cal, 1992), aff'd 54 F3d 535 (CA 9, 1994) ("The balance struck by Congress under the IGRA appears to be that the state laws governing gaming apply, for the most part, with the same force and effect the laws would have elsewhere in the state. Thus, by federalizing state law, the states could generally define the boundary between legal and illegal gaming, and could be assured that activities that would be illegal if performed outside the reservation boundaries would also be illegal within the reservation boundaries.").

[8] *Cabazon*, *supra* at 221.

[9] These tribes were the Sault Ste. Marie Tribe of Chippewa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, the Keweenaw Bay Indian Community, the Hannahville Indian Community, the Bay Mills Indian Community, the Lac Vieux Desert Band of Lake Superior Chippewa Indians, and the Saginaw Chippewa Indian Tribe. All these tribes are currently operating casinos.

[10] After IGRA was passed, the tribes that were already engaged in casino gambling in Michigan requested that the Governor negotiate gaming compacts. The negotiations stalled and the tribes filed suit in federal court to compel negotiations. See *Sault Ste Marie Tribe v Engler,* 93 F Supp 2d

which the Michigan Court of Appeals twice confirmed that the Governor did not violate the separation of powers clause by binding the state to tribal-state compacts where the Legislature had approved those compacts by resolution. Thus, the Court of Appeals implied that mere resolution approval by the Legislature of tribal-state compacts was proper. See *McCartney v Attorney General,* 231 Mich App 722, 728; 587 NW2d 824 (1998); *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996).

The compacts at issue in this case were first signed by Governor Engler and each of four different Indian tribes in January of 1997.[11] Each compact was to take

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850 (WD Mich, 2000). During this litigation, the parties reached a settlement and the court entered a consent judgment. Essentially, the consent judgment is constituted of the seven 1993 compacts entered into by Governor Engler and the tribes in accord with the settlement. This consent judgment should not be interpreted as a federal court determination that a resolution vote is a proper adoption because the court did not address this question; it merely incorporated into the consent judgment the terms of the settlement as agreed to by Governor Engler and the tribes. Moreover, the United States Court of Appeals for the Sixth Circuit, in *Keweenaw Bay Indian Community v United States,* 136 F3d 469, 477 (CA 6, 1998), in which the court addressed an issue pertaining to one of the 1993 consent judgment compacts (but not the issue implicated in this case), stated:

> Regarding obtaining the Michigan Governor's "approval" twice, we point out that a governor's endorsement of a compact as required by the terms of a compact is coincidental, varied and dependent on the relevant state laws. *See, e.g.,* [*Pueblo of Santa Ana v Kelly,* 104 F3d 1559 (CA 10, 1997)], cert den 522 US 807 [118 S Ct 45; 139 L Ed 2d 11] (1997) (deciding that Governor of New Mexico lacked authority, under New Mexico Constitution or state statute, to bind state to tribal-state compacts).

Thus, the Sixth Circuit expressly recognized that a governor might not have the power to bind the state to an IGRA compact and that the question is a matter of state law.

[11] These tribes are the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Ottawa Indians, the Little River Band of Ottawa

effect, according to a compact provision, after "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature."[12] The compacts were modified and re-executed in December 1998, and the Legislature proceeded to consider them by resolution. See HCR 115 (1998). Unlike a bill, which must be passed by a majority of elected and serving members of the Legislature, a resolution may be passed by a majority vote of those legislators present at the time, as long as a quorum is present. The House of Representatives approved the compacts by a resolution vote of 48 to 47, and the Senate followed suit by a resolution vote of 21 to 17.

Following is a list of the essential compact terms:

- The compacts permit a variety of gambling activities.

- The compacts provide that the tribe and the Governor may subsequently agree to expand the list of class III gaming activities permitted by the compacts.

- The compacts provide that the tribe shall "enact a comprehensive gaming regulatory ordinance" but if any regulation imposed by the tribe is less stringent than that imposed by the compact, the compact governs.

- The compacts provide that the tribe shall have responsibility to administer and enforce applicable regulatory requirements.

- The compacts provide limitations on the tribe's hiring practices, for example, the tribe may hire no one under age 18 (whereas non-Indian casinos in Michigan may employ only those who are 21 or older).

Indians, and the Nottawaseppi Huron Potawatomi. Of these tribes, the Little Traverse Bay Band and the Little River Band are currently operating casinos.

[12] See § 11 of the compacts.

- The compacts allow persons aged 18 and over to gamble (whereas the age requirement in the rest of Michigan is 21).

- The compacts incorporate the protections of the Michigan Employment Security Act, MCL 421.1 *et seq.*; and the Worker's Disability Compensation Act of 1969, MCL 418.101 *et seq.*

- Any disputes between the tribe and the state are to be resolved through binding arbitration.

- The tribe must post a sign in the gaming facility noting that the facility "is not regulated by the State of Michigan."

- The compact is binding for a period of twenty years after it becomes effective.

- The tribe must make semi-annual payments of 8% of the net win at the casino to the Michigan Strategic Fund.

- The tribe must make semi-annual payments of 2% of the net win to the treasurer of the relevant county to be held by the treasurer on behalf of the Local Revenue Sharing Board. To this end, counties in the vicinity of the class III gaming facilities shall create a Local Revenue Sharing Board.

- The compacts contain a provision that purports to empower the Governor to amend them without legislative approval.

Various lawsuits were filed questioning the validity of the 1998 compacts. The Sault Ste. Marie Tribe of Lake Superior sued in federal court to enjoin the operation of the new casinos, but the United States Court of Appeals for the Sixth Circuit dismissed this suit on standing grounds. *Sault Ste Marie Tribe v United States*, 288 F3d 910 (CA 6, 2002). Two state legislators also challenged the approval of Michigan's 1998 compacts by the Secretary of Interior, which suit was also dismissed on

standing grounds by the United States Court of Appeals for the Sixth Circuit. *Baird v Norton,* 266 F3d 408 (CA 6, 2001).

Plaintiffs-appellants, the Taxpayers of Michigan Against Casinos and Laura Baird, filed this suit against Michigan in the Ingham Circuit Court seeking a declaratory judgment that the compacts do not comport with various constitutional provisions. Plaintiffs contend first that the compacts amount to legislation and, therefore, pursuant to Const 1963, art 4, § 22 the Legislature was required to adopt them by bill rather than approve them by resolution. The circuit court held that the compacts should have been approved by bill. The Court of Appeals reversed the circuit court decision, concluding that the compacts do not constitute legislation because they contain no enforcement provision that would ensure that their terms are satisfied and because the power of the state to legislate in this area is preempted by federal law. The Court of Appeals opined that the compacts constitute mere contracts and, therefore, approval by resolution was not constitutionally infirm. Plaintiffs also contend that the provision in the compacts that purports to empower the Governor to amend them without legislative approval violates Const 1963, art 3, § 2, the "separation of powers" doctrine. The circuit court agreed with plaintiffs. The Court of Appeals, however, reversed the decision of the circuit court on the basis that the amendatory provision issue was not ripe for review because the Governor had not yet attempted to amend the compacts. Plaintiffs additionally contend that the compacts violate Const 1963, art 4, § 29, the "local acts" clause. The circuit court disagreed, holding that art 4, § 29 is not implicated. The Court of Appeals agreed and affirmed the circuit court on this issue.

II. STANDARD OF REVIEW

Matters of constitutional and statutory interpretation are reviewed de novo by this Court. *Harvey v Michigan,* 469 Mich 1, 6; 664 NW2d 767 (2003); *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 62; 642 NW2d 663 (2002).

III. ANALYSIS

This Court has been called upon to consider, in this action seeking declaratory judgment, matters of significant constitutional concern. We are asked to consider whether the challenged tribal-state compacts and various actions undertaken by our legislative and executive branches of government pertinent to those compacts are consistent with the enactment requirement, the separation of powers doctrine, and the local acts provision embodied in Michigan's Constitution. "[D]eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *House Speaker v Governor*, 443 Mich 560, 575; 506 NW2d 190 (1993).

A. DO COMPACTS CONSTITUTE "LEGISLATION"?

The first question presented on review requires that we consider whether the tribal-state compacts at issue constitute "legislation." The Michigan Constitution requires that "[a]ll legislation shall be by bill . . . ." Const 1963, art 4, § 22. In addition, "[n]o bill shall become a law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. Plaintiffs contend that the compacts constitute legislation and, therefore, the Legislature was

required to approve them by bill—by a majority vote of the members elected to and serving in each house. Defendants contend that the compacts do not constitute legislation and instead are contracts of a unique nature that the state may validly enter into pursuant to federal law as provided in IGRA and, therefore, the compacts are not subject to Const 1963, art 4, §§ 22 and 26.

Black's Law Dictionary (7th ed) defines "legislation" as "[t]he process of making or enacting a positive law in written form, according to some type of formal procedure, by a branch of government constituted to perform this process-Also termed *lawmaking* . . . ." Michigan's Constitution provides that "[t]he legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. Thus, the branch of government "constituted to perform [the lawmaking] process" is the Legislature, and the "formal procedure" by which this process is to occur is constitutionally defined—lawmaking is to be "by bill" and is subject to a majority vote of those elected to each house of the Legislature. Const 1963, art 4, §§ 22 and 26. Accordingly, the definition of "legislation" in Black's Law Dictionary requires that we consider whether the compacts amount to "positive lawmaking."

In *Blank v Dep't of Corrections,* 462 Mich 103; 611 NW2d 530 (2000), this Court considered whether a provision in the Administrative Procedures Act, MCL 24.201 *et seq.*, that required administrative agencies to obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules violated the enactment and presentment requirements of Michigan's Constitution, Const 1963, art 4, §§ 26 and 33.[13]

[13] The differences between the two concurring opinions in *Blank* and the majority opinion are not pertinent to the analysis of *Blank* as set forth in this opinion.

In analyzing the question presented in *Blank*, we addressed whether the challenged action—a vote of the joint committee or the Legislature itself on an administrative rule—was "legislative" in nature, so that it was subject, under the enactment and presentment requirements of Michigan's Constitution, to a majority vote of the full Legislature and gubernatorial approval.[14]

In resolving that question, we employed the analytical framework laid out by the United States Supreme Court in *Immigration & Naturalization Service v Chadha,* 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1983). As we noted in *Blank,* the United States Supreme Court in *Chadha* made four observations in determining that the action challenged in that case was inherently legislative and was subject to the enactment and presentment requirements of the United States Constitution:

> First, the action "had the purpose and effect of altering ... legal rights, duties and relations of persons ... outside the legislative branch." Second, the action supplanted legislative action. The only way the House could have obtained the same result would have been by enacting legislation. Third, the House's action involved determinations of policy. Fourth, the constitution explicitly authorizes only four instances where one house of Congress can act alone. It does not include the authority for one house to exercise a legislative veto over duly authorized actions of the executive branch. [*Blank, supra* at 114, quoting *Chadha, supra* at 952-956 (citations omitted).]

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[14] In this case, the presentment requirement embodied in Michigan's Constitution, Const 1963, art 4, § 33, requiring that laws enacted by the Legislature be approved by the Governor before taking effect, is not at issue because the Governor signed the compacts. Thus, the issue, as noted, is whether the compacts violate the enactment requirements of Const 1963, art 4, § 26 because they constitute legislation.

Applying *Chadha's* framework in *Blank*, this Court held that the challenged action was "legislative" in nature and, therefore, it was subject to the enactment and presentment requirements of Michigan's Constitution.

Because the *Chadha*/*Blank* framework provides necessary guidance in determining whether a challenged action constitutes "legislation" subject to the constitutional enactment requirements, I employ it in the context of this case.[15] Accordingly, in my judgment, we must consider: (1) whether the compacts at issue " 'had the purpose and effect of altering . . . legal rights, duties and relations of persons . . . outside the legislative branch,' " *Blank, supra* at 114; (2) whether the Governor's action in negotiating the compacts and the Legislature's resolution vote on the compacts supplanted legislative action; (3) whether the compacts involved determinations of policy; and (4) whether Michigan's Constitution explicitly authorizes the Legislature to approve these compacts by a resolution vote even if they otherwise constitute "legislation."

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[15] Chief Justice CORRIGAN determines that the *Chadha*/*Blank* framework is not applicable to this case, despite the fact that the issue in this case is whether a certain deliberate act undertaken by a branch of our government violates the Constitution because the substance of the act constitutes "legislation," and this is specifically the issue that was addressed in *Chadha* and *Blank*. She contends that the *Chadha*/*Blank* framework is inapplicable because this case concerns IGRA compacts and not a legislative veto power and "our Constitution is silent regarding the proper form of legislative approval of tribal-state gaming compacts under IGRA . . . ." *Ante* at 330. However, the point of invoking *Chadha*/*Blank* is only to determine whether the compacts amount to legislation. If they do, Const 1963, art 4, § 22 and § 26 require that they be subject to bill-making approval. She tautologically surmises that the *Chadha*/*Blank* framework is not relevant because the compacts do not constitute legislation, but the very point of utilizing the *Chadha*/*Blank* framework is to determine *whether* the compacts constitute legislation. If so, then our Constitution is *not silent* on this issue.

i. LEGAL RIGHTS, DUTIES, AND RELATIONS

The first factor, whether the compacts had the purpose and effect of altering legal rights, duties, and relations of persons outside the legislative branch, i.e., whether they have a general effect upon the citizens of Michigan, addresses essentially the same question as does the definition of "legislation" in Black's Law Dictionary. That is, Black's primarily defines "legislation" as the making of positive law, and when an action has the purpose and effect of altering legal rights, duties, and relations of persons outside the legislative branch, that action is typically an exercise in positive lawmaking.

What is important to understand is that, in the absence of the challenged tribal-state compacts, gambling on the subject Indian land was *unlawful*. Gambling in the absence of a compact was unlawful pursuant to 18 USC 1166, which, as noted above, provides that, in the absence of a tribal-state compact, state laws regulating or prohibiting gambling "*shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State*," albeit, at least for criminal laws, through federal enforcement. 18 USC 1166(a). Casino gambling in Michigan is generally unlawful. MCL 750.301. The *only* casino gambling that is authorized in Michigan is that gambling conducted in accordance with the Michigan Gaming Control and Revenue Act (MGCRA), MCL 432.201 *et seq*. However, by its express terms, the MGCRA *does not apply to "gambling on Native American land."* MCL 432.203(2)(d),(5). Thus, casino gambling on Indian land cannot be authorized and conducted pursuant to the MGCRA, which leads to the inescapable conclusion that casino gambling on Indian lands located in Michigan is, pursuant to § 1166, subject to Michigan's general prohi-

bition against such gambling.[16] Accordingly, under § 1166, in the absence of a tribal-state compact, casino gambling on Indian land within Michigan's borders is unlawful, and that general unlawfulness is to be enforced by the federal government.[17]

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[16] Moreover, I find to be of significance the fact that MCL 432.203 not only expressly provides that the MGCRA is inapplicable to casino gambling on Indian lands, but it also provides:

> If a federal court or agency rules or federal legislation is enacted that allows a state to regulate gambling on Native American land or land held in trust by the United States for a federally recognized Indian tribe, the legislature shall enact legislation creating a new act consistent with this act to regulate casinos that are operated on Native American land or land held in trust by the United States for a federally recognized Indian tribe. The legislation shall be passed by a simple majority of members elected to and serving in each house. [MCL 432.203(5).]

Thus, within the framework of the MGCRA, the Legislature apparently recognized that if Michigan is granted the right to regulate gambling on Indian lands within Michigan's borders, such ensuing regulation would be "legislative" in nature and would require legislative action in accordance with the enactment requirement of Const 1963, art 4, § 26. In fact, the MGCRA *requires* that the Legislature pass legislation regulating gambling on Indian lands if federal law so permits. It is clear, in my judgment, that IGRA grants states, through both § 1166 and the compacting process of § 2710(d), a means of regulating gambling on Indian lands. Accordingly, pursuant not only to Const 1963, art 4, §§ 22 and 26, but also pursuant to the Legislature's own self-imposed mandate in MCL 432.203(5), the compacts, because they represent federally permitted state regulation of gambling on Indian lands, should have been passed by a majority of those elected to and serving in each house.

[17] My colleagues in the majority, in my judgment, simply ignore the relevance of § 1166 in determining the lawfulness, in the absence of a compact, of casino gambling on Indian land. They do this by summarily noting and relying on the fact that it is the federal government that is charged under § 1166 with enforcing the applicable state law regulations. Opinion of CORRIGAN, C.J., *ante* at 321-323; opinion of KELLY, J., *ante* at 342-343. As already indicated, I agree with the United States Court of Appeals for the Ninth Circuit in *Artichoke Joe's, supra* at 722, that, "the fact that the federal government retained [the enforcement] power does

Moreover, gambling on the subject Indian lands absent the challenged compacts was unlawful pursuant to 25 USC 2710(d)(1)(C). This is because, as noted, § 2710(d) provides that "[c]lass III gaming activities *shall be lawful* on Indian lands *only if* such activities are . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." Therefore, before these challenged compacts existed, gambling on the subject Indian lands was *unlawful*.

Thus, it becomes clear that, before the challenged compacts existed, the tribes would have been engaging in an unlawful activity had they endeavored to operate their respective casinos. It necessarily follows that the compacts had the intended purpose, and the effect, of altering legal rights and relations of Michigan citizens generally. The compacts purport to allow Indian tribes to lawfully engage in activities that would otherwise be unlawful.

Moreover, the compacts impose specific duties upon both the members of the tribes and upon non-Indian

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not change the fact that [states] may enact laws and regulations concerning gambling that have an effect [in the absence of a compact] on Indian lands." That is, the states retain *substantive* authority over gambling law on Indian lands. See n 6. Chief Justice CORRIGAN further states that § 1166 does not truly give the states regulatory power because "the federal government may conclude at any time that it will no longer apply state law and so amend IGRA." *Ante* at 323. While it is true that it is within Congress's power to amend the IGRA, this fact is irrelevant because we are called upon to decide this case under the law as it is today, and not under the law as it could conceivably one day be. Moreover, Chief Justice CORRIGAN opines that Congress chose to make state casino gambling laws applicable to Indian land "for expediency." *Id.* She provides no support for this finding. The relevant legislative history indicates that Congress chose to make state gambling laws applicable to tribes not for reasons of "expediency," but to specifically give states some regulatory power over casino gambling on Indian land. See *Cheyenne River Sioux Tribe, supra* at 526.

peoples and entities. By way of example, the compacts impose a duty on the tribes to administer and enforce on the casinos the regulatory requirements embodied in the compacts. Further, the compacts impose a duty on local units of government to create a local revenue sharing board to receive and distribute a percentage of casino profits that the tribes are required under the compacts to disburse. Alternately, if the local units of government do not create a local revenue sharing board, it may be said that the compacts impose a duty on local units of government to expend their own government funds to cover the inevitable costs for public services, police, etc., that they will incur as a result of having a casino in their area. Under either scenario, the compacts impose duties on local units of government.[18] Accordingly, it is clear that the compacts had the intended purpose and the effect of altering the legal duties generally of Michigan citizens.

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[18] Defendants argue, and the majority concludes, that the compacts do not actually *require* the creation of local revenue sharing boards, but rather *permit* local units of government to voluntarily create such boards if they wish to enjoy the benefits of the annual percentage payment that the tribes are to make to those local units of government pursuant to the compacts. Opinion of CORRIGAN, C.J., *ante* at 325; opinion of KELLY, J., *ante* at 345-346. This argument is both flawed and disingenuous. First, as is expressly stated in the compacts themselves, the annual payment of funds by the tribe to the local revenue sharing boards is meant to "provide financial resources to those political subdivisions of the State *which actually experience increased operating costs associated with the operation of the Class III gaming facility[ies].*" See § 18(A)(ii) of the compacts. Thus, it is evident that the "choice" the local units of government have is either: (1) to create a local revenue sharing board or (2) to simply assume the *actual costs* incurred by the unit of government in the operation of the casinos. Either choice, as noted above, imposes a duty on local units of government. Moreover, I note that the compacts purport to *mandate* the creation of the local revenue sharing boards, as evidenced by the term "shall." That is, the compacts provide that "a Local Revenue Sharing Board *shall* be created by those local units of government . . . ." Thus, the compacts themselves do not purport to provide any "choice" on this matter.

Further, the tribal-state compacts alter legal relationships because the compacts remove from the federal government the jurisdiction to enforce the applicable state gambling laws and regulations that apply, pursuant to § 1166, on Indian land in the absence of a tribal-state compact and place that jurisdiction in the hands of the tribes themselves. This change in jurisdiction affects Michigan citizens generally because citizens engaging in gambling in tribal casinos were formerly subject to federal jurisdiction, but are now subject to tribal jurisdiction. Additionally, the compacts alter the legal relationships of Michigan citizens generally because they may allow anyone over the age of eighteen to gamble in tribal casinos, whereas the legal gambling age that applies to Michigan casinos subject to the MCGRA is twenty-one.

Thus, the first factor of the *Chadha*/*Blank* framework leads to the conclusion that the compacts constitute legislation. That is, the compacts "had the [intended] purpose and effect of altering . . . legal rights, duties and relations of persons . . . outside the legislative branch." *Blank*, *supra* at 114.

II. SUPPLANTING LEGISLATIVE ACTION

The second *Chadha*/*Blank* factor requires that we consider whether the Governor's action in negotiating the compacts and the Legislature's resolution vote on

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My colleagues espouse a third-party beneficiary analysis in reaching their conclusion that the compacts impose no duties on local units of government. Opinion of CORRIGAN, C.J., *ante* at 325; opinion of KELLY, J., *ante* at 345-346. It may be that under contract law, the local units are indeed third-party beneficiaries. However, that is simply not dispositive, nor particularly relevant, in this case. The fact remains that local units of government must either create the revenue sharing boards or assume the actual costs incurred by the units of government in the operation of the casinos.

the compacts "supplanted legislative action." In *Blank, supra* at 114, we further elaborated on this point, as did the United States Supreme Court in *Chadha,* by considering whether "[t]he only way the House could have [properly] obtained the same result would have been by enacting legislation." Thus, we must consider how, in the absence of the challenged compacts, the Legislature could alternatively have achieved the same result, i.e., how the Legislature could alternatively have made gambling on Indian land lawful. If no IGRA tribal-state compact exists, general state laws pertaining to the regulation or prohibition of gambling apply on any particular Indian land as they apply elsewhere in the state. 18 USC 1166. Therefore, in the absence of a compact, if the Legislature wanted to make gambling on Indian land lawful, the only way it could do that would be by either changing the gambling laws that are generally applicable within the state or by changing the reach of the MGCRA. Changing those laws would, it cannot seriously be disputed, require "legislation." Thus, it becomes clear that the compacts effectively supplanted legislative action and, therefore, they themselves constitute "legislation."[19]

III. DETERMINATIONS OF POLICY

The third *Chadha*/*Blank* factor requires that we consider whether the compacts "involved determina-

[19] Furthermore, the compacts "supplant legislative action," *Blank, supra* at 114, because they attempt to bind the state to their terms for a period of twenty years, and during those twenty years, the Legislature may not, even by appropriate legislative action, amend or repeal the compacts. Thus, the compacts not only supplant current legislative actions, but in effect, they likewise supplant any future proper legislative action that the Legislature might otherwise undertake regarding this issue.

tions of policy." *Blank, supra* at 114. The compact negotiation process required the Governor to undertake and resolve multiple policy-making decisions of great consequence to this state, the most significant of which was the initial decision to make lawful what was otherwise unlawful—casino gambling on the subject Indian lands. The fact that casino gambling engenders considerable controversy and passion throughout our society at large, as evidenced by the very existence of this lawsuit, underscores the significance of the policy decision that these compacts represent.

Moreover, the compacts represent a host of additional policy decisions that sprang from the initial decision to make gambling lawful on the subject Indian lands. These include, but certainly are not limited to, decisions regarding the number of compacts to sign and the number of casinos to allow, the minimum gambling age that would be enforced in the relevant casinos, the percentage of profits that the tribes would be required to submit to the state and the subsequent use of those funds by the state, the decision to incorporate into the compacts the protections of the Michigan Employment Security Act, MCL 421.1 *et seq.,* and the Worker's Disability Compensation Act, MCL 418.101 *et seq.,* and the decision to leave enforcement of the compact rules and regulations to the tribes themselves rather than delegating that duty to the relevant state agencies as the state clearly could have done pursuant to 25 USC 2710(d)(3)(C).[20]

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[20] It appears that that Court of Appeals considered significant the fact that the compacts do not give the state the power to enforce them other than by arbitration or mediation. The Court of Appeals stated, "While states may have the ability [under IGRA] to negotiate and include regulatory terms in the compacts, there is no mechanism for enforcement. Rather, any dispute is submitted to arbitration or a mediator. Consequently, the challenge to the method of approval by resolution is

In my judgment, these policy decisions are exactly the sorts of decisions that properly belong within the province of the Legislature.[21] This point was well made by the highest court for the state of New York, the Court of Appeals of New York, in a decision in which that Court held that IGRA tribal-state compacts represent legislation. In *Saratoga Co Chamber of Commerce*

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without merit." *Taxpayers of Michigan Against Casinos v Michigan*, 254 Mich App 23, 46; 657 NW2d 503 (2002). Likewise, defendants emphasize, as did the Court of Appeals, *id.,* that the compacts confer no regulatory power on the state because the responsibility to ensure that the compacts' "regulatory requirements" are being enforced within the casinos lies solely within the tribes' hands; and therefore the compacts are not "legislation." However, IGRA provides that compacts may include provisions relating to "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations . . . ." 25 USC 2710(d)(3)(C)(2). Thus, the compacts *could* have granted the state the jurisdiction to enforce the relevant laws and regulations. Justice KELLY concedes that if the compacts "extend[ed] state jurisdictional authority to tribal land," they would constitute legislation. *Ante* at 347. In my judgment, the decision to place the enforcement jurisdiction entirely within the tribes' hands, as well as the decision to resolve compact disputes through mediation and arbitration, were, in fact, policy decisions made by the Governor that may not now be used to insulate the compacts from a finding that they constitute legislation. Chief Justice CORRIGAN likewise refers to many of the compact terms in order to support her contention that the compacts do not constitute legislation. *Ante* at 324-327. As an example, she notes that "[u]nder the terms of the compacts, the tribes themselves, not the state, regulate the conduct of class III gaming on tribal lands. The Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the state unilaterally rectify a violation of the compacts." *Ante* at 324-325. This term, and the other compact terms discussed in the Chief Justice's opinion, were the direct result of policy choices made on behalf of the state by the Governor and should not now be used circularly to insulate the compacts from being characterized as legislation. It is, in part, precisely because the compacts resolve such fundamental policy choices that they constitute legislation.

[21] As noted in n 16, MCL 432.203 indicates that the Legislature itself recognized this when it provided in the MGCRA that the *Legislature* must, if permitted by federal law, enact an act similar to and consistent with the MGCRA that would govern casino gambling in Indian territory, just as the MGCRA governs other casino gambling that is authorized in Michigan.

v Pataki, 100 NY2d 801, 822-823; 798 NE2d 1047; 766 NYS2d 654 (2003), the court stated:

> IGRA itself contemplates that states will confront several policy choices when negotiating gaming compacts. Congress provided that potential conflicts may be resolved in the compact itself, explicitly noting the many policies affected by tribal gaming compacts. Indeed, gaming compacts are laden with policy choices, as Congress well recognized.
>
> "Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—
>
> "(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> "(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> "(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> "(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> "(v) remedies for breach of contract;
>
> "(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> "(vii) any other subjects that are directly related to the operation of gaming activities." [25 USC 2710(d)(3)(C).]
>
> *Compacts addressing these issues necessarily make fundamental policy choices that epitomize "legislative power." Decisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multi-member, representative Legislature is entrusted to perform under our constitutional structure.* [Emphasis added.]

I agree with the court's decision on this issue in *Saratoga Co* and with the other state supreme courts that have considered this issue and reached a similar conclusion. See *State ex rel Clark v Johnson*, 120 NM 562; 904 P2d 11 (1995); *State ex rel Stephan v Finney,* 251 Kan 559; 836 P2d 1169 (1992); *Panzer v Doyle,* 271 Wis 2d 295; 680 NW2d 666 (2004); *Narragansett Indian Tribe of Rhode Island v Rhode Island,* 667 A2d 280 (RI, 1995).[22] It is evident that the compacts "involved determinations of policy," *Blank, supra* at 114, such that they themselves constitute "legislation."

iv. MICHIGAN CONSTITUTION

The fourth *Chadha*/*Blank* factor requires that we consider whether Michigan's Constitution explicitly authorizes the Legislature to approve these compacts by resolution even if the compacts otherwise constitute legislation.

Before 1908, the Michigan Constitution allowed the Legislature to make laws by the resolution process. See Const 1850, art 4, § 19. However, the constitutions of

[22] My research revealed that every state supreme court that has directly considered this issue has held that tribal-state gaming contracts constitute legislation. The majority cites *Confederated Tribes of the Chehalis Reservation v Johnson*, 135 Wash 2d 734, 750; 958 P2d 260 (1998), for an opposite conclusion. Opinion of CORRIGAN, C.J., *ante* at 324; opinion of KELLY, J., *ante* at 346. In that case, the Supreme Court of Washington stated that tribal-state compacts are "agreements" and not legislation. However, the issue in that case was whether the compacts were subject to Washington's public records disclosure act, and the court's statement regarding the legislative nature of a compact, which was made with no analysis whatever, was therefore not in response to a direct consideration of that question. Justice KELLY likewise string cites *Confederated Tribes of Siletz Indians of Oregon v Oregon*, 143 F3d 481 (CA 9, 1998), and *Gallegos v Pueblo of Tesque*, 132 NM 207, 218; 46 P3d 668 (2002). Both those cases are equally irrelevant to the instant issue.

1908 and 1963 leave out that earlier proviso, and our Constitution now makes it entirely clear, as already explained, that lawmaking is subject to the enactment requirement. See Const 1963, art 4, §§ 1, 22, and 26.

In *Becker v Detroit Savings Bank,* 269 Mich 432, 434-436; 257 NW 855 (1934), this Court considered whether a legislative resolution can create binding law. In accordance with our Constitution, the *Becker* Court held that it could not, stating:

> The language of the constitution is in itself a complete answer to the proposition. It provides in express terms that there shall be but one mode of enacting a "law" thereunder, and that mode is the exclusive measure of the power of the legislature in that regard. *A mere resolution, therefore, is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.* . . . The requirements of the Constitution are not met by that method of legislation. "Nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." Cooley [Const Lim at 155, ch 6] . . . .
>
> * * *
>
> [W]hile the resolution of the Legislature is entitled to respectful consideration, it is not law and courts are bound by the law. [*Id.* at 434-436 (emphasis added).]

Moreover, Michigan's Constitution provides a number of specific instances in which the Legislature is explicitly authorized to act by way of resolution. See Const 1963, art 4, §§ 12, 13, 37; art 5, § 2; art 6, § 25. However, none of these provisions is applicable to this issue and none provides a basis for concluding that our

Constitution explicitly grants the Legislature the authority to approve the instant compacts by way of resolution even though they otherwise constitute legislation.[23] Therefore, the Legislature's approval of the challenged compacts is not constitutionally exempted from the general lawmaking procedures embodied in our Constitution. Thus, the fourth *Chadha*/*Blank* factor likewise leads to a finding that the Legislature was required to adopt the compacts consistently with the enactment requirements of Michigan's Constitution.

Accordingly, in my judgment, the tribal-state compacts at issue constitute legislation. The compacts had the purpose and effect of generally altering legal rights, duties, and relations of Michigan citizens; they supplanted legislative action; they represent determinations of policy issues of fundamental importance to the social and economic environment of the state of Michigan; and our Constitution does not authorize the Legislature to approve the compacts by a resolution vote.

B. IS A RESOLUTION NONETHELESS CONSTITUTIONAL?

Having determined that the *Chadha*/*Blank* analytical framework leads to the conclusion that the compacts constitute "legislation" subject to the enactment requirement of Michigan's Constitution, I will now con-

[23] The majority concludes that legislative approval by resolution was appropriate because the Constitution is a limit on our Legislature's power rather than a grant of power and, therefore, the Legislature may do anything that it is not specifically prohibited by the Constitution from doing. Opinion of CORRIGAN, C.J., *ante* at 327; opinion of KELLY, J., *ante* at 348. It may well be true that the Constitution is a limit on legislative power, but one of those limits is embodied in Const 1963, art 4, § 22 and § 26, and these require that legislation be by bill. The majority essentially engages in a faulty, circular argument to support the conclusion that the compacts are not legislation.

sider the significant issues raised by defendants and upon which the majority opinions are primarily based.

i. FEDERAL PREEMPTION

First, Justice KELLY concludes that the compacts are not "legislation" because federal law preempts Indian gambling regulation unless the state prohibits gambling. Thus, because Michigan permits limited casino gambling, Justice KELLY reasons that Michigan may not legislate with respect to gambling on Indian land. *Ante* at 339-342. In support of this proposition, the opinion refers to 25 USC 2701 of IGRA, which provides:

> The Congress finds that
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

Justice KELLY has misconstrued the relevance of § 2701(5). This provision is simply a part of the Congress's legislative "findings" and does not constitute substantive law.[24] That is, the Congress found, before enacting IGRA, that Indian tribes had the "exclusive right to regulate gaming activity on Indian lands if the

[24] A "findings" statement in a federal act is a part of what is commonly referred to as the "preamble." As long ago as 1889, the United States Supreme Court, in *Yazoo & M V R Co v Thomas,* 132 US 174, 188; 10 S Ct 68; 33 L Ed 302 (1889), stated: "[A]s the preamble is no part of the act, and cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous, the necessity of resorting to it to assist in ascertaining the true intent and meaning of the legislature is in itself fatal to the claim set up." See also Singer, 1A Sutherland Statutory Construction(6th ed), § 20:3, p 123: "The function of the preamble is to supply reasons and explanations and not to confer power or determine rights. Hence it cannot be given the effect of enlarging the scope or effect of a statute."

gaming activity [was] not specifically prohibited by Federal law and [was] conducted within a State which did not . . . prohibit such gaming activity."[25] *Id*. Having so found, the Congress subsequently enacted IGRA in order to "provide a statutory basis for the regulation of gaming . . . ." 25 USC 2702(2). Because 25 USC 2701(5) is not substantive law, Justice KELLY errs in invoking it as such and using it to effectively shield Indian tribes from state regulation of gambling otherwise consistent with the text of IGRA.

II. STATE AUTHORITY TO LEGISLATE

Second, defendants argue that the compacts cannot constitute legislation because the state has no authority to legislate casino gambling on Indian lands, and, therefore, the compacts merely constitute an "agreement" between the tribe and the state that has nothing to do with "legislation." However, pursuant to the express terms of IGRA itself, the Congress recognized that a tribal-state compact may result in state legislation. Therefore, it cannot be disputed that IGRA permits states to legislate pursuant to a compact. Section 2710(d)(5) of IGRA provides:

> Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such

[25] This congressional finding comports with the pre-IGRA opinion of the United States Supreme Court in *Cabazon* in which the Court acknowledged that if California *prohibited* casino gambling within its borders, California could enforce its criminal laws relating to that prohibition on Indian lands through 18 USC 1162; but absent express Congressional permission, California could not enforce its purely *regulatory* gambling laws on Indian lands. Thus, under *Cabazon,* Indian tribes indeed had the exclusive right to regulate casino gambling on Indian lands if the gambling was not specifically prohibited by federal law and was conducted within a state that did not prohibit such gambling.

> regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any tribal-state compact entered into by the Indian tribe under paragraph (3) that is in effect.

This section both affirms that an Indian tribe's right to regulate gambling on its lands is not exclusive and that the state does, indeed, have authority to regulate gambling on Indian lands through lawmaking. The compact provisions in IGRA merely ensure that any state regulation over tribal gambling arises out of the negotiation process; they do not, however, prohibit such regulation.

The majority concludes, however, that the fact that the compacts must arise out of the negotiation process means that they do not constitute "legislation" because legislation must be "unilateral." Opinion of CORRIGAN, C.J., *ante* at 318; opinion of KELLY, J., *ante* at 344. That is, if a tribal-state compact, and thus any state regulation over tribal gambling, can only result through a federally mandated negotiation process, it cannot be said that the state enjoys a right to "unilaterally" legislate gambling on Indian land. In support of this theory—that unless a state may "unilaterally" regulate, it may not "legislate"—Justice KELLY refers to this Court's opinion in *Westervelt v Natural Resources Comm,* 402 Mich 412, 440; 263 NW2d 564 (1978). *Ante* at 344.

Westervelt considered whether an executive agency "legislates" when it engages in rulemaking pursuant to a legislative delegation of power. If so, the executive agency would be violating the separation of powers doctrine embodied in Const 1963, art 3, § 2 because, pursuant to Const 1963, art 4, § 1, "[t]he legislative power of the State of Michigan is vested in [the Legis-

lature]."[26] *Westervelt*, in concluding that an executive agency does not legislate when it engages in rulemaking, stated, "the concept of 'legislation,' in its essential sense, is the power to speak on any subject without any specified limitations." *Westervelt, supra* at 440. (Emphasis deleted). The "specified limitations" referred to in *Westervelt* were those limitations inherent in the legislative delegation of authority to the executive branch. Because an executive agency is confined in its exercise of authority to the relevant legislative delegation, including any specific limitations upon such delegation set by the Legislature, the power to engage in rulemaking is not a power to "legislate." It could not be such a power under the Constitution if the delegation is valid because the Constitution does not allow any entity to exercise "legislative power" other than the Legislature.[27]

Justice KELLY argues that the power to speak "without any specified limitations" means the power to "unilaterally" legislate. In this case, she argues, the Legislature may not speak "without specified limitations" because it is limited by the mandate that the state must negotiate in good faith with the tribes and, therefore, it may not legislate. *Ante* at 344. In my judgment, *Westervelt* must be interpreted within the different context of that case. I see no reason to expand

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[26] Compare the United States Constitution, art I, § 1, in which "*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Emphasis added.)

[27] *Westervelt*, considered in its totality, actually supports plaintiffs' position in this case. This is because the compacts constitute legislation, yet the legislative power is exclusively vested in the Legislature. Const 1963, art 4, § 1. Thus, when the Governor negotiated and signed the compacts without having first received a proper delegation of power from the Legislature, he effectively exercised the Legislature's functions in contravention of Const 1963, art 3, § 2.

its specific holding to mean that any time the Legislature is constricted in any sense by "any specified limitation," it may not "legislate." A legislature is always subject to "specified limitations," such as those posed by the federal and state constitutions, or, in this case, by federal law. Indeed, the very premise of our constitutional system is that all governmental institutions operate under "specified limitations." The fact that federal law imposes some limits on the state's power to regulate in a specific area simply cannot mean that any legislative action touching upon such an area is not actually "legislation."

Chief Justice CORRIGAN, in support of her contention that the state has no power to "unilaterally" regulate, and therefore legislate, tribal gambling under § 2710(d), cites *Boerth v Detroit City Gas Co*, 152 Mich 654; 116 NW 628 (1908), and *Detroit v Michigan Pub Utilities Comm* (*MPUC*), 288 Mich 267; 286 NW 368 (1939), for the proposition that the power to legislate does not require "consent" from those subject to its powers. *Ante* at 318. Because § 2710(d) provides for a process of negotiation, the Chief Justice opines that it gives tribes a power to "consent" that negates a finding that a compact constitutes legislation. In *Boerth* and *MPUC*, this Court held that, absent a legislative delegation of power to Detroit, Detroit possessed no legislative power to set gas rates because such power was within the exclusive jurisdiction of the Legislature. However, Detroit was found to possess a power to contract for reasonable gas rates under its power to control its streets. In this case, the state possesses regulatory power over tribal casino gambling even in the absence of a compact, see § 1166, including the outright power to prohibit such gambling. Moreover, the "consent" that the Chief Justice argues that the tribes may exercise in

this case, by virtue of § 2710(d), is the type of "consent" referred to in *Boerth* and *MPUC*. Although § 2710(d) provides for a negotiation process, the tribes are *not* wholly free to withhold their "consent" from the Legislature to enter into contracts regulating casino gambling on their lands and to, instead, engage in such gambling without compacts. This is because in the absence of a compact, casino gambling is *unlawful*. § 2710(d)(1).[28]

iii. CONTRACTUAL NATURE OF COMPACTS

Third, the majority concludes that the tribal-state compacts are not legislation because they merely constitute contracts between two sovereign entities that the Governor, pursuant to IGRA, may enter into on behalf of the state and that the Legislature may approve of by resolution vote.[29] Opinion of CORRIGAN, C.J., *ante* at

[28] I do not accept the premise of the Chief Justice that, when a state exercises its regulatory authority over casino gambling within its borders, expressly granted to it by Congress, and makes that which was unlawful into that which is lawful, and in doing so binds itself to specific terms and conditions under which that which was unlawful is now lawful, the state is not "legislating" merely because IGRA provides a mechanism by which the tribes may participate in the negotiation process. The pertinent consideration in determining whether a compact constitutes legislation is not whether IGRA purports to compel a state to negotiate in good faith with a tribe, but rather whether the compact bears the larger hallmarks of "legislation." These hallmarks are sufficiently expounded upon in *Chadha*/*Blank*, and, as already discussed, I believe they lead to the conclusion that these sorts of compacts constitute legislation.

[29] If the majority were correct, but for the term in the compacts themselves stipulating that they become effective only upon resolution approval by the Legislature, the Legislature would not be required to approve them. This is because the Legislature's power is the power to legislate. Const 1963, art 4, § 1. Therefore, unless the compacts constitute legislation, neither the Constitution nor any other source of law would require that they be approved by the Legislature by any method. Thus, under the majority's faulty analysis, there is no reason that the

318-319; opinion of KELLY, J., *ante* at 346-347. I do not dispute that the compacts are akin to contracts of a unique nature. However, as explained above, these "contracts" create new law and constitute legislation and they purport to bind the state of Michigan to that legislation. That is the pivotal consideration in this case. A "contract" may, in effect, create new law and such a legislative contract should not be exempt from the constitutional provisions otherwise applicable to legislation.[30] Neither the executive nor the legislative branch of our state government may circumvent the constitutionally mandated processes for enacting legislation by entering into a contractual relationship. However, I will consider whether there is some source of law that *does* allow the Governor to enter into a compact without legislative approval consistently with the enactment requirement of Michigan's Constitution.

First, it should be considered whether IGRA itself, regardless of state constitutional procedures, provides that a Governor may enter into a tribal-state compact with only a resolution vote of the Legislature. It is clear that IGRA does not so provide. The court in *Saratoga Co, supra* at 822, stated:

Governor, in the future, cannot simply bind the state to casino compacts without even seeking resolution approval from the Legislature.

Thus, the compacts would have been effective between the state and the tribe once they had been signed by the Governor.

[30] See *Flint & F Plank-Road Co v Woodhull,* 25 Mich 99 (1872), in which Justice COOLEY acknowledged that a charter-compact is both a "law" *and* a contract. "It is not disputed . . . that the charter of a private corporation is to be regarded as a contract, whose provisions are binding upon the State . . . . *Such a charter is a law,* [and] it . . . also . . . contains stipulations which are terms of compact between the State as the one party, and the corporators as the other . . . ." *Id.* at 101. (Emphasis added.) Thus, a "contract" may clearly be a vehicle for creating both legislation and contractual terms that are binding on the state.

> IGRA imposes on "the State" an obligation to negotiate in good faith (25 USC 2710[d][3][a]), but identifies no particular state actor who shall negotiate the compacts; *that question is left up to state law* . . . . As the Supreme Court noted, the duty to negotiate imposed by IGRA "is not of the sort likely to be performed by an individual state executive officer or even a group of officers." [Quoting *Seminole Tribe of Florida v Florida,* 517 US 44, 75 n 17; 116 S Ct 1114; 134 L Ed 2d 252 (1996), citing *State ex rel Stephen Finney, supra*.]

Likewise, in *Clark, supra* at 577, the Supreme Court of New Mexico stated:

> We entertain no doubts that Congress could, if it so desired, enact legislation legalizing all forms of gambling on all Indian lands in whatever state they may occur. . . . That is, however, not the course that Congress chose. Rather, Congress sought to give the states a role in the process . . . . It did so by permitting Class III gaming only on those Indian lands where a negotiated compact is in effect between the state and the tribe. [25 USC 2710(d)(1)(C).] To this end, the language of the IGRA provides that *"Any State* . . . may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian Tribe." *Id.* § 2710(d)(3)(B). The only reasonable interpretation of this language is that it authorizes state officials, *acting pursuant to their authority held under state law,* to enter into gaming compacts on behalf of the state. [Emphasis added.]

Accordingly, IGRA does not provide or require that the Governor shall have the power to bind the state to tribal-state compacts with only a resolution vote of the Legislature. The pertinent consideration is which state actor has the power to bind the state to a legislative compact and according to which procedures *under state law.*[31]

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[31] Because IGRA does not purport to require or allow the Governor to negotiate a tribal-state compact subject only to a resolution vote, we need

Second, it is therefore necessary to consider whether state law grants the Governor the authority to bind the state to a tribal-state compact with only a resolution vote of the Legislature regardless whether that compact constitutes legislation. The Michigan Constitution provides that "[t]he executive power is vested in the governor." Const 1963, art 5, § 1. The majority essentially argues that the executive power includes the power to bind the states to contractual agreements with sovereign entities and, therefore, whether those agreements otherwise constitute "legislation" is irrelevant. The "executive power" is, first and foremost, the power to enforce. This observation was concisely summed up by this Court in *People ex rel Attorney General v Holschuh,* 235 Mich 272, 274-275; 209 NW 158 (1926), in which we stated, "Consideration of some fundamen-

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not consider whether such a provision in the IGRA would be lawful. However, I note the following statement made by the court in *Clark, supra* at 577:

> [The governor] . . . argues that he possesses the authority, as a matter of *federal law*, to bind the State to the terms of the compact . . . . We find the Governor's argument on these points to be inconsistent with core principles of federalism. The Governor has only such authority as is given to him by our state Constitution and statutes enacted pursuant to it. . . . We do not agree that Congress, in enacting the IGRA, sought to invest state governors with powers in excess of those that the governors possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state gubernatorial power. Cf. *Gregory* [*v Ashcroft*, 501 US 452, 460; 111 S Ct 2395; 119 L Ed 2d 410 (1991)] (recognizing that "[t]hrough the structure of its government . . . a State defines itself as a sovereign"); *New York v. United States* [505 US 144, 176; 112 S Ct 2408; 120 L Ed 2d 120 (1992)] (striking down an act of Congress on the ground that principles of federalism will not permit Congress to " 'commandeer[] the legislative processes of the States' " by directly compelling the states to act) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n* [452 US 264, 288; 101 S Ct 2352; 69 L Ed 2d 1 (1981)] . . . .

tal principles relative to the powers of government will aid greatly in determining the issues before us. . . . The law . . . must observe constitutional limitations; but within such limitations the legislative power may command, *the executive power must enforce*, and the judicial power respond." (Emphasis added.)[32] While our state Constitution grants specific additional powers to our executive branch of government beyond the "enforcement" of legislative enactments, I find no provision in our Constitution that supports a finding that the Governor possesses broad powers to bind the state to legislative compacts with foreign sovereignties absent legislative action consistent with the enactment requirement. Nor have my colleagues pointed to any language of that sort.

In addressing this issue, it is also necessary to consider what our Constitution does say regarding the Governor's right to bind the state to an "intergovernmental agreement." Const 1963, art 3, § 5 provides:

> Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the

[32] See Const 1963, art 5, § 8: "The governor shall take care that the laws be faithfully executed." See also *The People ex rel Sutherland v Governor,* 29 Mich 320, 324-325 (1874), in which Justice COOLEY stated: "And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, *while the third must see that the laws are executed*. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others." (Emphasis added.)

> United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution.

Thus, pursuant to this constitutional provision, the Governor of this state may enter into intergovernmental agreements without the advice or consent of the Legislature—whether by resolution vote or consistently with the enactment requirements of our Constitution. However, this power is not unlimited. First, it is specifically limited to agreements with "the other states, the United States, the Dominion of Canada, or any political subdivision thereof." The power to enter into an intergovernmental agreement with an Indian tribe is conspicuously absent. Second, the power is specifically limited to those agreements necessary "for the performance, financing or execution of [its] functions." Neither IGRA nor any other law places the duty or the power to determine the scope and parameters of gambling within Michigan's borders, on or off Indian lands, within the "functions" of the executive branch. Accordingly, unless the Legislature properly delegates to the executive branch a rulemaking power to set the parameters for gambling on Indian lands within Michigan's borders, that power is not, in my judgment, reasonably within the scope of the executive branch's "functions."

It may be said that because the intergovernmental agreement provision of the Michigan Constitution does not refer to agreements with Indian tribes that provision is inapplicable to this case. However, in light of the fact that the powers of the executive branch are constitutionally defined, I read additionally a negative implication in Const 1963, art 3, § 5. Because our Constitution contains an express provision regarding intergovernmental agreements that may validly be entered into by governmental authorities, I conclude that,

subject to provisions of general law, intergovernmental agreements beyond the scope of Const 1963, art 3, § 5 are invalid.[33]

Moreover, even were I to decline to read a negative implication into Const 1963, art 3, § 5, this provision is, nonetheless, significant insofar as it expressly provides that, in the realm of applicable intergovernmental agreements, no branch of the government may contract in such a way that is *inconsistent* with its own powers or that usurps the powers of another branch. That rule, which is consistent with the separation of powers doctrine of Const 1963, art 3, § 2, should apply equally to intergovernmental agreements that are expressly subject to Const 1963, art 3, § 5, as well as those that are not. Thus, in any case, a governmental authority may only bind the state to an intergovernmental agreement that is "for the performance, financing or execution *of their respective functions* . . . ." *Id.* As already noted, absent a proper legislative delegation of power to the executive branch, the duty and power to set the parameters for casino gambling on land within Michigan's borders is not in any comprehensible sense a "function" of the executive branch.

The United States Constitution expressly provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties,

[33] Const 1963, art 3, § 5 provides that it is "subject to general law." Therefore, a governmental authority may enter into an intergovernmental agreement with an Indian tribe despite the fact that tribes are not specifically mentioned in art 3, § 5 provided the agreement is consistent with provisions of general law. Federal law, under IGRA, permits a state to enter into a tribal-state gambling compact. However, because the compacts at issue constitute legislation, state law, particularly Const 1963, art 4, §§ 22 and 26, requires that they be approved by the Legislature by bill. Therefore, consistently with these provisions of general law, the Legislature may bind the state to tribal-state gambling compacts despite the fact that "Indian tribes" are not specifically referenced in art 3, § 5.

provided two thirds of the Senators present concur . . . ." US Const, art II, § 2, cl 2.[34] The Michigan Constitution notably contains no explicit authorization for the Governor to enter into treaties with sovereign nations without the majority approval of the entire Legislature. I have found no case law, nor have my colleagues identified such a law, that would support a determination that, despite our Constitution's silence on the issue, such a right exists.[35]

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[34] It is noteworthy that federal case law acknowledges that treaties are both agreements with other sovereignties, *and* they create "law." See *El Al Israel Airlines, Ltd v Tsui Yuan Tseng,* 525 US 155, 167; 119 S Ct 662; 142 L Ed 2d 576 (1999), in which the United States Supreme Court stated: " 'Because *a treaty* ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) [italics in original] and the post-ratification understanding of the contracting parties.' " (Citation omitted; emphasis added.) The point is that, pursuant to US Const, art II, § 2, treaties are binding *even though they amount to lawmaking* because the federal Constitution expressly so provides. Thus, that the tribal-state compacts at issue here are akin to contracts with a sovereign power does not, by that fact alone, mean that the compacts do not constitute "lawmaking." I believe the majority's conclusion that the compacts are not legislation simply because they are "contracts" with sovereign nations to be without merit. See also n 30.

[35] Does the Governor possesses some "inherent" authority to bind the state to a legislative compact with only a resolution vote of the Legislature, or indeed unilaterally? While the Governor has the power to issue executive orders on his own accord that have the status of enacted law, the permissible scope of such orders is limited by the express powers constitutionally or legislatively delegated to the Governor. See, generally, *House Speaker v Governor*, *supra* at 578-579; see also *Straus v Governor,* 230 Mich App 222, 228-230; 583 NW2d 520 (1998). Further, the separation of powers doctrine embodied in Michigan's Constitution 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*." Const 1963, art 3, § 2. Tribal-state compacts constitute legislation, and all legislative power is constitutionally vested in the Legislature. Const 1963, art 4, § 1. Therefore, the Governor may not bind the state to such a compact under some "inherent" power because the Governor may exercise legislative powers only "as expressly provided in

I believe that no source of law, federal or state, exists that would permit the Governor to bind the state to these legislative compacts without the approval of the Legislature consistent with the enactment requirements of Michigan's Constitution. Because the compacts constitute legislation, they were subject to Const 1963, art 4, §§ 22 and 26. Therefore, I would reverse the judgment of the Court of Appeals on this issue and hold that the approval of HCR 115 by resolution, rather than by bill, did not comport with the enactment requirement of our Constitution.[36]

C. DO AMENDATORY PROVISIONS VIOLATE THE CONSTITUTION?

Each of the challenged tribal-state compacts contains a provision that purports to empower the Governor to amend it on behalf of the state without seeking legislative approval of any specific amendment.[37] This provision, plaintiffs contend, violates the separation of powers doctrine embodied in art 3, § 2 of Michigan's Constitution because it grants broad authority to the Governor to usurp a legislative power. That is, plaintiffs argue that, like the original compacts, any amendment constitutes "legislation" that is subject anew to the enactment requirement of Const 1963, art 4, § 26.

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this constitution." Const 1963, art 3, § 2. Nowhere does our Constitution expressly, or otherwise, grant the Governor a power to bind the state to a legislative agreement with another sovereignty.

[36] The pertinent question in this case is whether the compacts constitute legislation. Because they do, the Legislature should have approved HCR 115 by bill. If the compacts did not constitute legislation, then no legislative approval, by either bill or resolution, would have been *constitutionally* required. In that case, the Legislature would have been required to approve the compacts only because the compacts themselves expressly required it in § 11, and either resolution or bill approval of HCR 115 would have been sufficient.

[37] See § 16 of the compacts.

Plaintiffs essentially argue that even had the Legislature properly adopted the compacts, the specific amendatory provision would nonetheless violate the separation of powers doctrine because the Legislature may not, even by properly enacted legislation, grant the Governor a general power to amend that legislation. Defendants contend, on the other hand, that the amendments to the compacts, like the compacts themselves, in no way implicate "legislation," and, therefore, the Governor does not usurp legislative functions in exercising the Governor's power to amend them.

The Court of Appeals ruled that this issue was not ripe for review because the Governor had not yet attempted to amend the compacts. However, during the pendency of this suit, Governor Granholm purported to amend the compact with the Odawa Tribe by (1) extending the terms of the compact from twenty to twenty-five years, (2) requiring the eight percent semiannual payment that the tribes must make to the Michigan Strategic Fund to instead be made "to the State . . . as the governor so directs," (3) increasing the semiannual payment from eight percent of profits to either eight, ten, or twelve percent depending on the profits of the casino, and (4) providing less restrictive limitations on gaming by requiring the tribe to make the semiannual payments to the state only as long as the state does not authorize new gaming in ten specified counties rather than statewide as under the original compact terms. Accordingly, this issue is at present ripe for review.[38]

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[38] The majority concludes that the issue may now be ripe for review, but that this Court should nonetheless decline to review it because the lower courts did not address this issue. Opinion of CORRIGAN, C.J., *ante* at 333; opinion of KELLY, J., *ante* at 350. It is true that the Court of Appeals declined to address the issue. However, the circuit court considered it and

As long ago as 1874, this Court recognized the importance of respecting the proper lines of demarcation between the practices of our three branches of government. In *The People ex rel Sutherland v Governor*, 29 Mich 320, 324-325 (1874), Justice COOLEY stated:

> And that there is such a broad general principle seems to us very plain. Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. . . . *This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.* [Emphasis added.]

This "broad general principle" elaborated upon by Justice COOLEY in *Sutherland* is what is now embodied in the separation of powers doctrine of Michigan's Constitution. Art 3, § 2 of our Constitution provides, "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

"The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. Thus, the Governor may not exercise legislative power unless expressly provided for in the Constitution. Yet, the amendatory provision of the tribal-state compacts purports to grant the Governor a broad and undefined legislative power—the power

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found a constitutional violation. Further, the parties briefed this issue and, in my judgment, the record is sufficiently developed that we may consider this question without having to first remand it to the lower courts.

to amend legislation. The Legislature may not, either by resolution or by bill, delegate to the executive branch a broad and undefined power to amend legislation. Thus, I would reverse the judgment of the Court of Appeals on this issue and hold that the amendatory provision contained in each compact violates the separation of powers doctrine and is, thus, void insofar as it may be regarded as granting sole amendatory power over legislation to the Governor.[39]

D. DO COMPACTS CONSTITUTE LOCAL ACTS?

For the reasons set forth in part VI of Chief Justice CORRIGAN's lead opinion, I do not believe that the compacts violate Const 1963, art 4, § 29. Accordingly, on this issue, I concur in the lead opinion that the decisions of the lower courts should be affirmed.

IV. CONCLUSION & CONSEQUENCES

We have been asked to consider, in an action seeking declaratory relief, whether the four tribal-state compacts at issue are inconsistent with various procedures

[39] Justice KELLY concludes that plaintiffs' challenge to the amendatory provision fails because plaintiffs cannot show that "no set of circumstances exists under which the [a]ct would be valid." *Ante* at 349. She explains that "[t]here are many conceivable amendments that a governor might make to these compacts. For example, a governor could amend the provision relating to dispute resolution or the provision about the timing of payments." *Id.* at 349. For reasons already explained in part III(A) of this opinion, Justice KELLY's examples represent legislative decisions that are properly within the province of the Legislature. That is, such amendment would constitute important policy decisions undertaken in the process of lawmaking and they would supplant legislative action. Therefore, such amendments, undertaken by the Governor and not approved by the Legislature pursuant to Const 1963, art 4, §§ 22 and 26 would offend the separation of powers doctrine. Justice KELLY has not demonstrated that there are, in fact, "conceivable amendments that a governor might make to these compacts," *id.*, so as to not offend this doctrine.

and doctrines embodied in Michigan's Constitution. Having considered the questions presented, I strongly dissent from the majority judgment that these compacts have been effected consistently with our Constitution. I would hold that these compacts constitute legislation and, thus, were subject to legislative approval consistent with the lawmaking procedures of art 4, §§ 22 and 26 of our Constitution. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court on this issue.

Further, in my judgment, the provision in the compacts that purports to empower the Governor with sole amendatory power over their covenants violates the separation of powers doctrine of art 3, § 2 of our Constitution. I therefore would hold that this provision is void insofar as it grants sole amendatory power over legislation to the Governor. Absent a proper delegation of power to the executive branch, amendments of the compacts must themselves comport with the bill-making enactment procedures of our Constitution. Accordingly, I would reverse the judgment of the Court of Appeals and reinstate the judgment of the circuit court on this issue as well.

Finally, I believe that the compacts do not violate the local acts provision of art 4, § 29 of our Constitution. Accordingly, on this issue, I concur with the analysis as set forth in part VI of the lead opinion, and would affirm the decisions of the lower courts.

Concerning the consequences of this opinion for the casinos operated by the tribes, I would afford plaintiffs no more relief than that requested. That is, in this action for declaratory judgment, I have sought only to say what the Constitution requires of the compact process. In order to assess the consequences of this requirement for the compacts at issue, other consider-

ations must necessarily come into play, including the standards to be applied by the Secretary of the Interior, pursuant to 25 USC 2710(d)(8), in approving a compact, in particular, a compact approved through procedures apparently acquiesced in by the executive and legislative branches of a state;[40] the standards by which the Secretary of the Interior will revisit prior approval of a compact;[41] and various equitable considerations pertinent to casinos that have already been built and are presently operating.

The analyses of the majority are deeply flawed and circular. As is typical in cases of this sort, the long-term consequences of the majority judgment cannot be fully predicted, but what is predictable is that there will be consequences in terms of the relationships between the branches of government. The result of the majority's analyses in this case is that a matter of fundamental policy concern to the people of this state—casino gambling and its social and economic impact—a realm in which the federal government has unequivocally authorized Michigan to exercise regulatory authority, has now been transformed into the exclusive province of a single public official, the Governor.[42] By concluding that

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[40] Generally, deliberate acts of any of the three branches of government are presumed constitutional and, moreover, "state officials and those with whom they deal are entitled to rely on a presumptively valid state [act], [performed] in good faith and by no means plainly unlawful." See *Lemon v Kurtzman,* 411 US 192, 209; 93 S Ct 1463; 36 L Ed 2d 151 (1973). See also *Thompson v Washington,* 179 US App DC 357; 551 F2d 1316 (1977), *Bd of Comm'rs of Wood Dale Pub Library Dist v Co of Du Page*, 103 Ill 2d 422; 469 NE2d 1370 (1984), and, of significant interest, *Lac Vieux Desert Band of Lake Superior Chippewa Indians v Michigan Gaming Control Bd,* 2002 WL 1592596 (WD Mich, 2002).

[41] The compacts at issue have already been approved by the Secretary of the Interior, and any declaratory judgment along the lines of this dissenting opinion would not, without further action by the Secretary, render such approval null and void.

[42] Moreover, I fear that the majority's "contractual" approach to Michigan constitutional law in this case cannot be cabined to apply only

tribal-state casino gambling compacts do not constitute legislation, and are not required to conform to the legislative process set forth in the Michigan Constitution, the majority has effectively ensured that in future cases the Legislature's role in approving such compacts will exist merely at the sufferance of the Governor. That is, according to the understanding of the majority, unless the Governor agrees in future compacts to affirmatively grant a role for the Legislature, it will have no role. Rather than both the executive and legislative branches being required to approve the expansion of casinos within Michigan, the approval of a single branch, the executive branch, will be sufficient.

The lead decision represents the first state supreme court decision in the United States to conclude that a tribal-state casino gambling compact does not constitute "legislation" and, therefore, does not require the approval of the branch of government that is most directly representative of the people.

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to tribal-state casino gambling compacts, and do not understand why it would not be equally applicable to *any* compact between Michigan and an Indian tribe, a sister state, or a sovereign nation to which the Governor may be inclined to unilaterally bind the state. The majority appears to grant the Governor a broad power, not even implicitly recognized in the Michigan Constitution, to bind the state as the Governor sees fit, as long as the Governor does so within the framework of the majority's "contractual" approach to compacts, i.e., an approach in which state compacts can be fully understood through resort to the four corners of the compact itself and without consideration to surrounding constitutional circumstances, including the Constitution's separation of powers doctrine, its legislative processes, and the specific limitations it places upon the individual branches of government.

BRYANT v OAKPOINTE VILLA NURSING CENTRE, INC

Docket Nos. 121723-121724. Argued January 13, 2004 (Calendar No. 2). Decided July 30, 2004. Rehearing denied *post*, at 1201.

Denise Bryant, as personal representative of the estate of Catherine Hunt, deceased, brought an action in the Wayne Circuit Court against Oakpointe Villa Nursing Centre, Inc., seeking damages for the decedent's death that resulted from injuries sustained while under the defendant's care. The claim alleged ordinary negligence. The court, Pamela Harwood, J., denied the defendant's motion for summary disposition that alleged that the claims sounded in medical malpractice. The plaintiff filed a first amended complaint alleging ordinary negligence by and through the defendant's employees generally, negligent infliction of emotional distress, and gross negligence by the defendant's employees generally. The ordinary negligence count contained four distinct claims against the defendant. First, negligently and recklessly failing to assure that the decedent was provided an accident-free environment; second, negligently and recklessly failing to train its nursing assistants to assess the risk of positional asphyxia by the decedent; third, negligently and recklessly failing to take steps to protect the decedent when, the day before the accident in which the decedent was asphyxiated, the decedent was discovered entangled between the bed rails and the mattress on her bed; and fourth, negligently and recklessly failing to inspect the beds, bed frames, and mattresses to assure that the risk of positional asphyxia did not exist for the decedent. The court, John A. Murphy, J., dismissed the complaint on the basis that the "ordinary negligence" count sounded in medical malpractice and that, although the ordinary negligence claims could be brought against the nursing assistants individually, those claims had not been pleaded properly. The plaintiff appealed to the Court of Appeals and also filed a notice of intent to sue in medical malpractice and refiled her claim. The circuit court denied the defendant's motion to dismiss that alleged that the period of limitations for the medical malpractice action had expired. The defendant appealed to the Court of Appeals. The Court of Appeals consolidated the appeals and in an unpublished opinion per curiam by JANSEN, P.J., and HOLBROOK, JR., J. (GRIFFIN, J., dissenting), agreed with the plaintiff that the case sounded in ordinary negligence. Unpublished opinion per curiam of the Court of Appeals, issued

May 21, 2002 (Docket Nos. 228972, 234992). The Supreme Court granted leave to appeal. 468 Mich 943 (2003).

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

The judgment of the Court of Appeals must be reversed and the case must be remanded to the circuit court for further proceedings.

The claim that the defendant negligently failed to respond after learning that the decedent's bedding arrangements created a risk of asphyxiation sounds in ordinary negligence. The claim regarding an accident-free environment sounds in strict liability and is not cognizable in either ordinary negligence or medical malpractice. The remaining claims sound in medical malpractice. Although these claims were filed after the applicable period of limitations had run and would ordinarily be time-barred, the procedural features of this case dictate that the plaintiff should also be permitted to proceed with her medical malpractice claims.

1. A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only within the course of a professional relationship. Second, medical malpractice claims necessarily raise questions involving medical judgment beyond the realm of common knowledge and experience and, thus, require expert testimony.

2. Here, a professional relationship existed to support a claim for medical malpractice.

3. The claim that the defendant knew of the risk of asphyxiation but negligently failed to prevent it from occurring sounds in ordinary negligence because no expert testimony is needed with regard to this issue.

4. Under the facts of this case, the ability to assess the risk of positional asphyxia, and thus the training of employees to properly assess that risk, involves the exercise of professional medical judgment and requires expert testimony. Plaintiff's failure to train claim thus sounds in medical malpractice.

5. In order to determine whether the defendant was negligent in assessing the risks posed by the decedent's bedding arrangement, the fact-finder must rely on expert testimony, and this claim also sounds in medical malpractice.

6. The plaintiff's failure to comply with the applicable statute of limitations with regard to the medical malpractice allegations is a product of an understandable confusion about the legal nature of the claims rather than a negligent failure to preserve her rights. In this case, and others now pending that involve similar procedural circumstances, the medical malpractice claims may proceed to trial.

Reversed and remanded.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that all of the plaintiff's claims sound in ordinary negligence. The issues in this matter are within the common knowledge and experience of laypersons.

Ordinary negligence may be committed in the course of medical care. This is what the plaintiff is alleging. The plaintiff's first claim should be read to allege that the defendant was obligated to provide an environment free of negligently caused accidents. This claim is one for ordinary negligence and is cognizable under Michigan law.

Plaintiff asserts that defendant failed to act once it had knowledge of a hazard, not that it breached a medical standard of care. Hence, the claim regarding the training of nursing assistants sounds in ordinary negligence.

The third and fourth claims, regarding defendant's actions with respect to the decedent becoming entangled in the bedding, assert the breach of duty that can be evaluated by ordinary jurors or laypersons and do not involve the breach of a medical standard of care. These claims allege ordinary negligence.

This action was brought well within the period of limitations for ordinary negligence actions or wrongful death actions that are based on medical malpractice. The period of limitations was tolled when the trial court ruled that the claims sounded in ordinary negligence, at least until the new trial judge reversed that decision. The decision of the Court of Appeals should be affirmed to the extent that it found that all the claims sounded in negligence.

1. NEGLIGENCE — MEDICAL MALPRACTICE.

The first issue in any purported medical malpractice action is whether the action is being brought against someone who, or an entity that, is capable of malpractice; the second issue is whether the claim sounds in medical malpractice.

2. NEGLIGENCE — MEDICAL MALPRACTICE.

A medical malpractice claim is distinguished by two defining characteristics; first, medical malpractice can occur only within the course of a professional relationship; second, medical malpractice claims necessarily raise questions involving medical judgment beyond the realm of common knowledge and experience.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Olsman, Mueller & James, P.C.* (by *Jules B. Olsman*), for the plaintiff.

Kitch Drutchas Wagner DeNardis & Valitutti (by *Susan Healy Zitterman*) and *Carol Holmes, P.C.* (by *Carol Holmes*), for the defendant.

MARKMAN, J. In this case, plaintiff, Denise Bryant, personal representative of the estate of her deceased aunt, Catherine Hunt, alleges that defendant Oakpointe Villa Nursing Centre, Inc. (Oakpointe), is liable for the death of her aunt, who died from positional asphyxiation while in defendant's care. Plaintiff has alleged that defendant was negligent in four distinct ways: (1) by failing to provide "an accident-free environment" for her aunt; (2) by failing to train its Certified Evaluated Nursing Assistants (CENAs) to recognize and counter the risk of positional asphyxiation posed by bed rails; (3) by failing to take adequate corrective measures after finding Ms. Hunt entangled in her bedding on the day before her asphyxiation; and (4) by failing to inspect plaintiff's bed arrangements to ensure "that the risk of positional asphyxia did not exist for plaintiff's decedent." We are required in this appeal to determine whether each claim sounds in medical malpractice or ordinary negligence.

Plaintiff's "accident-free environment" claim is one of strict liability; because medical malpractice requires proof of negligence, this claim is not legally cognizable. Moreover, under the standards set forth in *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999), plaintiff's failure-to-train and failure-to-inspect claims sound in medical malpractice. Plaintiff's claim that defendant failed to take action after its employees found Ms. Hunt entangled in her bedding on the day before her asphyxiation, however, sounds in ordinary negligence.

We reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for proceedings on plaintiff's claim of ordinary negligence and,

given the equities in this case, on her two medical malpractice claims as well.

I. BACKGROUND

Plaintiff's decedent, Catherine Hunt, was a resident of Oakpointe. She suffered from multi-infarct dementia[1] and diabetes, had suffered several strokes, and required twenty-four-hour-a-day care for all her needs, including locomotion, dressing, eating, toileting, and bathing. Hunt's condition impaired her judgment and reasoning ability and, in turn, caused cerebral atrophy. Hunt had no control over her locomotive skills and was prone to sliding about uncontrollably and, therefore, she was at risk for suffocation by "positional asphyxia."[2]

Because Hunt had no control over her locomotive skills, Dr. Donald Dreyfuss, defendant's medical director, authorized the use of various physical restraints. These included bed rails to keep Hunt from sliding out

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[1] According to Tabers Cyclopedic Medical Dictionary (2002), "dementia" constitutes

> progressive, irreversible decline in mental function, marked by memory impairment and, often, deficits in reasoning, judgment, abstract thought, registration, comprehension, learning, task execution, and use of language. The cognitive impairments diminish a person's social, occupational, and intellectual abilities.

"Multi-infarct dementia" constitutes

> [d]ementia resulting from multiple small strokes. . . . The cognitive deficits of multi-infarct dementia appear suddenly, in "stepwise" fashion. The disease is . . . most common in patients with hypertension, diabetes mellitus, or other risk factors for generalized atherosclerosis. Brain imaging in patients with this form of dementia shows multiple lacunar infarctions. [*Id*.]

[2] "Positional asphyxia" refers to suffocation that results when someone's position prevents them from breathing properly. See <http://en.wikipedia.org/wiki/Positional_asphyxia> (accessed July 27, 2004).

of the bed, as well as a restraining vest that kept her from moving her arms, thereby impeding her ability to slide. The authorized restraints also included wedges or bumper pads that were placed on the outer edge of the mattress to keep her from hurting herself by striking, or entangling herself in, the rails. The use of restraints of this sort is regulated by the state of Michigan to prevent overuse and excessive patient confinement, and must be authorized by a physician.[3]

Several persons cared for Hunt on a twenty-four-hour basis, including registered nurses, practical nurses, and nursing assistants (CENAs). On March 1, 1997, nursing assistants Monee Olds and Valerie Roundtree noticed that Hunt was lying in her bed very close to the bed rails and was tangled in her restraining vest, gown, and bed sheets. They untangled her from her vest and gown and attempted to position bed wedges onto decedent's bed to prevent her from slipping into a gap that existed between the mattress and bed rail. The nursing assistants testified that they informed their supervisor that the wedges were not sticking properly and kept falling off, and that better care should be taken in that regard for all patients or else the patients could hurt or even fatally injure themselves.[4]

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[3] MCL 333.20201(2)(l) specifies, with regard to restraints generally, that "[a] patient or resident is entitled to be free from mental and physical abuse and from physical and chemical restraints, except those restraints authorized in writing by the attending physician for a specified and limited time . . . ." Regarding bed rails in particular, MCL 333.21734(1) provides, in relevant part:

> A nursing home shall provide bed rails to a resident only upon receipt of a signed consent form authorizing bed rail use and a written order from the resident's attending physician that contains statements and determinations regarding medical symptoms and that specifies the circumstances under which bed rails are to be used.

[4] Whether the CENAs actually made the report, as plaintiff notes in her brief to this Court, is in dispute.

The next day, March 2, 1997, Hunt slipped between the rails of her bed and was in large part out of the bed with the lower half of her body on the floor but her head and neck under the bed side rail and her neck wedged in the gap between the rail and the mattress, thus preventing her from breathing. When Hunt was extricated, she was transported to a hospital. There was no recovery and, on March 4, 1997, she was taken off life support and died. The cause of her death was listed as positional asphyxia.

Plaintiff filed a suit alleging ordinary negligence against defendant in the Wayne Circuit Court in April 1998. In May 1998, defendant moved for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8), on the basis that plaintiff's claims sounded in medical malpractice rather than ordinary negligence. In August 1998, Judge Pamela Harwood ruled that plaintiff's complaint sounded in ordinary negligence and allowed the case to proceed. In January 1999, Judge Harwood recused herself from the case and it was reassigned to Judge John Murphy.

In June 1999, plaintiff filed a first amended complaint still alleging ordinary negligence. It contained three counts. These were, first, ordinary negligence "by and through" defendant's employees generally; second, negligent infliction of emotional distress; and third, gross negligence by defendant's employees generally. Plaintiff's "ordinary negligence" count—the claim at issue in this appeal—contained four distinct claims against defendant:

> (a) Negligently and recklessly failing to assure that plaintiff's decedent was provided with an accident-free environment;
>
> (b) Negligently and recklessly failing to train CENAs to assess the risk of positional asphyxia by plaintiff's decedent

despite having received specific warnings by the United States Food and Drug Administration about the dangers of death caused by positional asphyxia in bed rails;

(c) Negligently and recklessly failing to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 entangled between the bed rails and the mattress;

(d) Negligently and recklessly failing to inspect the beds, bed frames and mattresses to assure that the risk of positional asphyxia did not exist for plaintiff's decedent.

In October 1999, defendant again moved for summary disposition on the basis that plaintiff's new claims of ordinary negligence, in fact, sounded in medical malpractice. Unlike Judge Harwood, Judge Murphy, in June 2000, agreed with defendant and ruled that plaintiff's "ordinary negligence" count sounded in medical malpractice.[5] In addition, he ruled that, although ordinary negligence claims could be brought against the nursing assistants individually, these claims had not properly been pleaded. The court therefore dismissed the complaint in its entirety without prejudice.

Plaintiff appealed the dismissal to the Court of Appeals. Meanwhile, however, seeking to comply with Judge Murphy's decision, plaintiff, in August 2000, filed a notice of intent to sue in medical malpractice pursuant to MCL 600.2912b and, in February 2001, refiled her case, filing a second amended complaint alleging medical malpractice. Defendant again brought a motion to dismiss pursuant to 2.116(C)(7), on the basis that the two-year medical malpractice period of limitations had expired. Judge Murphy, in June 2001, disagreed and held that the period of limitations was tolled when Judge Harwood issued her August 1998 decision until that

[5] The trial court found that this case was indistinguishable from *Starr v Providence Hosp*, 109 Mich App 762; 312 NW2d 152 (1981), and *Waatti v Marquette Gen Hosp, Inc*, 122 Mich App 44; 329 NW2d 526 (1982).

decision was reversed by himself in June 2000. Defendant appealed this decision to the Court of Appeals.

The Court of Appeals consolidated plaintiff's appeal from Judge Murphy's June 2000 decision with defendant's appeal from his June 2001 decision. The Court of Appeals held in plaintiff's favor, finding that the case sounded in ordinary negligence.[6] The Court recognized that, having so held, the issue regarding the tolling of the period of limitations was moot. However, the Court concluded, in dictum, that if plaintiff's claim had sounded in medical malpractice, *Scarsella v Pollak,* 461 Mich 547; 607 NW2d 711 (2000), would require its dismissal with prejudice. Defendant appealed the Court of Appeals decision that plaintiff's case sounded in ordinary negligence, and we granted leave to appeal in this case and in *Lawrence v Battle Creek Health Systems*, 468 Mich 944 (2003), ordering that the two cases be argued and submitted together.[7]

II. STANDARD OF REVIEW

In determining whether the nature of a claim is ordinary negligence or medical malpractice, as well as whether such claim is barred because of the statute of limitations, a court does so under MCR 2.116(C)(7). We review such claims de novo. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001). In making a decision under MCR 2.116(C)(7), we consider all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it. *Fane*, *supra*; see also MCR 2.116(G)(5)-(6).

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[6] Unpublished opinion per curiam, issued May 21, 2002 (Docket Nos. 228972, 234992).

[7] 468 Mich 943 (2003).

III. MEDICAL MALPRACTICE VS. ORDINARY NEGLIGENCE

The first issue in any purported medical malpractice case concerns whether it is being brought against someone who, or an entity that, is capable of malpractice. In addressing this issue, defendant argues that, because MCL 600.5838a refers to "the medical malpractice of . . . an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment," plaintiff's claim sounds in medical malpractice for the simple reason that it alleges negligence committed by an employee of a licensed health care facility who was engaging in medical care and treatment. In response, we point out that MCL 600.5838a(1) is an accrual statute that indicates when a medical malpractice cause of action accrues. Additionally, as we noted in *Adkins v Annapolis Hosp*, 420 Mich 87, 94-95; 360 NW2d 150 (1984), this statute likewise expands the traditional common-law list of those who are subject to medical malpractice actions.[8] However, we caution that, although § 5838a expands the category of who may be

[8] In construing the former MCL 600.5838, in which, in the context of an accrual statute, the Legislature listed a wide array of specific health care professionals and entities who could potentially be subject to medical malpractice, we stated:

> While it is true that [the former] RJA § 5838 is an accrual provision, not a definitional section, there can be no other meaning of this language other than that [those health care occupations listed in the former § 5838] may be guilty of malpractice. Otherwise, there would be no reason to list those occupations in an accrual section. A malpractice action cannot accrue against someone who, or something that, is incapable of malpractice.
>
> . . . [The former § 5838] evidenced a legislative intent to alter the common law and subject other health professionals [as opposed to physicians and surgeons only] to potential liability for malpractice. [*Adkins,* 420 Mich 94-95.]

subject to a medical malpractice action, it does not define what constitutes a medical malpractice action.[9] The fact that an employee of a licensed health care facility was engaging in medical care at the time the alleged negligence occurred means that the plaintiff's claim may *possibly* sound in medical malpractice; it does not mean that the plaintiff's claim *certainly* sounds in medical malpractice.

The former § 5838 was amended by 1986 PA 178, as a result of which, the accrual provision relevant to medical malpractice actions was reenacted under the current § 5838a. Instead of listing specific health care professionals and entities subject to medical malpractice, the current § 5838a refers generally to a "licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment . . . ."

[9] Perhaps complicating an understanding of this body of law is this Court's unanimous peremptory order in 1998 in *Regalski v Cardiology Assoc, PC,* 459 Mich 891 (1998). In *Regalski*, we were presented with a case in which the Court of Appeals had held that the plaintiff's claim that the defendant's medical technician was negligent in assisting the patient's movement out of a wheelchair and onto the examining table was a matter of ordinary negligence. We reversed and concluded that this was not ordinary negligence but medical malpractice.

While the facts of that case were only briefly stated, we interpret this Court's *Regalski* holding to mean that the facts in that case led to the conclusion that the particular assistance rendered to that patient involved a professional relationship and implicated a medical judgment.

Even in the wake of *Regalski,* then, injuries incurred while a patient is being transferred from a wheelchair to an examining table (to take one example) may or may not implicate professional judgment. The court must examine the particular factual setting of the plaintiff's claim in order to determine whether the circumstances—for example, the medical condition of the plaintiff or the sophistication required to safely effect the move—implicate medical judgment as explained in *Dorris*.

In citing the medical malpractice accrual statute, MCL 600.5838a(1), in *Regalski*, we have caused some, including defendant herein, to venture that we were holding that this statute can also be understood as defining medical malpractice. This understanding is incorrect for the reasons that we have stated.

The second issue concerns whether the alleged claim sounds in medical malpractice. A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only " 'within the course of a professional relationship.' " *Dorris*, *supra* at 45 (citation omitted). Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id*. at 46. Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id*. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

In considering whether there has been a professional relationship between the plaintiff and the defendant, *Dorris* is central to our analysis. In that case, this Court held: " 'The key to a medical malpractice claim is whether it is alleged that the negligence occurred within the course of a professional relationship.' " *Id.* at 45, quoting *Bronson v Sisters of Mercy Health Corp*, 175 Mich App 647, 652; 438 NW2d 276 (1989). A professional relationship sufficient to support a claim of medical malpractice exists in those cases in which a licensed health care professional, licensed health care facility, or the agents or employees of a licensed health care facility, were subject to a contractual duty that required that professional, that facility, or the agents or employees of that facility, to render professional health care services to the plaintiff. See *Dyer v Trachtman*, 470

Mich 45; 679 NW2d 311 (2004);[10] *Delahunt v Finton,* 244 Mich 226, 230; 221 NW 168 (1928) ("Malpractice, in its ordinary sense, is the negligent performance by a physician or surgeon of the duties devolved and incumbent upon him on account of his contractual relations with his patient.");[11] see also *Hill v Kokosky*, 186 Mich App 300, 302-303; 463 NW2d 265 (1990); *Oja v Kin,* 229 Mich App 184, 187; 581 NW2d 739 (1998).

After ascertaining that the professional relationship test is met, the next step is determining whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience. If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved. As we stated in *Dorris*:

> The determination whether a claim will be held to the standards of proof and procedural requirements of a medi

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[10] We held in *Dyer* that in an action for negligence in performing an independent medical examination (IME), the plaintiff's claim sounded in medical malpractice rather than ordinary negligence, but that a physician incurred only a limited form of medical malpractice liability in performing the IME. *Id*. This conclusion was based on the contractual relationship between the parties.

[11] When the *Delahunt* decision was rendered in 1928, only physicians and surgeons could be sued in medical malpractice. See, for example, *Kambas v St Joseph's Mercy Hosp of Detroit,* 389 Mich 249; 205 NW2d 431 (1973). As observed in n 8, the Legislature has since expanded the common-law list of those who potentially may be subject to medical malpractice liability. See MCL 600.5838a; *Adkins,* 420 Mich 94-95.

> cal malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. [*Dorris*, *supra* at 46, citing *Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981).]

Contributing to an understanding of what constitutes a "medical judgment" is *Adkins v Annapolis Hosp,* 116 Mich App 558; 323 NW2d 482 (1982), in which the Court of Appeals held:

> [M]edical malpractice . . . has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science. [Citation omitted.]

IV. ANALYSIS OF ALLEGATIONS

We now turn to the complaint in the present case.[12] Plaintiff alleges that defendant is liable for: (1) negligently failing to assure that plaintiff's decedent was provided with an accident-free environment; (2) negligently failing to inspect the bed, bed frame, and mattress to assure the plaintiff's decedent was not at risk of suffocation; (3) negligently failing to properly train its CENAs regarding the risk to decedent of positional asphyxiation posed by the bed rails; and (4) negligently failing to take steps to protect decedent from further harm or injury after discovering her entangled between her bed rail and mattress on March

[12] Because the Court of Appeals majority in this case based its decision on plaintiff's June 1999 first amended complaint, we will use the claims in that complaint to analyze this case.

1. We address the application of *Dorris* to each of these claims below.[13]

A. PROFESSIONAL RELATIONSHIP

The first question in determining whether these claims sound in ordinary negligence or medical malpractice is whether there was a professional relationship between the allegedly negligent party and the injured party. This analysis is fairly straightforward and, in this case, is identical for each of plaintiff's claims. Because defendant, Oakpointe Villa Nursing Centre, Inc., a licensed health care facility, was under a contractual duty requiring both it and its employees to render professional health care services to plaintiff's decedent, a professional relationship existed to support a claim for medical malpractice.

B. MEDICAL JUDGMENT VS. LAY KNOWLEDGE

The second question is whether the acts of negligence alleged "raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment." *Dorris, supra* at 46.

1. "ACCIDENT-FREE ENVIRONMENT"

Plaintiff's first claim is that defendant "fail[ed] to assure that plaintiff's decedent was provided with an accident-free environment." This is an assertion of strict liability that is not cognizable in either ordinary negligence *or* medical malpractice. With reference to

[13] As stated, we address only count I of plaintiff's first amended complaint. Counts II and III (negligent infliction of emotional distress and gross negligence) may be addressed by the parties on remand in light of our decision regarding count I.

ordinary negligence, the test is whether the defendant breached a duty that proximately caused an injury to the plaintiff. See, e.g., *Haliw v Sterling Hts,* 464 Mich 297, 309-310; 627 NW2d 581 (2001). With reference to medical malpractice law, the Legislature has directed in MCL 600.2912a *et seq.*, that negligence is the standard. Thus, strict liability is inapplicable to either ordinary negligence or medical malpractice. As a result, because this claim is unrecognized in this area of our law, this allegation states no claim at all.

2. FAILURE TO TRAIN

Next, we must determine whether plaintiff's claim that defendant failed to train its staff "to assess the risk of potential asphyxia" is one that requires expert testimony on medical issues. In *Dorris* at 47, we stated that the plaintiff's allegations "concerning staffing decisions and patient monitoring involve questions of professional medical management and are not issues of ordinary negligence that can be judged by the common knowledge and experience of a jury." That is not to say, however, that *all* cases concerning failure to train health care employees in the proper monitoring of patients are claims that sound in medical malpractice. The pertinent question remains whether the alleged facts raise questions of medical judgment or questions that are within the common knowledge and experience of the jury. *Id.* at 46.

In *Dorris,* the staff training and patient monitoring issue sounded in medical malpractice because "[t]he ordinary layman does not know the type of supervision or monitoring that is required for *psychiatric* patients in a *psychiatric* ward." *Id.* at 47 (emphasis added). That is, knowing how to correctly monitor psychiatric patients requires a specialized knowledge of the complex diseases of the mind that may affect psychiatric pa-

tients and how those diseases may influence their behavior, and such knowledge is simply not within the realm of "common knowledge."

Similarly, in order to assess the risk of positional asphyxiation posed by bed railings, specialized knowledge is generally required, as was notably shown by the deposition testimony of plaintiff's own expert, Dr. Steven Miles. Dr. Miles testified that hospitals may employ a number of different bed rails depending on the needs of a particular patient.[14] Accordingly, the assessment of whether a bed rail creates a risk of entrapment for a patient requires knowledge of that patient's medical history and behavior.[15] It is this particularized knowledge, according to Dr. Miles, that should prompt a treating facility to use the bedding arrangement that best suits a patient's "individualized treatment plan," and to properly train its employees to recognize any risks inherent in that bedding arrangement and to adequately monitor patients to minimize those risks.

In describing the appropriate arrangement for plaintiff's decedent, Dr. Miles testified:

> This patient had a long history of slide and fall-type injuries, and her entire environment should have been adjusted as part of the individualized treatment plan for this.

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[14] Deposition Testimony of Dr. Steven Miles ("Well, first off, there's no such thing as generic side rails.").

[15] Dr. Miles testified:

> *Q.* Okay. When you indicated that [Hunt] required assistance for activities of daily living, are all persons who require assistance for such activities at risk for entrapment?
>
> *A.* No. As I stated in my previous comment, that the overall profile is one of being frail and disabled and having poor judgment and a history of impulsive behavior and a history of previous near entrapments. These are the people who are at risk, not the presence of any one of those.

> And furthermore, the facility had a general obligation to all of its patients, including Ms. Hunt, to provide beds that did not prevent—present a space that was large enough for an entrapment asphyxiation. And they should have been particularly aggressive in using that type of equipment for Ms. Hunt.

This testimony demonstrates that the ability to assess the risk of positional asphyxia and, thus, the training of employees to properly assess that risk, involves the exercise of professional judgment. The picture necessarily gets more complicated when one considers additional restraint mechanisms used in tandem with bed railing such as vests or pelvic restraints to promote the safety of patients.

Indeed, an article in the Journal of the American Geriatrics Society coauthored by plaintiff's expert, Dr. Miles, stresses the need for "clinical and ergonomic changes" in the use of bed rails and decries the widespread use of bed railings "without . . . a clear sense of their role in a treatment plan and without regulatory attention to their design."[16] This article concludes with a call for nursing homes to limit the use of bedrails, but notes that research into the relative costs and benefits of using bedrails is "needed urgently."[17]

This much is clear: in order to determine whether defendant adequately trained its CENAs to recognize the risks posed by particular configurations of bed rails and other prescribed restraint systems, therefore, the factfinder will generally require expert testimony on what specialists in the use of these systems currently know about their risks and on how much of this knowledge defendant ought to have conveyed to its staff.

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[16] Kara Parker and Steven H. Miles, *Deaths caused by bedrails,* 45 J Am Geriac Soc 797 (1997).

[17] *Id.*, p 799.

Given the patent need in this case for expert testimony regarding plaintiff's claim of failure to train, we conclude that this claim sounds in medical malpractice under *Dorris*.

3. FAILURE TO INSPECT

Next, plaintiff alleges that defendant is liable for "[n]egligently and recklessly failing to inspect the beds, bed frames and mattress to assure that the risk of positional asphyxia did not exist for plaintiff's decedent." It is clear from the record in this case that plaintiff's "failure to inspect" claim is not that defendant and its agents actually failed to *check* Ms. Hunt's bedding arrangements,[18] but that defendant failed to recognize that her bedding arrangements posed a risk of asphyxiation.

As shown above, and as demonstrated through the deposition testimony of plaintiff's expert, the risk of asphyxiation posed by a bedding arrangement varies from patient to patient. The restraining mechanisms appropriate for a given patient depend upon that patient's medical history. Thus, restraints such as bed railings are, in the terminology of plaintiff's expert physician, part of a patient's "individualized treatment plan."

The risk assessment at issue in this claim, in our judgment, is beyond the ken of common knowledge, because such an assessment require understanding and consideration of the risks and benefits of using and maintaining a particular set of restraints in light of a patient's medical history and treatment goals. In order

[18] Indeed, plaintiff repeatedly stresses that defendant's agents saw the gap between the bed and the railing and failed to recognize that this gap created a risk of asphyxiation. See § IV(B)(4) later in this opinion.

to determine then whether defendant has been negligent in assessing the risk posed by Hunt's bedding arrangement, the fact-finder must rely on expert testimony. This claim, like the claim described above, sounds in medical malpractice.

4. FAILURE TO TAKE STEPS

We turn, finally, to a claim fundamentally unlike those discussed previously. Plaintiff alleges that defendant "[n]egligently and recklessly fail[ed] to take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattress."

This claim refers to an incident on March 1, 1997—the day before Ms. Hunt was asphyxiated—when two of defendant's CENAs found Ms. Hunt tangled in her bedding and dangerously close to asphyxiating herself in the bed rails. According to the CENAs, they moved Ms. Hunt away from the rail and informed their supervising nurses that Ms. Hunt was at risk of asphyxiation.

Plaintiff now contends, therefore, that defendant had notice of the risk of asphyxiation through the knowledge of its agents and, despite this knowledge of the problem, *defendant did nothing to rectify it*. It bears repeating that plaintiff's allegation in this claim is not that defendant took inappropriate steps in dealing with the patient's compulsive sliding problem or that defendant's agents were negligent in creating the hazard in the first place. Instead, plaintiff claims that defendant knew of the hazard that led to her death and did nothing about it.

This claim sounds in ordinary negligence. No expert testimony is necessary to determine whether defendant's employees should have taken *some* sort of cor-

rective action to prevent future harm after learning of the hazard. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges.

Suppose, for example, that two CENAs employed by defendant discovered that a resident had slid underwater while taking a bath. Realizing that the resident might drown, the CENAs lift him above the water. They recognize that the resident's medical condition is such that he is likely to slide underwater again and, accordingly, they notify a supervising nurse of the problem. The nurse, then, does nothing at all to rectify the problem, and the resident drowns while taking a bath the next day.

If a party alleges in a lawsuit that the nursing home was negligent in allowing the decedent to take a bath under conditions known to be hazardous, the *Dorris* standard would dictate that the claim sounds in ordinary negligence. No expert testimony is necessary to show that the defendant acted negligently by failing to take any corrective action after learning of the problem. A fact-finder relying only on common knowledge and experience can readily determine whether the defendant's response was sufficient.

Similarly, no expert testimony is required here in order to determine whether defendant was negligent in failing to respond after its agents noticed that Ms. Hunt was at risk of asphyxiation. Professional judgment might be implicated if plaintiff alleged that defendant responded inadequately, but, given the substance of plaintiff's allegation in this case, the fact-finder need only determine whether *any* corrective action to reduce the risk of recurrence was taken after defendant's agents noticed that Ms. Hunt was in peril. Thus,

plaintiff has stated a claim of ordinary negligence under the standards articulated in *Dorris*.

V. STATUTE OF LIMITATIONS

Having decided that two of plaintiff's claims sound in medical malpractice, we must determine whether plaintiff's medical malpractice claims are now time-barred. See MCR 2.116(C)(7).

The period of limitations for a medical malpractice action is ordinarily two years. MCL 600.5805(6). According to MCL 600.5852, plaintiff had two years from the date she was issued letters of authority as personal representative of Hunt's estate to file a medical malpractice complaint. Because the letters of authority were issued to plaintiff on January 20, 1998, the medical malpractice action had to be filed by January 20, 2000. Thus, under ordinary circumstances, plaintiff's February 7, 2001, medical malpractice complaint (her third complaint in total) would be time-barred.

The equities of this case, however, compel a different result. The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris*. Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. MCR 7.316(A)(7). However, in future cases of this nature, in which the line between ordinary negligence and medical malpractice is not easily distinguishable, plaintiffs are

advised as a matter of prudence to file their claims alternatively in medical malpractice and ordinary negligence within the applicable period of limitations.[19]

VI. CONCLUSION

Plaintiff has stated two claims that require expert testimony and therefore sound in medical malpractice. Although these claims were filed after the applicable period of limitations had run and would ordinarily be time-barred, the procedural features of this case dictate that plaintiff should be permitted to proceed with her medical malpractice claims. The claim that defendant negligently failed to respond after learning that Ms. Hunt's bedding arrangements created a risk of asphyxiation sounds in ordinary negligence. Finally, plaintiff's claim regarding an "accident-free environment" sounds in strict liability and is not cognizable. Accordingly, we reverse the judgment of the Court of Appeals and remand this case to the circuit court for further proceedings consistent with this opinion.

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

KELLY, J. (*dissenting*). The question in this case is whether plaintiff's claims sound in medical malpractice or ordinary negligence. I disagree with the majority's reading of plaintiff's complaint and believe that all of plaintiff's claims sound in ordinary negligence. I also disagree with the majority's analysis of the statute of limitations issue.

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[19] If the trial court thereafter rules that the claim sounds in ordinary negligence and not medical malpractice, and may thus proceed in ordinary negligence, and this ruling is subsequently reversed on appeal, the plaintiff will nonetheless have preserved the right to proceed with the medical malpractice cause of action by having filed in medical malpractice within the period of limitations.

BACKGROUND

Plaintiff's decedent was a resident of defendant's nursing care facility. Among her needs were safety restraints on her bed to prevent her from falling out and injuring herself. In early 1997, defendant's nurses' assistants noted that she had developed a propensity to move around in bed. Because of her petite stature and the configuration of the bed, she was in danger of slipping under the bedrails and catching her neck. This could lead to strangulation and death.

Shortly after, the assistants' fears were realized. First, they discovered plaintiff's decedent "tangled up in the rails," her clothes, and the bedding. They successfully extricated her, but feared that she was in grave danger of being hanged. Yet, no change was made in the restraint configuration. The next day, she was discovered caught by her neck under the rails. This time, she did not recover. She died two days later after being removed from life support.

Plaintiff brought suit against the facility. Following pretrial motions for summary disposition, plaintiff was allowed to file a first amended complaint in June 1999. She alleged three counts of negligence: ordinary negligence, negligent infliction of emotional distress, and gross negligence.[1] *Ante* at 417. Central to the resolution of this case is plaintiff's count for ordinary negligence.

The ordinary negligence count consisted of four distinct claims. The first was that defendant, by providing medical care and housing to plaintiff's decedent,

[1] Plaintiff alleged that defendant negligently inflicted emotional distress on her by attempting to conceal the true circumstances of her decedent's death. The third count alleged that the nurses' assistants were grossly negligent for failing to inform their supervisors that they had found decedent entangled in her bedding the day before her death.

owed her decedent a duty to provide an accident-free environment. Defendant had a duty, plaintiff asserted, to assure that plaintiff's decedent was not subjected to an unreasonable risk of injury.

Second, plaintiff asserted that defendant breached its duty to train its staff to recognize the danger posed by bedrails. According to plaintiff's complaint, defendant had received specific information about this danger from the United States Food and Drug Administration (FDA). The allegation is that defendant failed to take precautions or share this information with its staff.

Third, plaintiff asserted that defendant discovered plaintiff's decedent caught between the rails and mattress. Plaintiff complains that defendant failed to prevent a recurrence by not remedying the rails-mattress configuration.

Fourth, plaintiff asserted that defendant had failed to inspect the bed's configuration to ensure that a danger of strangulation was not present.

Defendant moved for summary disposition under MCR 2.116(C)(7), and the circuit court granted the motion. It determined that plaintiff's ordinary negligence claims were really allegations of medical malpractice.

Plaintiff appealed to the Court of Appeals. She also took measures to preserve her claims as malpractice claims by filing an amended complaint and a notice of intent to sue pursuant to MCL 600.2912b. Defendant moved to dismiss, asserting that the suit was time-barred under the medical malpractice statutory period of limitations. MCL 600.5805(6). When the circuit court held that the statutory period had been tolled, defendant went to the Court of Appeals.

The Court of Appeals consolidated both parties' appeals. It concluded that plaintiff's claims sounded in ordinary negligence, adding that they would be barred by the limitations period if they sounded in medical malpractice. Unpublished opinion per curiam, issued May 21, 2002 (Docket Nos. 228972, 234992). We granted defendant's subsequent application for leave to appeal.[2] 468 Mich 943 (2003).

The majority determines that only one of plaintiff's claims sounds in ordinary negligence, that another is not cognizable under Michigan law, and that the other two are medical malpractice claims. It bases its holding on two facts: One, defendant did not respond at all upon finding plaintiff's decedent entangled in her bedding and, therefore, one of plaintiff's claims is for ordinary negligence. Two, the use of bedrails must be prescribed by a medical professional and, therefore, the remaining claims necessarily sound in medical malpractice.

STANDARD OF REVIEW

We review motions for summary disposition under MCR 2.116(C)(7) de novo. We accept the allegations in the complaint and documentary evidence as true unless other documents specifically contradict them. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

MEDICAL MALPRACTICE VERSUS ORDINARY NEGLIGENCE

In *Adkins v Annapolis Hosp,*[3] we recognized that ordinary negligence could occur in the course of medical

[2] We also ordered that the case be argued and submitted with *Lawrence v Battle Creek Health Systems,* 468 Mich 944 (2003).

[3] 420 Mich 87; 360 NW2d 150 (1984). See also *Dyer v Trachtman*, 470 Mich 45, 54 n 5; 679 NW2d 311 (2004).

care. In this case, plaintiff is alleging that ordinary negligence occurred. She does not dispute that a professional medical relationship existed between defendant and her decedent. But she relies on the established fact that every medical professional remains under a duty to exercise reasonable care. Also, professional standards of medical care supplement but do not necessarily supplant the ordinary duty of care.

Various differences exist between medical malpractice and negligence. When medical malpractice occurs, there has been a failure or omission that cannot be assessed by a layperson; it involves a matter that requires the exercise of professional medical judgment. Without expert testimony, the ordinary juror cannot determine if a defendant medical professional has fulfilled its duty of professional care. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 47; 594 NW2d 455 (1999). By contrast, expert witnesses are not always required in ordinary negligence actions because the trier of fact can often rely on its own common knowledge and experience. In addition, medical malpractice actions involve the alleged breach of medical standards of care; negligence actions do not.

THE NEGLIGENCE ALLEGED

Here, plaintiff's amended complaint alleged that defendant was negligent in four ways. Defendant is alleged to have breached its duties to

> (a) . . . assure that plaintiff's decedent was provided with an accident-free environment;
>
> (b) . . . train [nurses' assistants] to assess the risk of positional asphyxia by plaintiff's decedent despite having received specific warnings . . . ;

(c) . . . take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattress;

(d) . . . inspect the beds, bed frames and mattresses to assure that the risk of positional asphyxia did not exist for plaintiff's decedent.

With respect to the first claim, I disagree with the majority that plaintiff's assertion of a duty to provide an accident-free environment is not cognizable under Michigan law. *Ante* at 425-426. We have consistently held that the nature of the claim alleged is based on the underlying facts. It is independent of the words used to describe it. See *Dorris* at 43.

Plaintiff's decedent was in defendant's custodial care. As the Court of Appeals stated, defendant was obligated to take reasonable precautions to provide a reasonably safe environment. Unpublished opinion per curiam, issued May 21, 2002 (Docket Nos. 228972, 234992), citing *Owens v Manor Health Care Corp*, 159 Ill App 3d 684, 688; 512 NE2d 820 (1987). A breach of this duty can support a claim for ordinary negligence. Plaintiff's first claim should be read to mean that defendant was obligated to provide an environment free of negligently caused accidents.

Contrary to the majority's reading of this claim, plaintiff has not asserted that defendant was the guarantor of the safety of plaintiff's decedent. The ordinary juror can assess whether defendant's alleged actions or inactions constituted reasonable measures to fulfill its duty.

The second claim is that defendant breached its duty to train its nurses' assistants. I agree with the majority that assessing the medical needs of patients requires medical expertise. Similarly, assessing whether those needs were adequately addressed requires medical ex-

pertise. See part IV(B)(2), *ante* at 426-429. However, a fair reading of this claim reveals that plaintiff is not challenging defendant's assessment of her decedent's medical needs. Moreover, plaintiff is not challenging whether bed rails and other restraints were appropriately prescribed.

Instead, plaintiff asserts that defendant knew of the dangers posed by bed rails, yet, it took no steps to pass this information along to its employees. As the majority opines,

> [n]o expert testimony is necessary to determine whether [defendant] should have taken *some* sort of corrective action to prevent future harm after learning of the hazard. The fact-finder can rely on common knowledge and experience in determining whether defendant ought to have made an attempt to reduce a known risk of imminent harm to one of its charges.[4]

"Some sort of corrective action" may include, as plaintiff alleges, training employees or passing along specific information to them that it has learned from other employees or the FDA. Plaintiff asserts that defendant failed to act once it had knowledge of a hazard, not that it breached a medical standard of care. Hence, this claim sounds in ordinary negligence as well.

Plaintiff's third and fourth claims concern defendant's actions with respect to her decedent becoming entangled in the bedding. Plaintiff alleged that defendant failed to "take steps to protect plaintiff's decedent when she was, in fact, discovered on March 1 [1997] entangled between the bed rails and the mattress" and to "inspect the beds, bed frames and mattresses to assure that the risk of positional asphyxia did not exist for plaintiff's decedent."

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[4] See *ante* at 430-431, discussing plaintiff's claim for defendant's failure to respond after initially finding plaintiff's decedent entangled in her bedding.

Plaintiff asserts that the nurses' assistants employed by defendant failed to notify their supervisors when plaintiff's decedent was found caught in the bedrails on the first occasion. Alternatively, plaintiff asserts that a warning was given to the supervisors that they disregarded.

Again, plaintiff states: they "[n]egligently and recklessly fail[ed] to inspect the beds, bed frames and mattresses to assure that the risk of positional asphyxia did not exist . . ." and "to take steps to protect plaintiff's decedent . . . ." These allegations assert the breach of a duty of due care owed by defendant to plaintiff's decedent that can be evaluated by ordinary jurors.

Defendant's nurses' assistants were alerted to the danger when two of them first found plaintiff's decedent trapped in the bedrails. One specifically testified that, although she did not comprehend the medical needs of plaintiff's decedent, she recognized that the decedent was in serious physical danger. She expressed to her supervisor her fear that the elderly woman would be found dead if something were not done.

Plaintiff has presented evidence that defendant's nurses' assistants did not require medical training to understand that this small, frail person could again slip under the bedrail and jam her neck, endangering her life. Medical training was not needed to instruct them that the bedrail-mattress configuration had to be changed.

Laypersons can properly assess whether the manner in which bedrails and mattresses are configured creates an unreasonable risk of harm to a person like plaintiff's decedent. The claims do not involve the breach of a medical standard of care. They involve simple neglect to act or ordinary negligence, as the majority concedes.

Unlike the majority, I do not place undue emphasis on the fact that the nurses' assistants had previously discovered plaintiff's decedent in a dangerous position. *Ante* at 431-432. Any person caring for her could have recognized the danger that the bedding posed to a petite, frail, and elderly person who lacked normal control over her movements.[5]

The danger here was similar to that experienced by an infant in a crib whose mattress is too small and whose rails allow the baby to slip through. Those caring for such a child would quickly recognize the danger, and an expert would not be required to point it out. Similarly, ordinary jurors can assess whether defendant's caregivers here should have recognized the danger and acted with due care.

As stated earlier in this opinion, the nature of the claim is independent of the words used to describe it. Plaintiff used the proper term "positional asphyxia" to describe being hanged. However, use of the medical term does not transform plaintiff's negligence claim into one sounding in malpractice.

Defendant's supposition that ordinary people are incapable of recognizing an obvious danger of hanging is untenable, particularly here where untrained people actually did recognize the danger. The assessment of a hazard does not require professional training merely because a professional is capable of assessing it as well and can explain the exact mechanism of the danger. If that were true, a physical science expert would be required in this case as well as a medical one. That

[5] One nurses' assistant testified that she recognized the dangerous bedding arrangement that entangled plaintiff's decedent on a previous occasion even though she was not plaintiff's decedent's usual caregiver. This assistant had not had an opportunity to observe plaintiff's decedent for a prolonged period.

expert would be needed to inform the jury how plaintiff's decedent was in danger of strangulation because gravity would pull her down once she slipped beneath the bedrails.

STATUTE OF LIMITATIONS

Generally the period of limitations is tolled at the time the complaint is filed. MCL 600.5856(a). The period for an action premised on ordinary negligence is three years. MCL 600.5805(10); *Stephens v Dixon*, 449 Mich 531; 536 NW2d 755 (1995). Plaintiff's decedent died in March 1997, and plaintiff brought her action in April 1998. This was well within the period of limitations applicable to ordinary negligence actions, as well as wrongful death actions premised on medical malpractice. MCL 600.5852; MCL 600.5805(6). Still well within the applicable period of limitations, the trial court initially ruled that plaintiff's claim sounded in ordinary negligence. Thus, under MCL 600.5856(a), the period of limitations was tolled.

I believe that plaintiff and other similarly situated litigants are entitled to rely on a trial court's decision that their case sounds in ordinary negligence. The filing of plaintiff's ordinary negligence complaint tolled the period of limitations, at least until the new trial judge reversed that decision.

"Plaintiff's failure to comply with the applicable statute of limitations" was less the "product of [her] understandable confusion about the legal nature of her claim . . ."[6] and more the product of plaintiff's justifiable reliance on the trial court's initial ruling.

This Court need not resort to equity to save plaintiff's so-called medical malpractice claims. MCL 600.5856(a)

[6] *Ante* at 432.

and the initial trial court decision dictated that plaintiff's filing of the ordinary negligence complaint tolled the running of the period of limitations.

Finally, the majority's "prudent" decision that obliges someone injured by a negligent medical practitioner to allege alternate theories of medical malpractice and ordinary negligence pertaining to a single injury is ill-conceived. It needlessly complicates and impedes the injured person's efforts to recover through the courts from those responsible for his plight. The majority's free and unsolicited advice sends the wrong message to the bench and bar, and places an undue burden on injured people.

CONCLUSION

In this case, plaintiff has alleged that defendant had notice of a risk of harm that was readily apparent to the layperson and could have been rectified by a layperson. She has also alleged that, after receiving notice of the danger, defendant negligently missed several opportunities to avert it.

Medical expertise is not required to determine whether defendant's nonresponses constituted a failure to take ordinary care. An expert could render an opinion on the issues in this case, but it is unnecessary because the case does not raise questions of medical judgment. It does not involve the breach of medical standards of care. Instead, the issues are within the common knowledge and experience of lay jurors. Hence, plaintiff should be enabled to proceed under a theory of ordinary negligence.

Moreover, if any of plaintiff's claims did sound in medical malpractice, more than the equities of this case require that plaintiff be allowed to proceed; plaintiff

reasonably relied on the decisions of the lower courts that all her claims sound in ordinary negligence.

The decision of the Court of Appeals should be affirmed to the extent that it found that all of plaintiff's claims sound in negligence.

CAVANAGH, J., concurred with KELLY, J.

WAYNE COUNTY v HATHCOCK
WAYNE COUNTY v SPECK
WAYNE COUNTY v AUBINS SERVICE, INC
WAYNE COUNTY v JEFFREY KOMISAR
WAYNE COUNTY v WARD
WAYNE COUNTY v GRIZZLE
WAYNE COUNTY v STEPHANIE KOMISAR
WAYNE COUNTY v GOFF
WAYNE COUNTY v FINAZZO

Docket Nos. 124070-124078. Argued April 21, 2004 (Calendar No. 7). Decided July 30, 2004.

Wayne County brought nineteen condemnation actions in the Wayne Circuit Court against Edward Hathcock and other parcel owners who rejected the county's offer to purchase their lands for use in a new private development near Detroit Metropolitan Airport. The court, Michael F. Sapala, J., denied the defendants' motion for summary disposition. The Court of Appeals, O'CONNELL, P.J., and MURRAY and FITZGERALD, JJ., in an unpublished opinion per curiam, a concurring opinion by MURRAY, J., and an opinion by FITZGERALD, J., concurring with MURRAY, J., affirmed. MURRAY and FITZGERALD, JJ., affirmed solely on the basis of the binding precedent of *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981). O'CONNELL, P.J., determined that the county was authorized by MCL 213.21 *et seq*. to use the power of eminent domain to take the disputed lands, that the project was sufficiently far along to believe that the project would come to fruition so the taking was necessary, and that the taking of the lands was not for the primary intention of conferring a private use or benefit, although specific private interests would eventually benefit from the project. Judge O'CONNELL also noted the diversity of private interests to be benefited by the project rather than the sole private beneficiary involved in *Poletown* (Docket Nos. 239438, 239563, 240184, 240187, 240189, 240190, 240193-240195). Several defendants appealed.

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

The county is without constitutional authority to condemn the properties. The proposed condemnation is consistent with MCL 213.23, but does not advance a "public use" as required by Const 1963, art 10, § 2. *Poletown Neighborhood Council v Detroit*, 410

Mich 616 (1981), which was predicated on an erroneous construction of the "public use" requirement in art 10, § 2, is overturned. The overruling of *Poletown* shall have retroactive effect.

1. The Court does not determine a case on constitutional grounds if the case can legitimately be decided on other grounds. In this case, Wayne County, as a public corporation, is authorized by MCL 213.23 to condemn property, subject to other constitutional and statutory limitations. The county's goal of drawing commerce to the metropolitan Detroit area by converting the subject properties to a state-of-the-art technology and business park is consistent with statutory requirements in MCL 213.23.

2. Const 1963, art 10, § 2 requires that condemnations fulfill a "public use." The only support in this Court's jurisprudence for the proposed condemnations is *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981). In *Poletown,* the Court held that art 10, § 2 permitted the Detroit Economic Development Corporation to condemn private residential properties and subsequently convey those properties to a private corporation because of the generalized economic benefits that would follow that corporation's use of the property. The *Poletown* decision was predicated on a misconstruction of the "public use" requirement in art 10, § 2. "Public use" is a term that has been a part of Michigan constitutions since 1835. At the time the current Constitution was ratified, "public use" had acquired a specialized meaning which the people understood to be a legal term of art. Therefore, this phrase must be interpreted according to its construction in this Court's jurisprudence prior to the ratification of the 1963 Constitution. A generalized economic benefit stemming from the private use of condemned land is not a "public use" as that term was interpreted in this Court's pre-1963 eminent domain jurisprudence.

3. "Public use," as a legal term of art in the 1963 Constitution, permitted condemnations in which private land is transferred by the condemning authority to a private entity in one of three situations. The first involves a private enterprise generating public benefits whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving. The second involves a private entity that remains accountable to the public in the use of the transferred property. The third involves a situation in which the selection of land to be condemned is based on public concern rather than private interest, i.e., selection based on facts of independent public significance. None of these situations obtains in this instance, where the purpose of the condemnations at issue in this case is a general economic benefit based on another private owner's use of the condemned properties. Thus, the proposed

condemnations do not advance a public use as required by Const 1963, art 10, § 2.

4. The overruling of the rule in *Poletown* has retroactive effect, applying to all pending cases in which a challenge to *Poletown* has been raised and preserved. This retroactivity is necessary to vindicate our Constitution, to protect the people's property rights, and to preserve the legitimacy of the judicial branch as the expositor of fundamental law.

Justice WEAVER, joined by Justice CAVANAGH only with respect to section I, concurring in part and dissenting in part, concurred with the majority's result and its decision to overrule *Poletown*. *Poletown* wrongly abandoned the expressed constitutional limitation on the exercise of the power of eminent domain when it held that land can be taken by the government and transferred to a private entity upon the mere showing that the economy will generally benefit from the condemnation. For the reasons stated by the majority, the decision to overrule *Poletown* should be applied retroactively.

Justice WEAVER, however, dissents from the majority's reliance on its rule of constitutional interpretation that gives constitutional terms such as the "public use" limitation on the exercise of eminent domain of Const 1963, art 10, § 2 the meaning that those "versed" and "sophisticated in the law" would have given it at the time of the Constitution's ratification. She also dissents from the majority's application of its rule to the facts of this case. The majority's rule perverts the long-established and primary rule that constitutional terms are to be interpreted as they were commonly understood by the citizens who ratified the Constitution. Constitutional terms that are embedded in law and history, like the term "public use," are familiar to and commonly understood by the people.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part with the majority and concurring with section I of Justice WEAVER's opinion, stated that he concurred with the majority in overruling *Poletown Neighborhood Council v Detroit,* 410 Mich 616 (1981), but dissented with respect to the retroactive application of the majority's decision.

With prospective application, the defendants would have to accept just compensation in exchange for their properties. However, Wayne County has spent about $50 million on this project in reliance on *Poletown*. The majority agrees that the county's reliance is clear. Wayne County and its taxpayers should not be penalized for the county following the Court's prior direction. A key factor in overruling a previous case is the extent of reliance on the old rule, which is substantial in this case. In determining retroactivity, this reliance must be balanced to minimize chaos and maximize justice. Prospective application would be appropriate.

Lower court decisions are reversed and the case is remanded to the circuit court for entry of orders of summary disposition for the defendants.

1. EMINENT DOMAIN — PUBLIC CORPORATIONS — PUBLIC USE.

For a public corporation to take land under the power of eminent domain delegated by the state, the taking must be for a public use, not merely to increase the general prosperity of the community (Const 1963, art 10, § 2; MCL 213.23).

2. EMINENT DOMAIN — TRANSFER OF CONDEMNED LAND TO PRIVATE ENTITIES.

Condemnations in which private land may be constitutionally transferred by the condemning authority to a private entity involve one of three situations; first, collective action is needed to acquire land for vital instrumentalities of commerce; second, the private entity remains accountable to the public in the use of the transferred property; and third, the selection of land is based on public concern rather than private interest, i.e., selection based on facts of public significance (Const 1963, art 10, § 2).

Zausmer, Kaufman, August & Caldwell, P.C. (by *Mark J. Zausmer* and *Mischa M. Gibbons*), for the plaintiff.

Ackerman & Ackerman, P.C. (by *Alan T. Ackerman* and *Darius W. Dynkowski*), *Plunkett & Cooney, P.C.* (by *Mary Massaron Ross*), and *Allan Falk, P.C.* (by *Allan S. Falk*), for the defendants.

Martin N. Fealk for defendants Speck.

Amici Curiae:

Kupelian Ormond & Magy, P.C. (by *Stephon B. Bagne*), for the International Council of Shopping Centers, Inc.

Secrest, Wardle, Lynch, Hampton, Truex and *Morley* (by *Gerald A. Fisher* and *Thomas R. Schultz*) for the Public Corporation Law Section of the State Bar of Michigan.

Miller, Canfield, Paddock and Stone, P.L.C. (by *Thomas C. Phillips, Clifford T. Flood, Jaclyn Shoshana Levine*, and *Thomas C. Phillips*), for the Michigan Municipal League.

Dykema Gossett PLLC (by *Richard D. McLellan* and *Julie A. Karkosak*) for the Michigan Economic Development Corporation.

Monghan, LoPrete, McDonald, Yakima, Grenke & McCarthy (by *Thomas J. McCarthy*) for the city of Dearborn.

Steinhardt Pesick & Cohen, P.C. (by *H. Adam Cohen* and *Jason C. Long*), for the Adell Children's Funded Trusts.

Lewis & Munday, P.C. (by *David Baker Lewis, Brian J. Kott, Susan D. Hoffman,* and *Darice E. Weber*), for the Economic Development Corporation of the City of Detroit, the City of Detroit Downtown Development Authority, and the Michigan Downtown and Financing Association.

Williams Acosta, PLLC (by *Avery K. Williams*), for the city of Detroit.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *S. Peter Manning*, Assistant Attorney General, for the Environment, Natural Resources, and Agriculture Division.

Ronald Reosti, *Ralph Nader*, and *Alan Hirsch* for the citizens of Michigan.

John F. Rohe and Georgetown Environmental Law & Policy Institute (by *Robert G. Dreher*) for the National Congress for Community Economic Development.

Marc K. Shaye, *James S. Burling*, and *Timothy Sandefur* for the Pacific Legal Foundation.

Kary L. Moss and *Michael J. Steinberg* for the American Civil Liberties Union Fund of Michigan.

Law Office of Parker and Parker (by *John Ceci*) and Institute for Justice (by *Dana Berliner*, *William H. Mellor*, and *Ilya Somin*) for the Institute for Justice and Mackinac Center for Public Policy.

YOUNG, J. We are presented again with a clash of two bedrock principles of our legal tradition: the sacrosanct right of individuals to dominion over their private property, on the one hand and, on the other, the state's authority to condemn private property for the commonweal. In this case, Wayne County would use the power of eminent domain to condemn defendants' real properties for the construction of a 1,300-acre business and technology park. This proposed commercial center is intended to reinvigorate the struggling economy of southeastern Michigan by attracting businesses, particularly those involved in developing new technologies, to the area.

Defendants argue that this exercise of the power of eminent domain is neither authorized by statute nor permitted under article 10 of the 1963 Michigan Constitution, which requires that any condemnation of private property advance a "public use." Both the Wayne Circuit Court and the Court of Appeals rejected these arguments—compelled, in no small measure, by this Court's opinion in *Poletown Neighborhood Council v Detroit*.[1] We granted leave in this case to consider the

[1] 410 Mich 616; 304 NW2d 455 (1981).

legality of the proposed condemnations under MCL 213.23 and art 10, § 2 of our 1963 Constitution.

We conclude that, although these condemnations are authorized by MCL 213.23, they do not pass constitutional muster under art 10, § 2 of our 1963 constitution. Section 2 permits the exercise of the power of eminent domain only for a "public use." In this case, Wayne County intends to transfer the condemned properties to private parties in a manner wholly inconsistent with the common understanding of "public use" at the time our Constitution was ratified. Therefore, we reverse the judgment of the Court of Appeals and remand the case to the Wayne Circuit Court for entry of summary disposition in defendants' favor.

FACTS AND PROCEDURAL HISTORY

In April 2001, plaintiff Wayne County initiated actions to condemn nineteen parcels of land immediately south of Metropolitan Airport. The owners of those parcels, defendants in the present actions, maintain that these condemnations lack statutory authorization and exceed constitutional bounds.

This dispute has its roots in recent renovations of Metropolitan Airport. The county's $2 billion construction program produced a new terminal and jet runway and, consequently, raised concerns that noise from increased air traffic would plague neighboring landowners. In an effort to obviate such problems, the county, funded by a partial grant of $21 million from the Federal Aviation Administration (FAA), began a program of purchasing neighboring properties through voluntary sales. Eventually, the county purchased approximately five hundred acres in nonadjacent plots scattered in a checkerboard pattern throughout an area south of Metropolitan Airport.

Wayne County's agreement with the FAA provided that any properties acquired through the noise abatement program were to be put to economically productive use. In order to fulfill this mandate, the county, through its Jobs and Economic Development Department, developed the idea of constructing a large business and technology park with a conference center, hotel accommodations, and a recreational facility. Thus, the "Pinnacle Project" was born.

The Pinnacle Project calls for the construction of a state-of-the-art business and technology park in a 1,300-acre area adjacent to Metropolitan Airport. The county avers that the Pinnacle Project will

> create thousands of jobs, and tens of millions of dollars in tax revenue, while broadening the County's tax base from predominantly industrial to a mixture of industrial, service and technology. The Pinnacle Project will enhance the image of the County in the development community, aiding in its transformation from a high industrial area, to that of an arena ready to meet the needs of the 21st century. This cutting-edge development will attract national and international businesses, leading to accelerated economic growth and revenue enhancement.

According to expert testimony at trial, it is anticipated that the Pinnacle Project will create thirty thousand jobs and add $350 million in tax revenue for the county.

The county planned to construct the business and technology park in a 1,300-acre area that included the five hundred acres purchased under the federally funded noise abatement program. Because the county needed to acquire more land within the project area, it began anew to solicit voluntary sales from area landowners. This round of sales negotiations enabled the county to purchase an additional five hundred acres within the project area.

Having acquired over one thousand acres, the county determined that an additional forty-six parcels distributed in a checkerboard fashion throughout the project area were needed for the business and technology park. The county apparently determined that further efforts to negotiate additional voluntary sales would be futile and decided instead to invoke the power of eminent domain. Thus, on July 12, 2000, the Wayne County Commission adopted a Resolution of Necessity and Declaration of Taking (Resolution of Necessity) authorizing the acquisition of the remaining three hundred acres needed for the Pinnacle Project.

The remaining properties were appraised as required by the Uniform Condemnation Procedures Act (UCPA),[2] and the county issued written offers based on these appraisals to the property owners. Twenty-seven more property owners accepted these offers and sold their parcels to the county. But according to the county's estimates, nineteen additional parcels were still needed for the Pinnacle Project. These properties, owned by defendants, are the subject of the present condemnation actions.

In late April 2001, plaintiff initiated condemnation actions under the UCPA. In response, each property owner filed a motion to review the necessity of the proposed condemnations.[3] They argued, first, that the county lacked statutory authority to exercise the power of eminent domain in this manner. Second, defendants contended that acquisition of the subject properties was not necessary as required by statute. Finally, they challenged the constitutionality of these condemnation actions, maintaining that the Pinnacle Project would not serve a public purpose.

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[2] MCL 213.51 *et seq*.

[3] See MCL 213.56.

An evidentiary hearing on the consolidated cases was held over four weeks in the Wayne Circuit Court. On December 19, 2001, the trial court affirmed the county's determination of necessity. The court held that the takings were authorized by MCL 213.23, that the county did not abuse its discretion in determining that condemnation was necessary, and that the Pinnacle Project served a public purpose as defined by *Poletown*. The trial court denied defendants' motions for reconsideration on January 24, 2002.

Defendants appealed the matter to the Court of Appeals, which granted leave on April 24, 2003. The Court of Appeals affirmed the trial court's decision.[4] The panel concluded that the proposed condemnations passed statutory and constitutional muster under MCL 213.21 *et seq*. and our *Poletown* decision. Judge MURRAY, joined by Judge FITZGERALD, concurred with Presiding Judge O'CONNELL, but opined that *Poletown* was poorly reasoned, wrongly decided, and ripe for reversal by this Court.[5]

We granted defendants' applications for leave to appeal on November 17, 2003.[6] Our grant order directed the parties to the following issues:

> (1) whether plaintiff has the authority, pursuant to MCL 213.23 or otherwise, to take defendants' properties; (2) whether the proposed taking, which are at least partly intended to result in later transfers to private entities, are for a "public purpose," pursuant to *Poletown Neighborhood Council v Detroit,* 410 Mich 616 (1981); and (3) whether the "public purpose" test set forth in *Poletown, supra,* is consistent with Const 1963, art 10, § 2 and, if not, whether

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[4] Unpublished opinion per curiam, issued April 24, 2003 (Docket Nos. 239438, 239563, 240187, 240189, 240190, 240193-420195).

[5] Slip op at 5-6 (MURRAY, J., concurring).

[6] 469 Mich 952 (2003).

> this test should be overruled. Further, the parties should discuss whether a decision overruling *Poletown, supra*, should apply retroactively or prospectively only, taking into consideration the reasoning in *Pohutski v City of Allen Park,* 465 Mich 675 (2002).

We also solicited briefs amicus curiae.

STANDARD OF REVIEW

Statutory construction is a question of law subject to review de novo.[7] In the eminent domain context, the UCPA limits our review of a public agency's determination that a condemnation is necessary. We may vacate an agency's finding that a condemnation serves a public necessity only if a party establishes that the finding is predicated on "fraud, error of law, or abuse of discretion."[8]

Constitutional issues, like questions of statutory construction, are subject to review de novo.[9]

ANALYSIS

A. MCL 213.23

Defendants, the property owners whose lands Wayne County now seeks to condemn, assert that the proposed takings exceed the county's statutory and constitutional authority. If it were correct that the county lacks statutory authorization to condemn defendants' properties, this Court need not—and must not, under well-established prudential principles—determine whether

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[7] *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003).

[8] MCL 213.56(2).

[9] *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

the takings also violate our Constitution.[10] We begin, therefore, with the county's contention that MCL 213.23 authorizes the proposed condemnations.

MCL 213.23 provides:

> Any public corporation or state agency is authorized to take private property necessary for a public improvement or for the purposes of its incorporation or for public purposes within the scope of its powers for the use or benefit of the public and to institute and prosecute proceedings for that purpose. When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made is authorized on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise. For the purpose of condemnation the unit may proceed under the provisions of this act.

In interpreting this statutory language, this Court's primary goal is to give effect to the Legislature's intent.[11] If the Legislature has clearly expressed its intent in the language of a statute, that statute must be enforced as written, free of any "contrary judicial gloss."[12]

Wayne County is a "public corporation" as the term is used in this statute,[13] and is therefore subject to the provisions of this section. Under MCL 213.23, a con-

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[10] *Federated Publications, Inc v Michigan State Univ Bd of Trustees,* 460 Mich 75, 93; 594 NW2d 491 (1999) (CAVANAGH, J., concurring in part and dissenting in part) (noting a "longstanding rule [that] requires us to consider constitutional questions only as a last resort, and to avoid such questions where a nonconstitutional basis exists for resolving the matter").

[11] *Morales, supra* at 490.

[12] *Id.*

[13] Const 1963, art 7, § 1 ("Each organized county shall be a body corporate with powers and immunities provided by law."); MCL 213.21 ("The term 'public corporations' as herein used shall include all counties,

demnation must be "necessary" for one of three ends: "a public improvement or for the purposes [to be advanced by the public corporation or state agency's] incorporation or for public purposes within the scope of [the corporation's or agency's] powers . . . ." Additionally, a proposed condemnation must be "for the use or benefit of the public . . . ."[14]

Plaintiff does not argue that the takings at issue are a "public improvement" or that they advance purposes of the county's incorporation. Consequently, this Court must determine only whether the proposed condemnations are *necessary* for *public purposes,* whether those purposes are *within the scope of the county's powers*, and whether the takings are "*for the use or benefit of the public . . . .*"[15]

1. "FOR PUBLIC PURPOSES WITHIN THE SCOPE OF ITS POWERS"

Wayne County's assertion that the proposed condemnations are "for public purposes within the scope of its powers"[16] raises two discrete questions—first, whether Wayne County is authorized to exercise the power of eminent domain at all and, second, whether this particular exercise of the eminent domain power is within the county's powers.

There is no question that the *state* possesses the power of eminent domain.[17] The state's authority to

cities, villages, boards, commissions and agencies made corporations for the management and control of public business and property . . . .").

[14] *Id.*

[15] MCL 213.23

[16] *Id.*

[17] *Peterman v Dep't of Natural Resources,* 446 Mich 177, 185; 521 NW2d 499 (1994) (" '[E]ach State by virtue of its statehood has the right to exercise the power of eminent domain.' "), quoting *Loomis v Hartz*, 165 Mich 662, 665; 131 NW 85 (1911).

condemn private property for public use is preserved by our Constitution[18] and has been expressly acknowledged by this Court on a number of occasions.[19] But whether that eminent domain power extends to counties within the state is another matter.

Plaintiff argues that the Legislature has expressly conferred that power upon public corporations such as Wayne County through the plain language of MCL 213.23. This statute begins by stating that "[a]ny public corporation or state agency *is authorized* to take private property . . . ."[20] Plaintiff argues that this language is a separate and independent delegation of the power to condemn private property for public purposes. Because § 23 "authoriz[es]" public corporations to condemn property in certain circumstances, a public corporation need not rely on any other statutory provision in order to exercise the power of eminent domain.

Defendants maintain, however, that plaintiff's reading renders the second sentence of MCL 213.23 a nullity. This sentence provides:

> When funds have been appropriated by the legislature to a state agency or division thereof or the office of the governor or a division thereof for the purpose of acquiring lands or property for a designated public purpose, such unit to which the appropriation has been made *is authorized* on behalf of the people of the state of Michigan to acquire the lands or property either by purchase, condemnation or otherwise.[21]

If the first sentence of MCL 213.23 is a separate grant of authority to condemn, defendants argue, the second

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[18] Const 1963, art 10, § 2.

[19] See, for example, *Peterman, supra* at 185-186, quoting *People ex rel Trombley v Humphrey,* 23 Mich 471, 474 (1871).

[20] MCL 213.23 (emphasis added).

[21] *Id.*

sentence—which also confers the authorization to condemn land—is redundant.

A careful reading of MCL 213.23 reveals that this statute is indeed a separate grant of authority and, thus, that plaintiff has parsed this statute correctly. The first sentence of MCL 213.23 states that a public corporation such as Wayne County "is authorized" to condemn private property if the other preconditions of § 23 are met. To "authorize" is to "to give the authority or official power to" or "to empower."[22] By its plain language, this first sentence is an affirmative grant of eminent domain power to public corporations and state agencies.

Contrary to defendants' arguments, giving effect to the plain language of the first sentence does not render the remainder of § 23 nugatory. The second sentence applies only to condemnation by the state, its agencies or their divisions; thus, it applies to a subset of the groups covered by the first sentence. Further, it establishes a precondition to the condemnation for a public purpose designated by the Legislature—namely, the appropriation of funds to the state agency or division for that purpose. Finally, the second sentence, unlike the first, authorizes specific methods of exercising the power of eminent domain. Accordingly, the second sentence of MCL 213.23 does not alter the plain meaning of the first: Wayne County, as a public corporation, is authorized by MCL 213.23 to condemn property, albeit subject to other constitutional and statutory limitations.

The second question raised by the county's reliance on the "for public purposes within the scope of its powers" phrase in § 23 is whether these *particular* condemnations are "within the scope of [Wayne County's] powers."

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[22] *Random House Webster's Unabridged Dictionary* (2d ed, 2001).

The power upon which plaintiff relies—the authority to condemn "for public purposes *within the scope of its powers*"—calls for an analysis of the scope of Wayne County's "powers," and an assessment of whether the proposed condemnations are within those powers.

Art 7, § 1 of our 1963 Constitution provides that "[e]ach organized county shall be a body corporate with powers and immunities provided by law." The Constitution also declares that a county may codify in its charter the power "to adopt resolutions and ordinances relating to its concerns."[23] These constitutional provisions are to be "liberally construed":

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.[24]

Given the broad authority conferred by the Constitution upon local governments, this Court has acknowledged that Michigan "is a home rule state," in which "local governments are vested with general constitutional authority to act on all matters of local concern not forbidden by state law."[25] The Legislature has also recognized that the Michigan constitution establishes a system of home rule. The charter county act,[26] enacted in 1966, states that county charters may expressly provide for

> [t]he authority to perform at the county level any function or service not prohibited by law, which shall

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[23] Const 1963, art 7, § 2.

[24] Const 1963, art 7, § 34.

[25] *Airlines Parking v Wayne Co,* 452 Mich 527, 537 n 18; 550 NW2d 490 (1996).

[26] MCL 45.501 *et seq.*

> include, by way of enumeration and not limitation: Police protection, fire protection, planning, zoning, education, health, welfare, recreation, water, sewer, waste disposal, transportation, abatement of air and water pollution, civil defense, *and any other function or service necessary or beneficial to the public health, safety, and general welfare of the county.*[27]

Plaintiff Wayne County has claimed all the authority granted by these constitutional and statutory provisions. Its charter states:

> Wayne County, a body corporate, possesses home rule power enabling it to provide for any matter of County concern and all powers conferred by the constitution or law upon charter counties or upon general law counties, their officers, or agencies.[28]

With this charter provision, Wayne County has claimed for itself the power to act in all matters not specifically reserved by statute or constitution to the state. The county's "powers" include the authority to pursue any end that is "necessary or beneficial to the public health, safety, and general welfare" of the county,[29] assuming that the pursuit of that objective is not reserved by our Constitution or by statute to the state.

In this case, Wayne County has condemned the defendants' real properties for the following purposes: "(1) the creation of jobs for its citizens, (2) the stimulation of private investment and redevelopment in the county to insure a healthy and growing tax base so that the county can fund and deliver critical public services, (3) stemming the tide of disinvestment and population loss, and (4) supporting development opportunities

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[27] MCL 45.515(c) (emphasis added).

[28] Wayne County Charter, § 1.112.

[29] See MCL 45.515(c).

which would otherwise remain unrealized."[30] The analysis provided in this opinion demonstrates that, unless the pursuit of one or more of these objectives has been assigned to the state by law, any condemnation in furtherance of these goals is "within the scope of Wayne County's powers," as required by MCL 213.23. Defendants have adduced no constitutional or statutory support for the proposition that a home rule county such as Wayne County may not pursue these objectives. Accordingly, the proposed condemnations are—at least for statutory purposes—within the scope of Wayne County's powers.

The pursuit of the goals cited above is within the scope of Wayne County's powers, and each goal certainly advances a "public purpose." A "public purpose" has been defined as that which " ' "has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose." ' "[31] A transition from a declining rustbelt economy to a growing, technology-driven economy would, no doubt, promote prosperity and general welfare. Consequently, the county's goal of drawing commerce to metropolitan Detroit and its environs by converting the subject properties to a state-of-the-art technology and business park is within this definition of a "public purpose."

That is not to say, of course, that the exercise of eminent domain in this case passes constitutional muster. While the proposed condemnations satisfy the

[30] Quoted from complaint for condemnation.

[31] *Gaylord v Gaylord City Clerk,* 378 Mich 273, 300; 144 NW2d 460 (1966), quoting *Hays v Kalamazoo,* 316 Mich 443, 454; 25 NW2d 787 (1947), quoting 37 Am Jur, Municipal Corporations, § 120, p 734.

broad parameters established by MCL 213.23, it must also be determined whether these condemnations pass the more narrow requirements of our Constitution. We address this question later.

2. "NECESSARY"

For a public corporation to condemn property under MCL 213.23, a proposed taking must not only advance one of the three objectives listed in that statute, but it must also be "necessary" to that end. The Legislature has vested the authority to determine the necessity required under MCL 213.23 in those entities authorized to condemn private property under that statute.[32] Accordingly, Michigan's courts are bound by a public corporation's determination that a proposed condemnation serves a public necessity unless the party opposing the condemnation demonstrates "fraud, error of law, or abuse of discretion."[33]

Defendants advance three basic arguments for the proposition that plaintiff has failed to establish that the takings are "necessary" as required by MCL 213.23 and therefore abused its discretion in condemning the subject properties. They contend, first, that the county has neither identified specific private purchasers for each of the defendants' parcels nor demonstrated that the parcels will be put to productive use now or in the immediate future. Thus, defendants argue that Wayne County is impermissibly using the power of eminent domain to "stockpile" land for speculative future use, a

[32] MCL 213.56(2) ("With respect to an acquisition by a public agency, the determination of public necessity by that agency is binding on the court in the absence of a showing of fraud, error of law, or abuse of discretion.").

[33] *Id.* See also *Detroit v Lucas,* 180 Mich App 47, 53; 446 NW2d 596 (1989).

practice expressly prohibited fifty years ago in *Grand Rapids Bd of Ed v Baczewski*.[34]

We disagree. The proposed condemnations are quite unlike the exercise of eminent domain prohibited in *Baczewski*. There, a local board of education attempted to condemn property near a high school because it surmised that the high school would need to expand in approximately thirty years. The affected landowner challenged the condemnation under the 1908 Constitution,[35] which—in contrast to the 1963 Constitution[36]—expressly required any exercise of eminent domain to be "necessary." This Court held that a condemnation is "necessary" only if the condemned property will be used "immediately" or "within a period of time that the jury determines to be the 'near future' or a 'reasonably immediate use.' "[37] The speculative need for property in thirty years time lacked any of the urgency of a "necessary" condemnation.

Even if we grant, arguendo, that the definition of "necessity" under the 1908 Constitution applies to MCL 213.23 as well, the present case is nevertheless distinguishable from *Baczewski*. Whereas the school board in *Baczewski* admitted that it would not need the defendant's property for thirty years after its condemnation, plaintiff has a definite plan for defendants'

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[34] *Grand Rapids Bd of Ed v Baczewski*, 340 Mich 265, 272; 65 NW2d 810 (1954).

[35] Const 1908, art 13, § 1 ("Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.").

[36] Const 1963, art 10, § 2 ("Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.").

[37] *Baczewski, supra* at 272.

properties and intends to construct a business and technology park as soon as possible. According to the trial court's summary of testimony at trial, the acquisition of defendants' properties would also enable the county to achieve a "critical mass of property," and would thereby facilitate investment in the project. *Baczewski* does not bar an exercise of the power of eminent domain simply because the ultimate owner of the condemned land has yet to be identified.

Second, defendants argue that the proposed condemnations are not "necessary" under MCL 213.23 because plaintiff must still clear a number of procedural hurdles in order to proceed with the Pinnacle Project. These include the need for a special exclusion from the FAA in order to use land acquired through the noise abatement program for the Pinnacle Project, environmental concerns that may arise if construction of the project disturbs extant wildlife habitats, and the creation of a local district finance authority and a tax increment finance plan under the Local Development Financing Act.[38]

This argument is unpersuasive. MCL 213.23 requires a proposed condemnation to be "necessary" to advance one of the specified purposes. It does not, however, require that the condemning authority clear all other statutory and procedural hurdles before commencing condemnation proceedings. In arguing that the plaintiff has failed to demonstrate necessity, defendants have essentially read new requirements into MCL 213.23.

Finally, defendants assert, without supporting argument, that plaintiff has failed to establish that "the [business and technology] park is necessary for the public." Given defendants' failure to brief the issue, this

[38] MCL 125.2151 *et seq.*

Court may consider it abandoned.[39] In any event, the argument erroneously shifts the burden of proof to plaintiff when the party opposing condemnation bears the burden of proving fraud, error of law, or abuse of discretion by the condemning authority.[40]

3. "FOR THE USE OR BENEFIT OF THE PUBLIC"

A condemnation that is necessary for a public purpose within the scope of the condemning authority's powers must also be "for the use or benefit of the public" in order to be valid under MCL 213.23. There is ample evidence in the record that the Pinnacle Project would benefit the public. The development is projected to bring jobs to the struggling local economy, add to tax revenues and thereby increase the resources available for public services, and attract investors and businesses to the area, thereby reinvigorating the local economy.

In fact, defendants do not dispute that the proposed condemnations would benefit the public. Instead, relying on *City of Lansing v Edward Rose Realty, Inc,*[41] defendants argue that the benefits that private parties will receive through the Pinnacle Project outweigh any benefits that the general public is likely to receive and, therefore, that plaintiff has failed to establish a "public use or benefit."

The two *Edward Rose* passages on which defendants rely, however, concern issues quite distinct from those under consideration here. The *Edward Rose* Court first engaged in a balancing of public and private interests in

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[39] *Gross v Gen Motors Corp,* 448 Mich 147, 162 n 8; 528 NW2d 707 (1995).

[40] See n 14, *supra,* and accompanying text.

[41] *City of Lansing v Edward Rose Realty, Inc,* 442 Mich 626; 502 NW2d 638 (1993).

addressing whether a city ordinance authorizing the condemnation of private property was a legitimate exercise of the general authority conferred upon Lansing as a home rule city.[42] The Court then returned to the balancing of public and private interests when evaluating the city's ordinance under the "heightened scrutiny" test of *Poletown*.[43] Neither passage concerns the meaning of the phrase "public benefit," much less the meaning of "public benefit" as used in MCL 213.23. Moreover, *Edward Rose* nowhere suggests that the "public use or benefit" element of MCL 213.23 requires a balancing of public and private benefits, or that public benefits must predominate over private ones under this statute. As such, defendants have failed to persuade us that the proposed condemnations will fail to provide a "public benefit" within the meaning of MCL 213.23.

On the basis of the foregoing analysis, we conclude that the condemnations sought by Wayne County are consistent with MCL 213.23 and that this statute is a separate and independent grant of eminent domain authority to public corporations such as Wayne County. If the authority to condemn private property conferred by the Legislature lacked any constitutional limits, this Court would be compelled to affirm the decisions of the circuit court and the Court of Appeals. But our state Constitution does, in fact, limit the state's power of eminent domain. Therefore, it must be determined whether the proposed condemnations pass constitutional muster.

B. ART 10, § 2

Art 10, § 2 of Michigan's 1963 Constitution provides that "[p]rivate property shall not be taken for public use

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[42] *Id.* at 634-635.

[43] *Poletown, supra* at 634-635.

without just compensation therefor being first made or secured in a manner prescribed by law." Defendants contend that the proposed condemnations are not "for public use," and therefore are not within constitutional bounds. Accordingly, our analysis must now focus on the "public use" requirement of art 10, § 2.

1. "PUBLIC USE" AS A LEGAL TERM OF ART

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.[44] This rule of "common understanding" has been described by Justice COOLEY in this way:

> "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.' "[45]

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.

This Court typically discerns the common understanding of constitutional text by applying each term's

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[44] *Nutt, supra* at 573.

[45] *Traverse City School Dist v Attorney General,* 384 Mich 390, 405; 185 NW2d 9 (1971) (emphasis in original), quoting Cooley's Constitutional Limitations 81.

plain meaning at the time of ratification.[46] But if the constitution employs technical or legal terms of art, "we are to construe those words in their technical, legal sense."[47] Justice COOLEY has justified this principle of constitutional interpretation in this way:

> [I]t must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history, and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the law speaks of an ex post facto law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.[48]

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[46] *Silver Creek, supra* at 375.

[47] *Id.*

[48] 1 Cooley, Constitutional Limitations (8th ed), pp 130-133. See also *In re Payne,* 444 Mich 679, 707 n 6; 512 NW2d 121 (1994) (RILEY, J., concurring in part and dissenting in part) (quoting a portion of this passage).

Justice COOLEY recognized, as demonstrated by the passage cited above, that, in ratifying a constitution, the people may understand that certain terms used in that document have a technical meaning within the law. Therefore, the people may ratify a constitution with the understanding that it incorporates legal terms of art—or, in Justice COOLEY's terms, words "employed in their technical sense." Cooley, *supra* at 132.

When one actually engages in the mode of analysis described by Justice COOLEY and quoted by Justice WEAVER, one need look no farther

Thus, in *Silver Creek,* for example, we determined that the phrase "just compensation" was a legal term of art of enormous complexity, and that its meaning could be discerned only by canvassing legal precedent on "just compensation" before 1963 to determine how an indi-

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than the COOLEY treatise upon which the concurrence relies to see that "public use" is indeed a term of art. See Cooley, Constitutional Limitations (5th ed, 1998), pp 657-666. After surveying some of the many judicial opinions wrestling with this concept, Justice COOLEY concludes: "But accepting as correct the decisions which have been made, it must be conceded that the term 'public use' as employed in the law of eminent domain, has a meaning much controlled by the necessity, *and somewhat different from that which it bears generally*." Cooley, Constitutional Limitations (5th ed, 1998), pp 664-665 (emphasis added). See also *id.* at 659 ("We find ourselves somewhat at sea, however, when we undertake to define in the light of the judicial decisions, what constitutes a public use.").

Thus, the notion that the meaning of "public use" was "commonly understood by the people, learned and unlearned, who ratified the constitution," *post* at 499, is one that would have been quite foreign to Justice COOLEY. In fact, this eminent jurist admitted to being "somewhat at sea" in attempting to cull a single definition of "public use" from the complex case law on the power of eminent domain. Cooley, *supra* at 659. This admission from our patron saint of constitutional interpretation stands in stark contrast to fictionalized "common understanding" proffered by the concurring opinion.

Frankly, we are hard pressed to understand what differentiates Justice WEAVER's construction from our own. Justice WEAVER herself acknowledges that "public use" must be read as a technical term. See *post* at 497-498. Justice WEAVER's recognition that "public use" must be read in light of its "legal and constitutional history" is precisely our point.

If there is any meaningful difference between reading a constitutional term according to its legal history because the ratifiers understood that the term was one with a technical meaning (our position) or because the ratifiers themselves were familiar with that legal history (Justice WEAVER's position) it is one we find difficult to discern. Under either Justice WEAVER's locution or ours, "public use" is read according to its "legal and constitutional history." Thus, it cannot be the case that our test leads more easily to "elitist" abuse than hers, since Justice WEAVER's "common understanding" approach is indistinguishable in result from our own.

vidual versed in the law before the Constitution's ratification would understand that concept.[49] Indeed, we have held that the *whole* of art 10, § 2 has a technical meaning that must be discerned by examining the "purpose and history" of the power of eminent domain.[50]

"Public use" is a legal term of art every bit as complex as "just compensation." It has reappeared as a positive limit on the state's power of eminent domain in Michigan's constitutions of 1850,[51] 1908,[52] and 1963,[53] and each invocation of "public use" has been followed by litigation over the precise contours of this language. Consequently, this Court has weighed in repeatedly on the meaning of this legal term of art. We can uncover the common understanding of art 10, § 2 only by delving into this body of case law, and thereby determining the "common understanding" among those sophisticated in the law at the time of the Constitution's ratification.

This case does not require that this Court cobble together a single, comprehensive definition of "public use" from our pre-1963 precedent and other relevant sources. The question presented here is a fairly discrete one: are the condemnation of defendants' properties and the subsequent transfer of those properties to private entities pursuant to the Pinnacle Project consistent with the common understanding of "public use"

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[49] *Silver Creek, supra* at 376.

[50] *Peterman, supra* at 186-187.

[51] See Const 1850, art 15, § 9. ("The property of no person shall be taken by any corporation for public use, without compensation being first made or secured, in such manner as may be prescribed by law.").

[52] See note 35.

[53] See note 36.

at ratification? For the reasons stated below, we answer that question in the negative.

2. "PUBLIC USE" AND PRIVATE OWNERSHIP

When our Constitution was ratified in 1963, it was well-established in this Court's eminent domain jurisprudence that the constitutional "public use" requirement was not an absolute bar against the transfer of condemned property to private entities.[54] It was equally clear, however, that the constitutional "public use" requirement worked to prohibit the state from transferring condemned property to private entities for a *private* use.[55] Thus, this Court's eminent domain jurisprudence—at least that portion concerning the reasons for which the state may condemn private property—has focused largely on the area between these poles.

Justice RYAN's *Poletown* dissent accurately describes the factors that distinguish takings in the former category from those in the latter according to our pre-1963 eminent domain jurisprudence.[56] Accordingly, we conclude that the transfer of condemned property is a "public use" when it possesses one of the three characteristics in our pre-1963 case law identified by Justice RYAN.

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[54] This fact is also noted by Justice RYAN in his *Poletown* dissent. *Poletown, supra* at 670.

[55] See, e.g., *Bd of Health of Portage Twp v Van Hoesen,* 87 Mich 533; 49 NW 894 (1891) (dismissing a petition seeking the condemnation of private property for use as a cemetery).

[56] *Poletown, supra* at 674-681. Although Justice RYAN viewed these common elements as "exceptions" to the general rule against condemnations for private use, the three exceptions reflect concepts that are incorporated into the definition of "public use," given the principles of constitutional interpretation articulated above.

First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable."[57] The "necessity" that Justice RYAN identified in our pre-1963 case law is a specific kind of need:

> [T]he exercise of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.[58]

Justice RYAN listed "highways, railroads, canals, and other instrumentalities of commerce" as examples of this brand of necessity.[59] A corporation constructing a railroad, for example, must lay track so that it forms a more or less straight path from point A to point B. If a property owner between points A and B holds out—say, for example, by refusing to sell his land for any amount less than fifty times its appraised value—the construction of the railroad is halted unless and until the railroad accedes to the property owner's demands. And if owners of adjoining properties receive word of the original property owner's windfall, they too will refuse to sell.

The likelihood that property owners will engage in this tactic makes the acquisition of property for railroads, gas lines, highways, and other such "instrumentalities of commerce" a logistical and practical nightmare. Accordingly, this Court has held that the exercise of eminent domain in such cases—in which collective action is needed to acquire land for vital instrumentali-

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[57] *Id.* at 675 (RYAN, J., dissenting).

[58] *Id.* at 676 (emphasis in original).

[59] *Id.* at 675.

ties of commerce—is consistent with the constitutional "public use" requirement.[60]

Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property.[61] Indeed, we disapproved of the use of eminent domain in *Portage Twp Bd of Health* in part because the entity acquiring the condemned land would not be subject to public oversight.[62] As Justice RYAN observed:

> [T]his Court disapproved condemnation that would have facilitated the generation of water power by a private corporation because the power company "will own, lease, use, and control" the water power. In addition, [we] warned, "Land cannot be taken, under the exercise of the power of eminent domain, unless, after it is taken, it will be devoted to the *use* of the public, *independent of the will of the corporation taking it.*"[63]

In contrast, we concluded in *Lakehead Pipe Line Co v Dehn* that the state retained sufficient control of a petroleum pipeline constructed by the plaintiff on condemned property.[64] We noted specifically that the plain-

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[60] See, e.g., *Swan v Williams,* 2 Mich 427 (1852) (holding that the condemnation of private property by a railroad company was consistent with the eminent domain provision of the federal constitution and the Northwest Ordinance of 1787).

[61] *Poletown, supra* at 677 (RYAN, J., dissenting), quoting *Swan, supra* at 439-440 (" 'By the terms of the charter the title to the lands is contingent upon their occupation as a railroad. It is vested in the company so long as they are used for a railroad, and no longer.'").

[62] *Poletown, supra* at 677 (RYAN, J., dissenting), quoting *Portage Twp Bd of Health, supra* at 539.

[63] *Poletown, supra* at 678 (RYAN, J., dissenting) (emphasis in original; citations omitted), quoting *Berrien Springs Water-Power Co v Berrien Circuit Judge,* 133 Mich 48, 51, 53; 94 NW 379 (1903).

[64] *Lakehead PipeLine Co v Dehn,* 340 Mich 25; 64 NW2d 903 (1954).

tiff had "pledged itself to transport in intrastate commerce,"[65] that plaintiff's pipeline was used pursuant to directions from the Michigan Public Service Commission, and that the state would be able to enforce those obligations, should the need arise.[66]

Thus, in the common understanding of those sophisticated in the law at the time of ratification, the "public use" requirement would have allowed for the transfer of condemned property to a private entity when the public retained a measure of control over the property.

Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern.[67] In Justice RYAN's words, the property must be selected on the basis of "facts of independent public significance," meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement.

The primary example of a condemnation in this vein is found in *In re Slum Clearance,*[68] a 1951 decision from this Court. In that case, we considered the constitutionality of Detroit's condemnation of blighted housing and its subsequent resale of those properties to private persons. The city's *controlling purpose* in condemning the properties was to remove unfit housing and thereby advance public health and safety; subsequent resale of the land cleared of blight was "incidental" to this goal.[69] We concluded, therefore, that the condemnation was

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[65] *Id.* at 42.

[66] *Id.* at 41-42.

[67] *Poletown, supra* at 680 (RYAN, J., dissenting).

[68] *In re Slum Clearance*, 331 Mich 714; 50 NW2d 340 (1951), is cited in *Poletown, supra* at 680 (RYAN, J., dissenting).

[69] *Id.* at 721.

indeed a "public use," despite the fact that the condemned properties would inevitably be put to private use. *In re Slum Clearance* turned on the fact that the act of condemnation *itself*, rather than the use to which the condemned land eventually would be put, was a public use.[70] Thus, as Justice RYAN observed, the condemnation was a "public use" because the land was selected on the basis of "facts of independent public significance"[71]—namely, the need to remedy urban blight for the sake of public health and safety.

The foregoing indicates that the transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred.[72]

3. *POLETOWN,* THE PINNACLE PROJECT, AND PUBLIC USE

The exercise of eminent domain at issue here—the condemnation of defendants' properties for the Pinnacle Project and the subsequent transfer of those properties to private entities—implicates none of the saving elements noted by our pre-1963 eminent domain jurisprudence.

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[70] *In re Slum Clearance, supra* at 720.

[71] *Poletown, supra* at 680 (RYAN, J., dissenting).

[72] *Id.* at 674-681 (RYAN, J., dissenting).

The Pinnacle Project's business and technology park is certainly not an enterprise "whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving."[73] To the contrary, the landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.

Second, the Pinnacle Project is not subject to public oversight to ensure that the property continues to be used for the commonweal after being sold to private entities. Rather, plaintiff intends for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise. The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy.

Finally, there is nothing about the *act* of condemning defendants' properties that serves the public good in this case. The only public benefits cited by plaintiff arise after the lands are acquired by the government and put to private use. Thus, the present case is quite unlike *Slum Clearance* because there are no facts of independent public significance (such as the need to promote health and safety) that might justify the condemnation of defendants' lands.

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[73] *Id.* at 676 (RYAN, J., dissenting).

We can only conclude, therefore, that no one sophisticated in the law at the 1963 Constitution's ratification would have understood "public use" to permit the condemnation of defendants' properties for the construction of a business and technology park owned by private entities. Therefore, the condemnations proposed in this case are unconstitutional under art 10, § 2.

Indeed, the only support for plaintiff's position in our eminent domain jurisprudence is the majority opinion in *Poletown*. In that opinion per curiam, a majority of this Court concluded that our Constitution permitted the Detroit Economic Development Corporation to condemn private residential properties in order to convey those properties to a private corporation for the construction of an assembly plant.[74]

As an initial matter, the opinion contains an odd but telling internal inconsistency. The majority first acknowledges that the property owners in that case "urge[d the Court] to distinguish between the terms 'use' and 'purpose', asserting they are not synonymous and have been distinguished in the law of eminent domain."[75] This argument, of course, was central to the plaintiffs' case, because the Constitution allows the exercise of eminent domain only for a "public *use.*"[76] The Court then asserted that the plaintiffs *conceded* that the Constitution allowed condemnation for a "public use" *or* a "public purpose," despite the fact that such a concession would have dramatically undermined the plaintiffs' argument:

> There is no dispute about the law. All agree that condemnation for a public use or purpose is permitted. . . .

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[74] *Id.* at 628-629.

[75] *Id.* at 629-630.

[76] Const 1963, art 10, § 2 (emphasis added).

> The heart of this dispute is whether the proposed condemnation is for the primary benefit of the public or the private user.[77]

The majority therefore contended that the plaintiffs waived a distinction they had "urged" upon the Court. And in so doing, the majority was able to avoid the difficult question whether the condemnation of private property for another private entity was a "public use" as that phrase is used in our Constitution.[78]

This inconsistency aside, the majority opinion in *Poletown* is most notable for its radical and unabashed departure from the entirety of this Court's pre-1963 eminent domain jurisprudence. The opinion departs from the "common understanding" of "public use" at the time of ratification in two fundamental ways.

First, the majority concluded that its power to review the proposed condemnations is limited because

> "[t]he determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect."[79]

The majority derived this principle from a *plurality* opinion of this Court[80] and supported the application of the principle with a citation of an opinion of the United States Supreme Court concerning judicial review of

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[77] *Poletown, supra* at 632.

[78] Moreover, as Justice RYAN noted, the majority also conflated the broad construction of "public purpose" in our taxation jurisprudence with the more limited construction of "public purpose" in the eminent domain context. See *id.* at 665-667.

[79] *Id.* at 632, quoting *Gregory Marina, Inc v Detroit*, 378 Mich 364, 396; 144 NW2d 503 (1966) (plurality opinion).

[80] *Gregory Marina, supra*.

congressional acts under the Fifth Amendment of the federal constitution.[81] Neither case, of course, is binding on this Court in construing the takings clause of our state Constitution, and neither is persuasive authority for the use to which they were put by the *Poletown* majority.

It is not surprising, however, that the majority would turn to nonbinding precedent for the proposition that the Court's hands were effectively tied by the Legislature. As Justice RYAN's dissent noted:

> In point of fact, this Court has *never* employed the minimal standard of review in an eminent domain case which is adopted by the [*Poletown*] majority . . . . Notwithstanding explicit legislative findings, this Court has always made an *independent* determination of what constitutes a public use for which the power of eminent domain may be utilized.[82]

Our eminent domain jurisprudence since Michigan's entry into the union amply supports Justice RYAN's assertion.[83] Questions of public *purpose* aside, whether the proposed condemnations were consistent with the Constitution's "public use" requirement was a constitutional question squarely within the Court's authority.[84] The Court's reliance on *Gregory Marina* and

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[81] *Berman v Parker,* 348 US 26; 75 S Ct 98; 99 L Ed 27 (1954). Justice RYAN noted in his *Poletown* dissent that the majority's reliance on this case "[was] particularly disingenuous." *Poletown, supra* at 668.

[82] *Id.* at 669 (emphasis in original).

[83] See, e.g., *Shizas v City of Detroit*, 333 Mich 44; 52 NW2d 589 (1952) (holding that the proposed condemnation was unconstitutional); similarly *Portage Twp Bd of Health, supra*; *Ryerson v Brown,* 35 Mich 333 (1877); *Trombley, supra*.

[84] See, e.g., *Lakehead Pipe Line Co v Dehn,* 340 Mich 25, 39; 64 NW2d 903 (1954) (" 'The question of whether the proposed use is a public use is a judicial one.'"), quoting *Cleveland v Detroit,* 332 Mich 172, 179; 33 NW2d 747 (1948).

Berman for the contrary position was, as Justice RYAN observed, "disingenuous."[85]

Second, the *Poletown* majority concluded, for the first time in the history of our eminent domain jurisprudence, that a generalized economic benefit was sufficient under art 10, § 2 to justify the transfer of condemned property to a private entity. Before *Poletown,* we had never held that a private entity's pursuit of profit was a "public use" for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy.

Justice COOLEY considered a similar proposition[86] well over a century ago and held that incidental benefits to the economy did not justify the exercise of eminent domain for private, water-powered mills:

> The statute [allowing the condemnation of private property for the construction of private powermills] appears to have been drawn with studious care to avoid any requirement that the person availing himself of its provisions shall consult any interest except his own, and it therefore seems perfectly manifest that when a public use is spoken of in this statute nothing further is intended than that the use shall be one that, in the opinion of the commission or jury, will in some manner advance the public interest. But incidentally every lawful business does this.[87]

Justice COOLEY was careful to point out that the Court was not ruling out the possibility that "incidental benefits to the public" might, in some cases, "justify an

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[85] *Poletown, supra* at 668 (RYAN, J., dissenting).

[86] *Ryerson, supra* at 337 ("An examination of the adjudged cases will show that the courts, in looking about for the public use that was to be accommodated by the statute, have sometimes attached considerable importance to the fact that the general improvement of mill sites, as property possessing great value if improved, and often nearly worthless if not improved, would largely conduce to the prosperity of the state.").

[87] *Id.* at 339.

exercise of the right of eminent domain."[88] But Wayne County has not directed us to a single case, other than *Poletown,* holding that a vague economic benefit stemming from a private profit-maximizing enterprise is a "public use."

Every business, every productive unit in society, does, as Justice COOLEY noted, contribute in some way to the commonweal.[89] To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. *Poletown*'s "economic benefit" rationale would validate practically *any* exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like. Indeed, it is for precisely this reason that this Court has approved the transfer of condemned property to private entities only when certain other conditions—those identified in our pre-1963 eminent domain jurisprudence in Justice RYAN's *Poletown* dissent—are present.[90]

Because *Poletown*'s conception of a public use—that of "alleviating unemployment and revitalizing the economic base of the community"[91]—has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of "public use"

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[88] *Id.*

[89] *Id.*

[90] See part B(2).

[91] *Poletown, supra* at 634.

in art 10, § 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the *Poletown* analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled.

We conclude that the condemnations proposed in this case do not pass constitutional muster because they do not advance a public use as required by Const 1963, art 10, § 2. Accordingly, this case is remanded to the Wayne Circuit Court for entry of summary disposition in defendants' favor.

C. RETROACTIVITY

In the process of determining that the proposed condemnations cannot pass constitutional muster, we have concluded that this Court's *Poletown* opinion is inconsistent with our eminent domain jurisprudence and advances an invalid reading of our Constitution. Because that decision was in error and effectively rendered nugatory the constitutional public use requirement, it must be overruled.[92]

It is true, of course, that this Court must not "lightly overrule precedent."[93] But because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule *Poletown* in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law.[94]

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[92] *Pohutski v City of Allen Park,* 465 Mich 675, 695; 641 NW2d 219 (2002).

[93] *Id.* at 693.

[94] *Id.* at 695.

In the twenty-three years since our decision in *Poletown,* it is a certainty that state and local government actors have acted in reliance on its broad, but erroneous, interpretation of art 10, § 2. Indeed, Wayne County's course of conduct in the present case was no doubt shaped by *Poletown*'s disregard for constitutional limits on the exercise of the power of eminent domain and the license that opinion appeared to grant to state and local authorities.

Nevertheless, there is no reason to depart from the usual practice of applying our conclusions of law to the case at hand.[95] Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963.[96] Our decision simply applies fundamental constitutional principles and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified.[97]

Therefore, our decision to overrule *Poletown* should have retroactive effect, applying to all pending cases in which a challenge to *Poletown* has been raised and preserved.[98]

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[95] See, e.g., *Lesner v Liquid Disposal*, 466 Mich 95, 108; 643 NW2d 553 (2002).

[96] *Pohutski, supra* at 696.

[97] See Baughman, *Justice Moody's lament unanswered: Michigan's unprincipled retroactivity jurisprudence,* 79 Mich B J 664 (2000), quoting Cooley, Constitutional Limitations, 91 ("When the Michigan Supreme Court exercises the 'judicial power,' it is, as said by Justice COOLEY, concerned with a determination of what the existing law is, even in 'changing' a mistaken interpretation, rather than making a 'predetermination of what the law shall be for the regulation of all future cases,' which is an act that 'distinguishes a legislative act from a judicial one.'").

[98] We disagree with Justice CAVANAGH's conclusion that this decision should apply prospectively. First, this case presents none of the exigent circumstances that warranted the "extreme measure" of prospective

CONCLUSION

We conclude that the condemnation of defendants' properties is consistent with MCL 213.23. However, we also hold that the proposed condemnations do not advance a "public use" as required by art 10, § 2 of our 1963 Constitution. Therefore, the decisions of the lower courts are reversed and this matter is remanded for entry of an order of summary disposition in defendants' favor.

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

WEAVER, J. (*concurring in part and dissenting in part*). I concur with the majority's result and decision to overrule *Poletown Neighborhood Council v Detroit,* 410 Mich 616; 304 NW2d 455 (1981), but do so for my own reasons.[1]

The Michigan Constitution states:

> Private property shall not be taken for public use without just compensation therefor being first made and

application in *Pohutski v City of Allen Park*. *Gladych v New Family Homes, Inc,* 468 Mich 594, 606 n 6; 664 NW2d 705 (2003. Second, there is a serious question as to whether it is constitutionally legitimate for this Court to render purely prospective opinions, as such rulings are, in essence, advisory opinions. The only instance in which we are constitutionally authorized to issue an advisory opinion is upon the 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." Const 1963 art 3, § 8. Furthermore, this Court has recognized that "[c]omplete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law." *Hyde v Univ of Mich Bd of Regents,* 426 Mich 223, 240; 393 NW2d 847 (1986). Because *Poletown* was a radical departure from our eminent domain jurisprudence, it is hardly the "clear and uncontradicted case law" contemplated by *Hyde.*

[1] I also concur in the majority's reasoning for applying this decision retroactively.

> secured in a manner prescribed by law . . . . [Const 1963, art 10, § 2.]

Proper application of the art 10, § 2's "public use" limitation on the exercise of eminent domain requires that the Court abandon *Poletown's* holding that land can be taken by the government and transferred to a private entity upon the mere showing that the economy will generally benefit from the condemnation. Thus, Wayne County's attempt to use its eminent domain authority to transfer defendants' properties to private developers to be included in a business and technology park violates the "public use" limitation of art 10, § 2 even though the park might benefit the region's economy.[2]

I dissent from the majority's holding that "public use" must be interpreted as it would have been by those "sophisticated" or "versed in the law" at the time of the 1963 Constitution's ratification and from their application of that holding to the facts of this case. Unlike the majority, I would employ the long-established method of constitutional interpretation that restrains judges by requiring them to ascertain the common understanding of the people who adopted the constitution. The majority's focus on the understanding of those "sophisticated in the law" is elitist; it perverts the primary rule of constitutional interpretation—that constitutions must be interpreted as the people, learned and unlearned, would commonly understand them. It invites the erosion of constitutional protections intended by the Michigan voters who ratified the 1963 Constitution.[3] The

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[2] The public purposes achievable by public corporations through condemnation pursuant to MCL 213.23 must conform to the "public use" limitation of Const 1963, art 10, §2. Because the county's public purposes extend well beyond the constitution's "public use" limitation, the county may not condemn the properties at issue.

[3] As explained in *Univ of Michigan Regents v Michigan*, 395 Mich 52, 74-75; 235 NW2d 1 (1975) (citations omitted), when the people ratified

majority's approach ignores the words of Michigan's respected jurist, Justice THOMAS M. COOLEY, who warned against the tendency to force from the Constitution, by "interested subtlety and ingenious refinement," meaning that was never intended by the people who adopted it.[4]

I. CONSTITUTIONAL INTERPRETATION

Justice COOLEY's often-cited description of the primary rule of constitutional interpretation bears repeating:

> "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 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 (emphasis in *Traverse City School Dist*).]

To ascertain the common understanding of the Constitution, the Court may also consider the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished by it. *Traverse City School Dist, supra* at 405.

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the 1963 Constitution, "the voters had before them the constitutional language and the explanatory 'Convention Comments' adopted by the delegates. Therefore, it is not the prerogative of this Court to change the plain meaning of the words in the constitution 'as understood by the people who adopted it.' "

[4] 1 Cooley, Constitutional Limitations (8th ed) p 131.

Contrary to Justice COOLEY'S warnings, the majority claims that the relevant "common understanding" by which we must interpret art 10, § 2 is that of those "sophisticated in the law at the time of the Constitution's ratification." *Ante* at 471. Until the majority's decision in this case, this Court has never asserted that the term "public use" is a term of such "enormous complexity" that the people who ratified the Constitution would be unable to grasp its meaning.[5] This Court's first reliance on the perspective of those "sophisticated in the law" was in *Michigan Coalition of State Employee Unions v Civil Service Comm,* 465 Mich 212; 634 NW2d 692 (2001). After appearing to acknowledge that constitutional language should be interpreted as it would have been understood by those who ratified it, the opinion asked, "Yet, what if the constitutional language had no plain meaning, but rather is a technical and legal term or phrase of art?" *Id*. at 222. Citing, out of context, a statement by Justice COOLEY regarding commonly understood technical or legal terms that must be supposed to have been employed in their technical sense,[6] the Court majority then erroneously equated such terms to words that are "in no way part of the common vocabulary."[7] The Court majority next launched its unprecedented rule of constitutional interpretation:

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[5] *Ante* at 470-471 (citing *Silver Creek Drain Dist v Extrusions Div Inc,* 468 Mich 367, 375; 663 NW2d 436 (2003). In *Silver Creek,* the same majority of justices incorrectly held that the term "just compensation" in Const 1963, art 10, § 2 must be interpreted as those "sophisticated in the law" would have understood the term at the time of the Constitution's ratification. I dissented because, " '[j]ust compensation' has long been readily and reasonably understood to be that amount of money that puts the property owner whose property is taken in as good, but not better, a financial position after the taking as the property owner enjoyed before the taking." *Silver Creek, supra* at 384-385 (WEAVER, J. dissenting in part).

[6] *Id.,* citing 1 Cooley, Constitutional Limitations (8th ed), p 132.

[7] *Id.* at 223, citing *Walker v Wolverine Fabricating & Mfg, Inc,* 425 Mich 586, 596; 391 NW2d 296 (1986).

> This, then, is the rule: if a constitutional phrase is a technical legal term or a phrase of art in the law, the phrase will be given the meaning that those sophisticated in the law understood at the time of the enactment unless it is clear from the constitutional language that some other meaning was intended. [*Id.* at 223.]

As in *Michigan Coalition,* the majority in this case claims to find support in Justice COOLEY'S treatise on constitutional interpretation, in which he wrote:

> [I]t must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense.[8]

The majority takes this quote out of context and twists its meaning. When Justice COOLEY'S statement is returned to its full context, it neither supports nor justifies the majority's abandonment of the people's common understanding of constitutional terms for the understanding of those "sophisticated or learned in the law."

As is revealed in the full text, Justice COOLEY sought to convey that certain constitutional terms have technical or legal meaning that is known to every person, learned or unlearned. Regarding such terms, COOLEY suggested that it is unnecessary for the Court to give them a more popular or plainer meaning. Careful attention is warranted to Justice COOLEY'S language that in context reads:

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[8] 1 Cooley, Constitutional Limitations (8th ed), p 132.

> In interpreting clauses we must presume that *words have been employed in their natural and ordinary meaning*. As *Marshall*, Ch. J., says: The framers of the constitution, and the people who adopted it, "must be understood to have employed the words in their natural sense, and to have intended what they have said." This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government.
>
> But it must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the Constitution speaks of an *ex post facto* law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights.[9]

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[9] *Id.* at 130-133(emphasis added).

This passage does not suggest that courts should defer to the understanding of those "learned or sophisticated in the law." To the contrary, it simply affirms that certain legal and constitutional terms are so embedded in our constitutional law and history and their meanings so familiar to the people, that the court need not and must not attempt to redefine them. Clearly, Justice COOLEY does not suggest that the people's common understanding of such terms be replaced by a "sophisticated" understanding that may be forced, by "interested subtlety and ingenious refinement," from constitutional language.[10] But this is the very danger that the majority's approach presents.

Justice COOLEY understood, as the majority refuses to accept, that the people do understand "the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights."[11] By substituting the "learned and sophisticated" understanding for that of the people's common understanding, the majority invites future judicial distortion of the Constitution, which was made by and for the people, and invites "interested subtlety and ingenious refinement" to "force from these instruments a meaning which their framers never held."[12]

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[10] *Id.* at 131.

[11] *Id.* at 132-133.

[12] *Id.* at 131. The majority has also incorrectly invoked its new rule of constitutional construction to interpret Const 1963, art 1, § 14, calling "The right of trial by jury" a "technical legal phrase with the meaning those understanding the jurisprudence of this state would give it." *Phillips v Mirac, Inc,* 470 Mich 415; 685 NW2d 174 (2004). Previously, in 1952, this Court took a much more straightforward approach to the same phrase when trying to determine whether a particular statute provided for a right to a trial by jury. *Conservation Dep't v Brown*, 335 Mich 343, 346; 55 NW2d 859 (1952). The Court stated, "The statute under which these . . . proceedings were brought is silent on the subject of a jury. Michigan Constitution 1908, art 2, § 13, provides, as did Michigan's

Constitutional terms with commonly understood technical or legal meanings must, therefore, be distinguished from terms that have no meaning in the common vocabulary. For example, in *Walker v Wolverine Fabricating & Mfg Co, Inc,* 425 Mich 586, 596; 391 NW2d 296 (1986), the Court held that "[a]ppeals . . . tried de novo" was a term that had no meaning in the common vocabulary. The Court noted that scholars disagreed and constitutional convention delegates expressed confusion regarding the term's meaning.[13] *Walker* then explained the appropriate approach to the interpretation of such terms. In order to ascertain the common understanding, *Walker* stated:

> First, one can look to the Constitutional Convention's Address to the People for its explanation of an ambiguous term. Second, one can survey contemporaneous judicial decisions and legal commentaries for evidence of a consensus within the legal community regarding the meaning of a term.[14]

The process of ascertaining the meaning of terms in a constitution that are not part of the common vocabulary through a survey of judicial decisions reflects the rule that the "framers of a Constitution are presumed to have knowledge of existing laws, . . . and act in reference to that knowledge."[15] However, the process of

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previous Constitutions, that 'The right of trial by jury shall remain.' Thus the right to trial by jury is preserved in all cases where it existed prior to the adoption of the Constitution." *Conservation Dep't, supra* at 346. That the Court then considered the right as it existed in the common law before the ratification of the 1908 Constitution does not transform the "right of trial by jury" into a concept too complex for nonlawyers and nonjudges, who are the vast majority of the citizens of this state.

[13] *Walker, supra* at 598-599.

[14] *Walker, supra* at 596-597.

[15] *Id.* at 597 (citations omitted). See, also, *Michigan United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 417; 630 NW2d 297 (2001) (WEAVER, J., dissenting).

ascertaining the understanding of the framers should not be confused with the process of ascertaining the understanding of the ratifiers.

Adhering to the common understanding of the ratifiers, as opposed to that of the "sophisticated in the law," helps ensure that courts restrain themselves from substituting a different meaning of a word to suit a court's own policy preferences. As Justice COOLEY so wisely noted, "[n]arrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government."[16] It is perhaps for this reason that Justice COOLEY concluded that "[n]o satisfactory definition of the term 'public use' has ever been achieved *by the courts*."[17]

II. THE PEOPLE'S COMMON UNDERSTANDING OF "PUBLIC USE"

From the ordinance for government of the Northwest Territory of 1787 to the Michigan Constitution of 1963, every document governing the state of Michigan has recognized the sovereign's power of eminent domain.[18] In 1852, this Court noted that " 'the whole policy of this country relative to roads, mills, bridges and canals, rests upon this single power [of eminent domain] . . . .' "[19] Thus, eminent domain has long been

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[16] 1 Cooley, Constitutional Limitations (8th ed), pp 131-132.

[17] 2 Cooley, Constitutional Limitations (8th ed), pp 1139-1140 (emphasis added).

[18] See, e.g., 1787 Gov't of Northwest Territory, art 2; 1805 Gov't of Michigan Territory, § 2; Const 1835, art 1, § 19; Const 1850, art 15, § 9 and art 18, §14; Const 1908, art 13, §1 and § 5; and Const 1963, art 10, § 2.

[19] *Swan v Williams,* 2 Mich 427, 432 (1852), quoting Chancellor Walworth, 3 Paige R 73.

one of the "leading principles of government" that we must assume the people understood when they ratified each of Michigan's constitutions.[20]

While eminent domain is an attribute of sovereignty,[21] "public use" is a limitation on the exercise of the power of eminent domain. In every Michigan constitution, the voters of Michigan imposed a "public use" limitation on the exercise of the power of eminent domain.[22] To ascertain the people's understanding of art 10, § 2, it is to be remembered:

> The primary source for ascertaining the meaning of a constitutional provision is to determine its plain meaning *as understood by its ratifiers at the time of its adoption*. This is so because "the constitution, although drawn up by a convention, derives no vitality from its framers, but depends for its force entirely upon the popular vote."
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> Nevertheless, "to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be considered." This Court cannot properly protect the mandate of the people without examining both the origin and purpose of a constitutional provision, *because provisions stripped of their context may be manipulated and distorted into unintended meanings*. Indeed we *must heed the intentions of the ratifiers because our constitution gains its authority from its ratification by the people—to do otherwise deprives them of their right to govern*. [*Peterman v Dep't of Natural Resources,* 446 Mich 177, 184-185; 521 NW2d 499 (1994) (citations omitted; emphasis added).]

As clearly and fully expressed by this Court in *Peterman,* art 10, § 2, "has 'acquired a well-understood

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[20] 1 Cooley, Constitutional Limitations (8th ed), p 132.

[21] *Sinas v City of Lansing,* 382 Mich 407, 411; 170 NW2d 23 (1969); *Swan, supra* at 431.

[22] Const 1835, art 1, § 19; Const 1850, art 15, § 9, §14; Const 1908, art 13, §1.

meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense.' "[23]

To clarify the meaning understood by the ratifiers of art 10, § 2, *Peterman* cited an 1857 case discussing the power of and limitations on eminent domain and in a footnote provided the following historical context:

> Before the American Revolution and the drafting of the United States Constitution, the sovereign was not only empowered to take private property for public use, but such takings were almost always uncompensated. . . . Nevertheless, the newly formed republic became increasingly hostile to governmental infringement of property rights as states seized loyalist lands, suspended or remitted debts and the collection of taxes, printed inflationary paper money, and delayed legal enforcement of property rights. To address these abuses was born the requirement that government may not take private property for public use without just compensation. [*Id*. at 187 n 14.]

Such historical perspective helps clarify the limitations on the exercise of eminent domain intended by the

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[23] *Peterman, supra* at 186 (quoting 1 Cooley, Constitutional Limitations (8th ed), p 132. The majority misuses *Peterman* to try to support the majority's elitist holding that art 10, § 2 must be interpreted as it would have been by person's "sophisticated in the law." Read in context above, *Peterman* squarely acknowledged that art 10, § 2 has acquired a well-understood meaning, which the people must be supposed to have had in view. That "public use" might be called a technical term or term of art does not remove it from the understanding of every person. The majority's perversion of the rule of common understanding is more than merely semantic. The majority's approach invites "sophisticated" refinement of the people's "right to govern" themselves through their popular vote. It allows the "sophisticated and learned in the law" to, intentionally or not, strip constitutional provisions of their context and manipulate and distort their meaning. See, e.g., *Peterman, supra* at 185.

ratifiers. *Peterman's* approach is entirely distinct from the majority's reliance on the "sophisticated" understanding of case law addressing the public use limitation. *Peterman's* commitment to ascertaining the common understanding of the ratifiers stands in stark contrast to the majority's statement that the people's common understanding is "fictionalized." *Ante* at 469-470 n 48.

Determining whether a particular exercise of eminent domain is for a constitutionally permissible "public use" has traditionally and necessarily involved consideration of the use to which the condemned property will be put. In 1877, this Court held that to constitutionally exercise the power of eminent domain, the use must "be public in fact; in other words, that it should contain provisions entitling the public to accommodations."[24] Thus, this Court upheld the condemnation of land for the laying out of a public highway;[25] the condemnation of land for the opening of a public avenue;[26] a statute delegating condemnation authority to cities, villages, townships, and counties for the construction of airports;[27] and a public school district's condemnation of property for use by the school.[28] In each of these cases the public retained the right to actually use the land.

A statute authorizing condemnation that merely requires the use of condemned property to generally serve the public interest is insufficient to justify the exercise of eminent domain authority because, "every

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[24] *Ryerson v Brown*, 35 Mich 333, 338 (1877).

[25] *Rogren v Corwin*, 181 Mich 53; 147 NW 517 (1914).

[26] *In re Opening of Gallagher Ave*, 300 Mich 309, 312; 1 NW2d 553 (1942).

[27] *In re Petition of City of Detroit for Condemnation of Lands for Airport*, 308 Mich 480; 14 NW2d 140 (1944).

[28] *Union School Dist of the City of Jackson v Starr Commonwealth for Boys*, 322 Mich 165; 33 NW2d 807 (1948).

lawful business does this."[29] It is thus well-established that the "public use" requirement precludes the condemnation of property for private use even if the private use will generally benefit the public.[30]

> "The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from the more profitable use to which the latter may devote it. [*Portage Twp Bd of Health v Van Hoesen*, 87 Mich 533, 538; 49 NW 894 (1891), quoting Cooley, Const Limitations (6th ed), p 654.]

This Court has held, therefore, that condemnation of land for a rail spur serving a single private company was an unconstitutional exercise of condemnation power because the private company could control its use and exclude the public.[31] Similarly, this Court has held that a statute authorizing condemnation of property to provide a private landowner access to his landlocked private property was unconstitutional.[32]

Ultimate private ownership of lands proposed for condemnation, however, does not necessarily render the taking of land unconstitutional under the "public use" requirement. This Court has upheld the exercise of eminent domain involving lands that remain in private ownership (albeit new private ownership) where the public retains the right to use the lands taken.

> In every instance of turnpike, plank road, bridge, ferry, and canal companies, [eminent domain] has been employed,

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[29] *Ryerson, supra* at 339.

[30] See, e.g., *Pere Marquette R Co v United States Gypsum Co,* 154 Mich 290; 117 NW 733 (1908).

[31] *Pere Marquette, supra* at 300.

[32] *Tolksdorf v Griffith*, 464 Mich 1, 9; 626 NW2d 163 (2001).

> as well as those of railroads. All this class of incorporations have been enacted upon the hypothesis that the lands taken for these purposes were taken for *public use*, and not for private endowment . . . . The right to purchase and hold lands for the purposes of the road, being a right delegated in virtue of the eminent domain of the government, and derogatory to those of the citizen whose property is condemned, must be construed as conferring no right to hold the property in derogation of the purposes for which it was taken. [*Swan, supra* at 439-440 (emphasis added).]

Thus, this Court upheld a statute providing for the appropriation of private property for a railroad designed to provide public travel[33] and a statute authorizing the condemnation of property for an interstate bridge available for public travel.[34] In these cases, ultimate private ownership of condemned land did not offend the "public use" limitation even though the owner would profit from its ownership, because the owner was and could be compelled to continue to devote the condemned land to the public use for which it was condemned.[35]

While this Court's evaluation of whether a condemnation is for a "public use" has traditionally involved consideration of the public's use or control over the use of the property condemned, this Court has considered the government purposes to be achieved by the condemnation. For example, this Court held the transportation of oil throughout the state to be a valid legislative purpose and upheld the constitutionality of a statute allowing the condemnation of lands for a pipeline to

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[33] *Swan, supra.* (*Swan* involved the interpretation of the eminent domain provisions of the United States Constitution and the Ordinance of 1787 governing the Northwest Territory.)

[34] *Detroit Int'l Bridge Co v American Seed Co*, 249 Mich 289; 228 NW 791 (1930).

[35] *Swan, supra* at 436, and *Detroit Int'l Bridge Co, supra* at 299.

serve that purpose.[36] There the Court concluded, however, that the pipeline was a "public use benefiting the people of the State of Michigan" and emphasized that the state retained control of the pipeline allowing it to ensure its devotion to public use.[37] The Court has also excused the absence of ultimate public use or control over lands taken and then transferred to a private entity in cases involving the removal of slums and blight that endangered public health, morals, safety, and welfare.[38] In these cases, the Court reasoned that "slum clearance is in any event the one *controlling* purpose of the condemnation."[39]

Until *Poletown*, this Court's decisions consistently distinguished "public use," as that concept limits the exercise of eminent domain, from private uses and uses that only generally advance the public interest. This distinction was readily traceable in the law and must be assumed to have been well understood by Michigan citizens, the vast majority of whom are not lawyers and are not "sophisticated in the law." The distinction between a "public use" and uses that are strictly private or only generally beneficial to the public protects against the arbitrary exercise of the "extraordinary" sovereign power of eminent domain.[40]

Wayne County's purpose supporting each of the condemnation proceedings at issue is the creation of a contiguous land mass of approximately 1,300 acres for

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[36] *Lakehead Pipe Line Co, Inc v Dehn*, 340 Mich 25, 36; 64 NW2d 903 (1954).

[37] *Id.* at 37 and 40.

[38] See, e.g., *In re Slum Clearance,* 331 Mich 714; 50 NW2d 340 (1951), *Sinas v City of Lansing*, 382 Mich 407; 170 NW2d 23 (1969), and *City of Center Line v Michigan Bell Tel Co*, 387 Mich 260; 196 NW2d 144 (1972).

[39] *In re Slum Clearnace, supra* at 72 (emphasis in original).

[40] *Swan, supra* at 433.

the development of the Pinnacle Aeropark Project. The county states that contiguity is necessary to attract investors and further that the development will create thousands of jobs and tens of millions of dollars in tax revenue, while broadening its primarily industrial tax base.

However laudable these goals are, the facts remain that Wayne County intends to transfer these properties to private entities. These entities will be under no obligation to let the public in their doors or even on their lands. There is no way to characterize the county's transfer of dominion over these properties as accommodating "public use." Further, Wayne County will not retain control over the properties or enterprises to ensure their devotion to public use. Nor can it be said that a controlling purpose of the condemnations is the removal of blight or slums that endanger the public health, morals, safety, and welfare. This case is indeed a very straightforward example of government taking one person's property for the sole benefit of another.

III. THE MAJORITY ABANDONS THE COMMON UNDERSTANDING

The majority's application of its "sophisticated in the law" approach to this case is unnecessary and subject to abuse: it invites the erosion of the limitations placed on the exercise of eminent domain. As noted by Justice COOLEY, "[a] little investigation will show that any definition [of 'public use'] attempted would exclude some subjects that properly should be included in, and include some subjects that must be excluded from, the operation of the words 'public use' . . . ."[41] Nevertheless, the majority opines that

[41] 2 Cooley, Constitutional Limitations (8th ed), pp 1139-1140.

> transfer of condemned property to a private entity, seen through the eyes of an individual sophisticated in the law at the time of ratification of our 1963 Constitution, would be appropriate in one of three contexts: (1) where "public necessity of the extreme sort" requires collective action; (2) where the property remains subject to public oversight after transfer to a private entity; and (3) where the property is selected because of "facts of independent public significance," rather than the interests of the private entity to which the property is eventually transferred. [42]

The majority's categorization of Michigan case law addressing transfers of property to private entities is better suited to articles in law journals that have no force of law than it is to judicial opinions. If, instead of the common understanding of "public use," future courts rely on "facts of independent public significance" to determine whether a condemnation is for a "public use," then it is easy to imagine how the people's limit on the exercise of eminent domain might be eroded. For example, a municipality could declare the lack of a two-car garage to be evidence of blight, as has been attempted in Lakewood, Ohio[43] or justify condemning a small brake repair business so that the property can be used for a hardware store, as has been attempted in Mesa, Arizona.[44] The majority's "sophisticated in the law" approach makes the intended protections from such encroachments on protected rights less certain because it moves away from the constitutional text.

The majority's categories are based on what the majority has determined is the "sophisticated" understanding of case law. However, "sophisticated" catego-

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[42] *Ante* at 476 (citing *Poletown, supra* at 674-681 [RYAN, J., dissenting]).

[43] Engage, *Berman and Beyond: The Misuse of Blight Laws and Eminent Domain* (Vol 5, Issue 1). See, also, CBS News, *60 Minutes,* September 28, 2003.

[44] CBS News, *60 Minutes,* September 28, 2003.

rizations should not replace the traditional approach to ascertaining the common understanding of the ratifiers. Justice COOLEY aptly summarized the "public use" limitations as follows:

> [T]he *public use* implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.
>
> We find ourselves somewhat at sea, however, when we undertake to define, in the light of the judicial decisions, what constitutes a public use.[45]

Justice COOLEY's scholarly treatise follows this statement with a review of judicial decisions from various states regarding the meaning of "public use" and concludes that "public use" "has a meaning much controlled by necessity, and somewhat different from that which it generally bears."[46]

Contrary to the majority's suggestion, Justice COOLEY does not justify invoking a cadre of legal "sophisticates" to help ascertain the meaning of "public use," rather it reveals that "public use" is indeed a constitutional term that must be understood not in its "more popular character," but rather in "the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights."[47] The sense fixed upon the term in legal and

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[45] 2 Cooley, Constitutional Limitations (8th ed), p 1129.

[46] *Id*. at 1138.

[47] 1 Cooley, Constitutional Limitations (8th ed), pp 132-133. A more "popular" sense of "public use" might be derived by concluding that the term required the public's actual physical use of the land or by combining lay dictionary definitions of "public" and "use." These definitions would

constitutional history is, in Justice COOLEY'S words, "familiar to the people."[48]

The facts of each case involving a proposed condemnation should be considered in light of the "public use" limitation on the exercise of eminent domain as the limitation would have been commonly understood by the people, learned and unlearned, who ratified the Constitution. This ensures that the "sense fixed upon the words in the legal and constitutional history" continue to serve to protect the "popular rights."[49]

Contrary to the majority's suggestion, the people's common understanding is not "fictionalized." *Ante* at 470 n 48. The people who ratified art 10, § 2 do understand the limitations they imposed on the exercise of eminent domain. As stated by Justice COOLEY:

> [I]t is always an invasion of liberty and of right when one is compelled to part with his possessions on grounds which are only colorable. A person may be very unreasonable in insisting on retaining his lands; but half the value of free institutions consists in the fact that they protect every man in doing what he shall choose, without liability to be called account for his reasons or motives, so long as he is doing only that which he has a right to do. [*Ryerson, supra* at 342.]

Nevertheless, the majority substitutes the people's common understanding with that of those "sophisticated in the law." Apparently, the current majority does not share Justice COOLEY'S respect for every person's understanding of their most basic and established constitutional protections.

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not necessarily reflect the full protections intended by the ratifiers of art 10, § 2 when they limited the exercise of eminent domain.

[48] 1 Cooley, Constitutional Limitations (8th ed), p 132.

[49] 1 Cooley, Constitutional Limitations (8th ed), pp 132-133.

IV. CONCLUSION

I agree with the majority's result and its decision to overrule *Poletown*. *Poletown* wrongly abandoned the express constitutional limitation on the exercise of eminent domain power when it held that land can be taken by the government and transferred to a private entity upon the mere showing that the economy will generally benefit from the condemnation. For the reasons stated by the majority, I agree that this decision should apply retroactively. Thus Wayne County may not condemn the properties of the defendants at issue.

I dissent from the majority's reliance on its recently created and elitist rule of constitutional interpretation that gives constitutional terms the meaning that those "versed" and "sophisticated in the law" would have given it at the time of the Constitution's ratification.

I also dissent from the majority's application of this new rule to the facts of this case. While the majority's application of its method of interpretation reaches the correct result in this case, this new rule of constitutional interpretation perverts the long-established and primary rule that constitutional terms are to be interpreted as they are understood by the citizen ratifiers, the vast majority of whom are not lawyers or judges and are not "sophisticated in the law." The majority's new rule of constitutional interpretation opens the door, as Justice COOLEY warned, for "interested subtlety and ingenious refinement" to be forced on the Constitution's language—constitutional language that the people framed and adopted for themselves "as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government."[50]

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[50] 1 Cooley, Constitutional Limitations (8th ed), pp 131-132.

Where a legal and constitutional term is so embedded in our constitutional law and history and so familiar to the people as to be commonly understood, this Court should not redefine it through the eyes of those "sophisticated in the law," but should give it the common understanding that the people who ratified the Constitution would have given the term.

CAVANAGH, J., concurred only with respect to section I.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur with the majority that *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981), should be overruled. I also concur with section I of Justice WEAVER's partial concurrence and partial dissent. I write separately, however, because I believe that the analysis offered by Justice RYAN in his dissent in *Poletown* offers the best rationale to explain why I believe *Poletown* should be overruled. Further, I dissent from the majority's conclusion that today's decision should be applied retroactively. Contrary to the majority, I would apply today's decision prospectively only.

This Court has determined that various factors must be considered when determining whether a decision should have retroactive application. In *Pohutski v City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002), this Court stated that these "factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." This Court also "recognized an additional threshold question whether the decision clearly established a new principle of law." *Id*. Further, this Court has adopted a thoughtful approach to retroactivity to minimize chaos and maximize justice. See *Tebo v Havlik*, 418 Mich 350, 360, 361, 363; 343 NW2d 181 (1984) (opinion by BRICKLEY, J.); *Lindsey*

v Harper Hosp, 455 Mich 56, 68; 564 NW2d 861 (1997) ("Prospective application of a holding is appropriate when the holding overrules settled precedent . . . .").

The key factors in this case are Wayne County's reliance on this Court's decision in *Poletown* and the effect retroactive application will have on Wayne County, as well as other communities that relied on *Poletown*. In brief, Wayne County has spent approximately $50 million on the project at issue in this case in reliance on this Court's decision in *Poletown*. While I agree with the majority that *Poletown* improperly interpreted and applied the law, Wayne County's reliance on this Court's decision in *Poletown* is clear and I do not believe that Wayne County and its taxpayers should be penalized because the county followed this Court's guidance.

The majority states that "Wayne County's course of conduct in the present case was no doubt shaped by *Poletown*'s disregard for constitutional limits on the exercise of the power of eminent domain and the license that opinion *appeared to* grant to state and local authorities." *Ante* at 484 (emphasis added). The *Poletown* opinion did not *appear* to grant power to state and local authorities, it actually did so. Although we now overrule *Poletown* because it incorrectly interpreted our Constitution, there is no doubt that Wayne County's actions were a direct result of this Court's decision in *Poletown* and were proper under the reasoning and holding in that decision.

I understand that prospective application would mean that defendants must accept just compensation in exchange for their properties. In an ideal situation, no one, including defendants, would have to sell property unless they wanted to sell. However, in examining the factors that this Court considers when determining

whether a decision should have retroactive application, I cannot penalize Wayne County and its taxpayers because the county followed this Court's prior direction. Therefore, while I concur with the majority in overruling *Poletown*, I dissent with respect to the retroactive application of the majority's decision.

KELLY, J., concurred with CAVANAGH, J.

PRESERVE THE DUNES, INC v
DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket Nos. 122611, 122612. Argued October 16, 2003 (Calendar No. 10). Decided July 30, 2004.

Preserve the Dunes, Inc., brought an action under the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*., in the Berrien County Trial Court against the Department of Environmental Quality (DEQ) and TechniSand, Inc., seeking injunctive relief against a TechniSand sand dune mining operation and challenging the DEQ's decision to issue a sand dune mining permit to TechniSand. The court, David Peterson, J., denied the defendants' motions for summary disposition, finding that the suit was not time-barred and that MEPA provided for an independent cause of action. Later, the court, Scott Schofield, J., denied the plaintiff's motion for summary disposition, determining that the plaintiff's claims were time-barred and, even if they were not, TechniSand qualified for an amended permit under the exception provided in MCL 324.63702(1)(b). After the subsequent bench trial, the court, Paul L. Maloney, J., found that, although the plaintiff had established a prima facie case under MEPA, the defendants had rebutted the prima facie showing by establishing that any adverse impact on natural resources would not rise to the level of impairment or destruction of natural resources required by MEPA for relief. The Court of Appeals, OWENS, P.J., and MARKEY and MURRAY, JJ., first granted an injunction pending appeal (unpublished order, entered September 9, 2002 [Docket No. 231728]), then reversed the decision of the trial court, concluding that the plaintiff's action was not time-barred and that TechniSand did not qualify for an exception to the prohibition on sand dune mining in critical dune areas under MCL 324.6302, and remanded the case to the circuit court for entry of an order granting summary disposition for the plaintiff. 253 Mich App 263 (2002). The defendants each appealed.

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

The claim of Preserve the Dunes is time-barred. TechniSand's eligibility for a permit under MCL 324.63702(1) may not be brought as a MEPA claim.

1. MEPA affords no basis for judicial review of an agency decision under MCL 324.63702(1). The focus of MEPA is to protect Michigan's natural resources from harmful conduct. MEPA offers no basis for invalidating an issued permit for sand dune mining on any basis unrelated to the permit holder's conduct.

2. The Court of Appeals erred by treating the plaintiff's challenge to TechniSand's eligibility for a permit under MCL 324.63702(1) as a MEPA claim. The plaintiff's claim is time-barred because the plaintiff brought its claim in the trial court more than nineteen months after the DEQ issued the permit.

3. The case must be remanded to the Court of Appeals for expedited review of the circuit court finding that TechniSand's mining conduct did not violate MEPA.

Reversed and remanded.

Justice KELLY, joined by Justices CAVANAGH and WEAVER, dissenting, stated that a sand dune mining permit application that satisfies MCL 324.63702 and 324.63704(2) of the sand dune mining act (SDMA) may be challenged under the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq*. It is not subject to the periods of limitations delineated in the Administrative Procedures Act, MCL 24.201 *et seq*., or the Revised Judicature Act, MCL 600.601 *et seq*.

The SDMA includes a flat prohibition of mining in a critical sand dune area unless the mining entity had a mining interest in the area before July 5, 1989. TechniSand purchased the land in 1991. Under the statute, TechniSand was not, and is not, eligible for a permit to mine critical sand dunes.

Under the SDMA, the procedure for the issuance of a permit specifically includes an examination of potential environmental harm that the mining might cause. The mining prohibition qualifies as an antipollution procedure under MEPA, MCL 324.1701(2). The majority's determination wrongly insulates the SDMA permit eligibility determinations from judicial review. Because of the environmental component in the permit process, the issuance of the permit may be challenged under MEPA. The Court of Appeals correctly remanded the case for entry of an order granting summary disposition for the plaintiff.

MINES AND MINERALS — SAND DUNE MINING — PERMITS — MICHIGAN ENVIRONMENTAL PROTECTION ACT.

The Michigan environmental protection act affords no basis for judicial review of a decision by the Department of Environmental Quality to issue a sand dune mining permit in a critical dune area pursuant to MCL 324.64702(1), because the focus of the act is to protect Michigan's natural resources from harmful conduct; only a

basis for permit invalidation related to the permit holder's conduct can be reviewed under the act (MCL 324.1701 *et seq*.).

Neal, Gerber & Eisenberg (by *Phil C. Neal*), *Taglia Fette Dumke & White PC* (by *Thomas R. Fette*), and *Beier Howlett, P.C.* (by *Jeffrey K. Haynes* and *L. Rider Brice, III*), for the plaintiff.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *James R. Piggush*, Assistant Attorney General, for defendant Department of Environmental Quality.

Howard & Howard Attorneys PC (by *James H. Geary, Susan E. Padley*, and *Cara J. Edwards Heflin*) for defendant TechniSand, Inc.

Amici Curiae:

Clark Hill PLC (by *F.R. Damm, Peter D. Homes*, and *Paul C. Smith*) for the Michigan Manufacturers Association.

Warner Norcross & Judd LLP (by *Kenneth W. Vermeulen* and *John J. Bursch*) for the Michigan Aggregates Association.

Law, Weathers & Richardson P.C. (by *James P. Enright* and *Alan Bennett*) for the West Michigan Environmental Action Council, Inc.

Baker & McKenzie (by *David P. Hackett* and *Eric W. Sievers*) and Lake Michigan Federation (by *Laurel O'Sullivan*) for the Lake Michigan Federation.

CORRIGAN, C.J. Defendant Michigan Department of Environmental Quality (DEQ) and defendant TechniSand, Inc., appeal a Court of Appeals decision holding that the DEQ improperly granted a sand dune mining

permit to TechniSand, contrary to the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq.*[1] The only issue properly before us is whether MEPA authorizes a collateral challenge to the DEQ's decision to issue a sand dune mining permit under the sand dune mining act (SDMA), MCL 324.63701 *et seq.*, in an action that challenges flaws in the permitting process unrelated to whether the conduct involved has polluted, impaired, or destroyed, or will likely pollute, impair, or destroy natural resources protected by MEPA. Because MEPA does not authorize such a collateral attack, we reverse the decision of the Court of Appeals and remand to that Court for expedited review of the remaining issues of plaintiff Preserve the Dunes (PTD).[2]

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

In 1991, defendant TechniSand purchased a sand mining operation with a mining permit that was set to expire in 1993. That permit did not allow mining in adjacent property, the Nadeau Site Expansion Area (NSE), which had been classified in 1989 as a "critical dune" area under MCL 324.35301 *et seq*.

Mining in critical dune areas was prohibited after July 5, 1989, subject to certain narrowly defined exceptions to MCL 324.63702(1):

> Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 [MCL 324.35301 *et seq.*] after July 5, 1989, except under either of the following circumstances:
>
> (a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.

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[1] 253 Mich App 263; 655 NW2d 263 (2002).

[2] PTD is an ad hoc organization of local citizens formed for the purpose of instituting this lawsuit.

> (b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989, the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit.

In late 1994, TechniSand applied for an amended permit under MCL 324.63702(1)(b). In April 1995, the Department of Natural Resources (DNR)[3] denied the application on the ground that TechniSand was ineligible for an amended permit under subsection 1(b) because it had purchased the operation after July 5, 1989.

In May 1996, TechniSand amended and resubmitted its application and supporting documentation to the DEQ. After a public hearing, the DEQ approved TechniSand's application on November 25, 1996. TechniSand began mining the NSE area thereafter.

Nineteen months later, in July 1998, PTD sued defendants, seeking injunctive and declaratory relief under MEPA. MEPA provides a cause of action for declaratory and other equitable relief for conduct that is likely to result in the pollution, impairment, or destruction of Michigan's natural resources. MCL 324.1701 *et seq*.

PTD alleged that the DEQ violated MEPA when it approved TechniSand's amended mining permit. It further alleged that TechniSand's mining conduct violated MEPA. Defendants sought summary disposition because PTD's action was time-barred. The circuit court denied defendants' motion.

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[3] During this time, the DNR was the administrative agency that regulated sand mining. In 1995, this responsibility was transferred from the DNR to the DEQ by Executive Reorganization Order No. 1995-16 (codified at MCL 324.99903).

PTD sought summary disposition after the original circuit judge had retired. His successor ruled that PTD's claim under the SDMA was indeed time-barred. It also held that plaintiff had established a prima facie MEPA claim on the basis of TechniSand's mining conduct.

After a seven-day bench trial on the MEPA claim alone, the court ruled that defendants had successfully rebutted PTD's prima facie case and entered a judgment of no cause of action. The court specifically found that "any adverse impact on the natural resources which will result from the sand mining will not rise to the level of impairment or destruction of natural resources within the meaning of MEPA."

The Court of Appeals reversed and remanded for entry of an order granting summary disposition for PTD. The Court of Appeals concluded that (1) the DEQ's decision to grant a permit could be challenged at any time under MEPA and (2) TechniSand did not qualify for a permit under § 63702. The DEQ and TechniSand filed applications for leave to appeal in this Court, and we granted leave.[4]

II. STANDARD OF REVIEW

The issue presented involves a question of statutory interpretation. We review de novo questions of statutory interpretation. *Oade v Jackson Nat'l Life Ins Co,* 465 Mich 244, 250; 632 NW2d 126 (2001).

III

A. OVERVIEW OF MEPA

MEPA is contained in part 17, MCL 324.1701 *et seq.,* of the Natural Resources and Environmental Protection

[4] 468 Mich 869 (2003).

Act, MCL 324.101 *et seq*. To prevail on a MEPA claim, the plaintiff must make a "prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources, or the public trust in these resources . . . ." MCL 324.1703(1). The defendant may rebut the plaintiff's showing with contrary evidence or raise an affirmative defense that (1) there is no feasible and prudent alternative to the conduct and (2) the "conduct is consistent with the promotion of the public health, safety, and welfare in light of" the state's concern with protecting Michigan's natural resources. *Id*. The focus of MEPA is on the defendant's conduct.

MEPA provides for immediate judicial review of allegedly harmful conduct. The statute does not require exhaustion of administrative remedies before a plaintiff files suit in circuit court. MCL 324.1701(2). A court may, however, "direct the parties to seek relief" in available administrative proceedings. MCL 324.1704(2).

B. OVERVIEW OF SDMA PERMIT PROCESS

The DEQ may authorize mining in critical sand dune areas under two specific conditions set forth in MCL 324.63702(1)(a) and (b):

> (1) Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 [MCL 324.35301 *et seq*.] after July 5, 1989, except under either of the following circumstances:
>
> (a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.
>
> (b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend

> the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989, the operator owned the land or owned rights to mine dune sand in the land for which the operator seeks an amended permit.

If an operator does not fall within one of these limited exceptions to the SDMA ban on mining in critical dunes areas, the inquiry ends. Nowhere in this initial inquiry is the DEQ required to evaluate the permit seeker's proposed conduct. Indeed, such an inquiry would be pointless unless the DEQ first determined that the applicant was eligible for a permit on the basis of the applicant's status as either a past owner or operator.

Once the DEQ determines that an applicant is eligible to apply for a sand dune mining permit in a critical dune area under § 63702(1), the applicant must fulfill the requirements of § 63704. Specifically, applicants are required to submit the following to the DEQ:

> (a) A permit application on a form provided by the department.
>
> (b) An environmental impact statement of the proposed mining activity as prescribed by section 63705.
>
> (c) A progressive cell-unit mining and reclamation plan for the proposed mining activity as prescribed in section 63706.
>
> (d) A 15-year mining plan as prescribed by section 63707. [MCL 324.63704(2).]

After the DEQ determines that the applicant has satisfied §§ 63702(1) and 63704(2), it must next determine whether the applicant meets the requirement of § 63709. Section 63709 prohibits the DEQ from approving an amended permit if the applicant's proposed conduct "is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources, as provided by part 17." Thus, MEPA, in

part 17, MCL 324.1701 *et seq.,* expressly controls the DEQ's § 63709 determinations.

C. MCL 324.1701 AND *NEMETH v ABONMARCHE DEVELOPMENT*

In addition to conferring power upon the Attorney General, MCL 324.1701(1) authorizes a private cause of action under MEPA:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

MCL 324.1701(2) provides:

> In granting relief provided by subsection (1), if there is a standard for pollution or for an antipollution device or procedure, fixed by rule or otherwise, by the state or an instrumentality, agency, or political subdivision of the state, the court may:
>
> * * *
>
> (b) If a court finds a standard to be deficient, direct the adoption of a standard approved and specified by the court.

Thus, in *Nemeth v Abonmarche Development, Inc*,457 Mich 16; 576 NW2d 641 (1998), we held that a violation of the soil erosion and sedimentation control act (SESCA), MCL 324.9101 *et seq.*, may establish a plaintiff's prima facie showing under MEPA because the SESCA contains a pollution control standard.

MCL 324.1702 is not applicable in this case because, unlike the SESCA, the SDMA does not contain an antipollution standard. Consequently, it is not within the exception created by MCL 324.1701(2). *Nemeth,* there-

fore, does not support the argument that a violation of the SDMA may serve as a prima facie violation of MEPA.

The Court of Appeals decision to the contrary was based on a misinterpretation of our holding in *Nemeth*:

> [A]lthough subsection 1701(2) speaks in terms of whether a "standard for pollution or antipollution device or procedure" exists, but does not specifically include whether a standard for impairment or destruction of a natural resource exists, our Supreme Court in *Nemeth* did not seem to find that to be an important point in that case in which soil erosion, rather than what is commonly thought of as pollution, was at issue. [253 Mich App 263, 286 n 2; 655 NW2d 263 (2002).]

The Court of Appeals conclusion is incorrect. In *Nemeth*, we expressly justified our holding in part because erosion *is* a form of pollution. *Nemeth, supra* at 27 ("Sedimentation and erosion is a [sic] well-recognized source of water pollution.").

Moreover, in *Nemeth*, as in all MEPA actions, the focus was on the defendant's actual conduct.[5] Specifically, this

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[5] Although we held in *Nemeth* that the SESCA creates a pollution control standard applicable to MEPA claims, we also specifically stated:

> We emphasize that this is not the end of the inquiry. The trial court held that plaintiffs' showing of defendants' SESCA violations established a prima facie claim under the MEPA. Then, defendants had the opportunity to rebut that prima facie showing either by submitting evidence to the contrary, i.e., *that plaintiffs have shown neither pollution, impairment, nor destruction*, *nor the likelihood thereof, in spite of proof of the* SESCA *violations,* or by showing that there is no feasible and prudent alternative to defendants' conduct. Subsection 1703(1). [*Nemeth* at 36 n 10 (emphasis added).]

Thus, it is clear that a defendant's opportunity to rebut a prima facie MEPA violation remains the same whether that violation has been established independently or by reference to another statute's pollution control standard, and that the determinative consideration is whether the defendant's conduct will, in fact, pollute, impair, or destroy a natural resource. In the instant case, the Court of Appeals erroneously concluded that

Court reiterated in *Nemeth* the findings of fact required of a trial court as announced in *Ray v Mason Co Drain Comm'r*, 393 Mich 294; 224 NW2d 883 (1975). In *Ray*, we stated:

> The trial judge must find the facts on which the plaintiff claims to have made a prima facie case under [§ 1703(1)], namely that *the defendant's conduct* "has, *or is likely* to pollute, impair or destroy the air, water or other natural resources." . . . Obviously the evidence necessary to constitute a prima facie showing will vary with the nature of the alleged environmental degradation involved. [*Ray* at 309 (some emphasis supplied).]

That the Court of Appeals failed to recognize that MEPA is concerned only with harmful conduct is readily apparent from its characterization of the circuit court's focus on TechniSand's mining conduct as error:

> Judge Schofield simply addressed whether TechniSand's proposed mining was likely to "pollute, impair, or destroy" the natural resource in this case—the critical dune area. [253 Mich App 286.]

Plaintiff and the dissent urge us to hold that although TechniSand's mining operation may or may not be likely to pollute, impair, or destroy the air, water, or other natural resources, its predecessor's allegedly deficient past relationship to the mining property nega-

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§ 63702 of the SDMA creates a pollution control standard and that defendant violated it. Having so concluded, the Court of Appeals effectively concluded that defendant's violation of § 63702 amounted to a MEPA violation per se. It failed to consider at all whether TechniSand had submitted evidence sufficient to rebut the alleged prima facie MEPA violations. The trial court, however, *did* consider this evidence after finding that PTD presented a prima facie MEPA violation independent of the SDMA. The trial court held that TechniSand had rebutted the prima facie MEPA violation. The Court of Appeals failure to consider whether TechniSand could rebut the (erroneously found) prima facie MEPA violation evidences the extent to which it improperly failed to consider whether TechniSand's *conduct* would actually "pollute, impair, or destroy" a natural resource.

tively affects the environment. We decline their invitation to accept such fuzzy logic. Where a defendant's conduct itself does not offend MEPA, no MEPA violation exists.

D. REVIEW OF THE DEQ'S MCL 624.63702(1) DECISIONS[6]

We reject the dissent's gloomy prediction that this orderly understanding of MEPA "insulates [SDMA] permit eligibility determinations from judicial review." *Post* at 539.

As previously discussed, DEQ determinations of permit eligibility under §§ 63702(1) and 63704(2) are unrelated to whether the applicant's proposed activities on the property violate MEPA. Therefore, MEPA provides no private cause of action in circuit court for plaintiffs to challenge the DEQ's determinations of permit eligibility made under §§ 63702(1) and 63704(2).

An improper administrative decision, standing alone, does not harm the environment. Only wrongful conduct offends MEPA.

In general, judicial review of an administrative decision is available under the following statutory schemes: (1) the review process prescribed in the statute applicable to the particular agency, (2) an appeal to circuit court pursuant to the Revised Judicature Act (RJA), MCL 600.631, and Michigan Court Rules 7.104(A), 7.101, and 7.103, or (3) the review provided in the Administrative Procedures Act (APA), MCL 24.201 *et seq*. *Palo Group Foster Care, Inc v Dep't of Social Services*, 228 Mich App 140, 145; 577 NW2d 200 (1998).

The SDMA does not expressly establish procedures for disputing a DEQ determination in a contested case

[6] PTD does not challenge TechniSand's satisfaction of the requirements under § 63704(2).

unrelated to MEPA. We need not decide here whether PTD's challenge to the DEQ's permit decision is governed by the RJA or the APA because the challenge is time-barred under either statute. PTD brought this action nineteen months after the DEQ's decision to grant TechniSand's application for an amended permit, which far exceeds the sixty-day period allowed by the APA, MCL 24.304(1), and the twenty-one-day period provided by MCR 7.101(B)(1), which governs appeals under MCL 600.631 of the RJA pursuant to MCR 7.104(A). The DEQ and TechniSand properly interposed this defense in their initial pleadings. Thus, PTD's claim was time-barred.

E. PARTICIPATION AND INTERVENTION DURING THE PERMIT PROCESS UNDER THE SDMA OR MEPA

Parties who wish to intervene during the permit process have two options. They may intervene either under the procedures governed by the SDMA or those governed by MEPA.

MCL 324.63708(5) of the SDMA establishes a procedure for notifying interested parties of permit applications:

> The department shall provide a list of all pending sand dune mining applications upon a request from a person. The list shall give the name and address of each applicant, the legal description of the lands included in the project, and a summary statement of the purpose of the application.

Thus, the SDMA provides a mechanism whereby interested parties may learn of and participate in agency decisions regarding approval of critical dune area mining permits.

MEPA provides another procedure for intervention in permit proceedings. MCL 324.1705(1). This statute

requires a potential intervenor to file a pleading asserting that the proceeding or action for judicial review involves conduct that has violated, or is likely to violate, MEPA. Thus, while PTD could have intervened in TechniSand's permit process under MEPA, its only basis for intervention would have been TechniSand's proposed conduct. MEPA does not allow such intervention on the basis of anything other than alleged wrongful conduct.

F. REVIEW OF DEQ'S MCL 324.63709 DETERMINATIONS

As already discussed, a challenge under MEPA may be filed in circuit court before or during the time that the alleged MEPA violation occurs, without any requirement that a litigant exhaust administrative remedies. Thus, whether TechniSand was ineligible for the permit under § 63709 on the basis of alleged harmful conduct was a question that was properly before the circuit court. The circuit court ruled against PTD.

The Court of Appeals has not reviewed the circuit court's decision that TechniSand's conduct did not violate the MEPA standard incorporated into the SDMA under § 63709. Because the Court of Appeals never reached PTD's claim that TechniSand's mining operation violates MEPA, that issue is not ripe for this Court's review. We remand the case to the Court of Appeals to review the circuit court's findings regarding TechniSand's sand mining activity. The Court of Appeals is directed to expedite its consideration of this case.

G. RESPONSE TO THE DISSENT

The dissent initially contends that it is undisputed that TechniSand is "ineligible for a permit." *Post* at 525. We disagree. The time for challenging TechniSand's eligibility for a permit is long past. TechniSand is

lawfully entitled to mine sand dunes in Michigan according to the DEQ permit. Whether the DEQ's permitting decision was "unprincipled" or an "illegal about-face" is not a determination for this Court to make. *Post* at 525. That decision is time-barred.

The dissent further asserts that the DEQ's permit decision "*will* directly enable destruction of critical dunes." *Post* at 526 (emphasis supplied). The dissent asserts that critical dunes will be destroyed because the Court of Appeals stated that TechniSand had acknowledged as much in an environmental impact statement. The entire environmental impact statement is not in the record.[7] Moreover, the trial court expressly found to the contrary when it ruled on the MEPA claim. It specifically held that TechniSand's mining would *not* destroy a critical dune. The Court of Appeals never addressed this finding.

The dissent's conclusion that the permitting process is subject to collateral attack is not defensible on the basis of MEPA's language, structure, or purpose. Countless entities apply for and receive permits for conduct that affects Michigan's natural resources. Under the dissent's regime, the permitting decision can never be final. Were we to adopt the dissent's extreme understanding of MEPA, every permit that has ever been issued would be subject to challenge; any undotted "i" or uncrossed "t" could potentially invalidate an existing permit. We do not believe the Legislature intended MEPA to destabilize the state's permitting system in this manner.

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[7] The excerpt in the record indicates that TechniSand acknowledged that the project would "greatly alter" approximately 61% of the NSE. In any case, the trial court expressly found more credible TechniSand's expert witnesses and ultimately held "the adverse impact on the environment caused by the mining as permitted will not rise to the level of impairment or destruction within the meaning of MEPA."

Imagine the world that the dissent's reasoning would create. The present energy crisis offers a good example. For many years, our country has sought to decrease our reliance on foreign sources of oil. Suppose an oil company decided to invest in oil exploration in Michigan in reliance on a DEQ-issued permit. Under the dissent's view, MEPA would authorize a challenge at any time to flaws in the permitting process. Moreover, under the dissent's reasoning, a court must accept as true the bare assertion that a company's conduct will destroy natural resources. It can never rely on a permit to do business. What sane investor would take such a risk? As gas prices soar, few people in Michigan would thank this Court for "protecting" the environment in this radical fashion.

The dissent's regime would render the permitting process a useless exercise. It would cripple economic expansion in Michigan and probably lead to disinvestment. No one would invest money to obtain a permit that is subject to endless collateral attacks.

MEPA nowhere strips the permitting process of finality. It is the dissent that makes a mockery of legislative intent by failing to anchor its exaggerated claims in the statute's actual language. See *post* at 526. MEPA does not impose the radical requirement that courts indefinitely police administrative agencies' permit procedures and decisions. As noted in *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 403 Mich 215, 232-233; 248 NW2d 240 (1978) (opinion by LEVIN, J.):

> A court is not empowered to prevent any conduct . . . which does not rise to the level of environmental risk proscribed by [MEPA]. The standard, 'has or is likely to pollute, impair or destroy,' is a limitation as well as a grant of power.

Moreover, the Court of Appeals never reached the issue of whether TechniSand's actual conduct is likely to harm natural resources. As already noted, the trial court specifically held that TechniSand's conduct did not violate MEPA. Given this procedural posture, we are puzzled by the dissent's statement that defendant's mining "will" destroy critical dunes.

After taking extensive testimony on the issue, the trial court ruled that any "adverse impact on the environment caused by the mining as permitted will not rise to the level of impairment or destruction within the meaning of MEPA." The Court of Appeals did not explicitly reject the trial court's findings. Instead, it erroneously concluded that a permit that affects the environment in any way may be challenged at any time under MEPA. For the reasons articulated above, the Court of Appeals erred in interpreting MEPA in this manner.

CONCLUSION

MEPA affords no basis for judicial review of agency decisions under MCL 324.63702(1) because that inquiry is outside the purview of MEPA. The focus of MEPA is to protect our state's natural resources from harmful conduct. It offers no basis for invalidating an issued permit for reasons unrelated to the permit holder's conduct. To hold otherwise would broaden by judicial fiat the scope of MEPA and create a cause of action that has no basis in MEPA's language or structure.

The Court of Appeals erred by treating PTD's challenge to TechniSand's eligibility for a permit under MCL 324.63702(1) as a MEPA claim. Because PTD brought its claim more than nineteen months after the DEQ issued the permit, PTD's claim is time-barred. We reverse the decision of the Court of Appeals on that issue.

We remand the case to the Court of Appeals to review the circuit court's findings that TechniSand's mining conduct does not violate MEPA, and direct the Court of Appeals to expedite its review.

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

KELLY, J. (*dissenting*). In 1995, the Michigan Department of Natural Resources (DNR) denied defendant TechniSand permission to mine critical dunes because it was ineligible for a permit under the sand dune mining act[1] (SDMA), MCL 324.63701 *et seq*. One year later, following Governor Engler's reorganization of the DNR, the newly created Department of Environmental Quality (DEQ) invited TechniSand to apply again, citing "changes in state government." TechniSand reapplied and the DEQ granted a permit despite the fact, now undisputed, that TechniSand remained ineligible to mine critical dunes. As a result, critical dunes that would otherwise remain untouched will be impaired and perhaps destroyed.

Through the decision in this case, a court majority of four sanctions the DEQ's unexplained and illegal about-face on TechniSand's critical dune mining permit. In the process, it strikes a devastating blow to Michigan's environmental law.[2] This majority perpetuates the

[1] The sand dune mining act is codified as part 637 of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*.

[2] The majority's decision to significantly narrow the scope of the applicability of the Michigan environmental protection act (MEPA), MCL 324.1701 *et seq.,* in this case is compounded by its recent decision in *Nat'l Wildlife Federation & Upper Peninsula Environmental Council v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). There, the same majority ignores thirty years of precedent and applies judge-created standing tests to MEPA plaintiffs. It makes this ruling despite the fact that

DEQ's unprincipled decision to permit illegal mining of critical dunes by insulating it from the scrutiny of the Michigan environmental protection act (MEPA). MCL 324.1701 *et seq*. Its holding that the DEQ's decision to grant the permit to mine critical dunes is "unrelated to" the destruction of those critical dunes defies reality. It mocks our Legislature's intent to prevent environmental harm. In addition, it is contrary to this Court's earlier MEPA decisions.[3]

Critical sand dunes, like those at issue in this case, are specially protected natural resources. The mining act protects these irreplaceable resources by strictly limiting who is eligible to mine them. MEPA works in tandem with the mining act to, in its own words, supplement "existing administrative and regulatory procedures provided by law." MCL 324.1706. Issuance of the permit will directly enable destruction of critical dunes that would otherwise remain untouched. Hence, it is inescapable that the DEQ's decision to issue the permit may be challenged under the environmental protection act.

Moreover, the environmental protection act does not impose a statutory period of limitations on legal actions that assert that a party's conduct will cause environmental pollution, impairment, or destruction. Therefore, I would hold that plaintiff's challenge is not limited by the statutory period of either the Adminis-

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the statute explicitly grants standing to "any person" to maintain an action to prevent pollution, impairment, or destruction of our natural resources. MCL 324.1701(1).

[3] See, e.g., *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975), *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 304-305; 224 NW2d 883 (1975), *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741, 751; 275 NW2d 538 (1979) (*WMEAC*), and *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16; 576 NW2d 641 (1998).

trative Procedures Act (APA) or the Revised Judicature Act (RJA). MCL 24.201 *et seq*., MCL 600.101 *et seq*.

I dissent because the majority's decision subverts the purposes of the sand dunes mining act and the environmental protection act by incorrectly insulating the DEQ's permit decision from scrutiny under the environmental protection act. Defendant TechniSand is not eligible for a permit to mine critical dunes sand under the sand dunes mining act. Accordingly, I would affirm the decision of the Court of Appeals.

THE MAJORITY'S RESPONSE TO THE DISSENT

The majority's "Response to the Dissent"[4] is an abrupt departure from its precedent of declining to amend legislative policy decisions with which it disagrees.[5] Its discussion of the wisdom of the Legislature's decision to bar sand dune mining by anyone who does not meet limited eligibility criteria is unsuited for a judicial opinion. Moreover, the majority's comparison of the eligibility problem in the permit to a clerical error and its suggestion that my position would allow endless challenges for such trifles are gross exaggerations. *Ante* at 522. Granting a permit to mine critical dunes to an ineligible operator is a substantive fault. It is a violation of the law that allows conduct likely to pollute, impair, or destroy a natural resource specially protected by the Legislature. Economic development in this state has not ceased in the past thirty years. It will not now grind to a halt under the oppressive weight of permit challenges if

[4] *Ante* at 521-524.

[5] This Court has scrupulously declined to consider the wisdom of the Legislature's policy decision. See, e.g., *Oakland Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 612-613; 575 NW2d 751 (1998).

this Court reaffirms its prior holdings that MEPA allows challenges to environmentally destructive permit decisions.

FACTS AND PROCEEDINGS BELOW

Defendant TechniSand purchased real property in 1991 that included both critical and noncritical dune areas. Along with its purchase, it obtained a permit to mine sand in noncritical dune areas on one portion of the property. In 1994, TechniSand applied for an amendment of this permit to expand sand dune mining to critical dune areas on an adjacent portion of the property.

The Michigan Department of Natural Resources, the agency charged with reviewing SDMA permit applications at the time, denied the application on the ground that TechniSand was ineligible for an amended permit. The original permit was to mine in noncritical dune areas and did not include the property's critical dune areas. Also, TechniSand had purchased the land and mining operation after the deadline to apply for an unassociated permit to mine the critical dune areas. MCL 324.63702(1)(b).

In 1995, Governor John Engler created a new agency, the Michigan Department of Environmental Quality (DEQ). Executive Reorganization Order No. 1995-16 (codified at MCL 324.99903). The DEQ was given responsibility for administering the SDMA and other environmental permitting programs, and the Governor appointed its director. The DEQ then wrote to TechniSand indicating that "changes in state government" and "additional information" from TechniSand would allow the DEQ to review the permit application.[6]

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[6] Letter dated April 1, 1996, from Douglas Daniels and Kimberly Rice of the DEQ. The letter makes reference to an April 20, 1995, letter by

TechniSand resubmitted the environmental impact statement and reclamation plan that it had submitted with its previous application, without providing additional information demonstrating how it was eligible for an amended permit. The DEQ issued the permit later that year. It did not explain how TechniSand met the eligibility criteria in the SDMA. Also, it does not now dispute that TechniSand is ineligible for a permit.

Plaintiff Preserve the Dunes was formed in 1996. In 1998, it sued TechniSand and the DEQ for injunctive relief to stop TechniSand's mine expansion. Plaintiff alleged that TechniSand was ineligible for an SDMA permit and that its mine expansion violated MEPA.

The trial court ruled that plaintiff's challenge to the permitting decision was time-barred under the Administrative Procedures Act and that the environmental impact of the mining was insufficient to implicate MEPA. The Court of Appeals reversed the ruling. 253 Mich App 263; 655 NW2d 263 (2002). It held that the DEQ's decision to grant TechniSand's amended permit could be challenged under MEPA and that TechniSand did not qualify for a permit under § 63702 of the SDMA. The DEQ's decision to amend TechniSand's permit, it concluded, violated MEPA.

The Court of Appeals remanded the case to the trial court for entry of summary disposition for plaintiff. Because it had found TechniSand ineligible for a permit to mine the critical dune area, it did not review the trial court's finding that the mining itself violated MEPA. This Court granted the applications for leave to appeal filed by the DEQ and TechniSand. 468 Mich 869 (2003).

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which Roger Whitener of the DNR informed TechniSand that, pursuant to an opinion of the state Attorney General, TechniSand was ineligible to mine critical dunes. The April 1, 1996, letter did not address TechniSand's ineligibility to mine critical dunes.

THE SAND DUNE MINING ACT PROTECTS MICHIGAN'S CRITICAL DUNES FROM DESTRUCTION

It is without contest that the Legislature enacted the sand dune mining act to stringently protect Michigan's sand dune areas from further destruction. They are one of the state's prized natural resources. The Legislature included in the act special provisions to preserve dune areas it labeled "critical."

It expressly indicated:

> The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and the people from other states and countries who visit this resource. [MCL 324.35302(a).]

The Legislature enacted the SDMA out of concern that mining the dunes consumes them and harms the environment. The act is an expression of the state's "paramount" interest in protecting the dunes. See MCL 324.1701. It defines "Sand dune mining" as the "removal of sand from sand dune areas for commercial or industrial purposes." MCL 324.63701(l).[7] It requires all persons seeking to mine sand dunes to obtain a sand dune mining permit. MCL 324.63704. Regarding critical dunes, the act states that "the removal of any volume of sand that is not sand dune mining within a critical dune area as defined in part 353 is subject to the critical dune protection provisions of part 353." MCL 324.63701(l).

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[7] The statute exempts from this definition the removal of "volumes of less than 3,000 tons" of sand if the removal is a "1-time occurrence and the reason the sand is removed is not for the direct use for an industrial or commercial purpose."

The SDMA's flat prohibition against mining any sand in designated critical sand dune areas is subject only to a narrow exception. That is, authorized mining entities that existed when the SDMA was enacted may continue operation (1) on land in which they had a mining interest before July 5, 1989, or (2) on land adjacent to property in which they had a mining interest before that date. MCL 324.63702(1).[8]

These "grandfathering" exceptions reflect the Legislature's attempt to balance mining interests that predated the critical dune designation of July 5, 1989, with the preservation of the remaining and newly designated critical dunes. New entities would be unable to begin operation. Existing entities would have limited opportunities to mine additional areas. By limiting critical dune mining to those entities with a preexisting interest, existing entities would be allowed to continue operating while ensuring that mining would not last indefinitely.

The Legislature mandated that these narrow exceptions for sand dune mining would be implemented

[8] MCL 324.62702(1) provides in full:

> Notwithstanding any other provision of this part, the department shall not issue a sand dune mining permit within a critical dune area as defined in part 353 after July 5, 1989, except under either of the following circumstances:
>
> (a) The operator seeks to renew or amend a sand dune mining permit that was issued prior to July 5, 1989, subject to the criteria and standards applicable to a renewal or amendatory application.
>
> (b) The operator holds a sand dune mining permit issued pursuant to section 63704 and is seeking to amend the mining permit to include land that is adjacent to property the operator is permitted to mine, and prior to July 5, 1989 the operator owned the land or owned the rights to mine dune sand in the land for which the operator seeks the amended permit.

through regulatory permits. MCL 324.63704. The act created a permitting procedure to ensure that future mining would be only by parties with a pre-existing legal interest, and in a manner protective of critical dune areas. It cannot reasonably be suggested that the eligibility criteria that completely prohibit all but an expressly defined few operators from mining critical dunes are not a measure of environmental protection.

Only if eligibility is verified do additional environmental protections come into play. Permit applications by eligible entities are reviewed on a case-by-case basis to ensure that the proposed mining is environmentally acceptable. The applicant must submit an environmental impact statement describing the anticipated environmental damage that will occur from the mining operation. MCL 324.63704(2)(b). The applicant must explain why alternative mining locations were not chosen. MCL 324.63705(h). It must include a reclamation plan for the area to be mined. MCL 324.63704(2)(c), 324.63706.

In reviewing the application, the DEQ must ensure that the proposed mining is unlikely to pollute, impair, or destroy natural resources or the public trust in those resources. MCL 324.63709. Any permit issued must require that the provisions of the applicant's progressive cell-unit mining and reclamation plan are met. MCL 324.63706(3). If threatened or endangered species are present, the plan must include provisions either to protect them or to mitigate the effect of mining on them. MCL 324.63706(3)(g).

PLAINTIFFS MAY CHALLENGE THE PERMIT ELIGIBILITY DETERMINATION UNDER THE MICHIGAN ENVIRONMENTAL PROTECTION ACT

The environmental protection act provides that

> . . . any person may maintain an action in the circuit court . . . where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [MCL 324.1701(1).]

Under this act, a plaintiff makes a prima facie case by showing "that the conduct of defendant is likely to . . . destroy the . . . natural resources or the public trust in these resources." MCL 324.1703(1).[9] The Legislature expressly provided that MEPA supplements existing regulatory procedures that were provided by law. MCL 324.1706.

The SDMA's eligibility restrictions protect critical dunes from mining by ineligible operators whose conduct is likely to impair or destroy critical dunes that would otherwise remain untouched. Hence, the environmental protection act is applicable to decisions regarding an SDMA permit applicant's eligibility. The SDMA specifically incorporates the Legislature's recognition that critical dunes are "irreplaceable" natural resources. MCL 324.35302(a). It provides that "the removal of any volume of sand . . . within a critical dune area . . . is subject to the critical dune protection provisions of part 353." MCL 324.63701(l). Its provisions strictly limiting eligibility to mine critical dunes are intended to help protect critical dunes from pollution, impairment, or destruction.

Thus, the majority's suggestion that permit eligibility is unrelated to whether the conduct permitted will

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[9] The majority's reference to MCL 324.1702(2) is misplaced. *Ante* at 516. Plaintiffs are not challenging the DEQ's imposition on TechniSand of the SDMA's pollution control standards. They do not challenge the manner in which permissible activity is undertaken. They challenge whether TechniSand's conduct is permissible at all.

harm the environment is untenable. Issuance of a permit to an ineligible operator to engage in any mining of critical dunes will allow "conduct . . . likely to pollute, impair, or destroy . . . natural resources or the public trust in these resources." MCL 324.1703(1); see also *West Michigan Environmental Action Council v Natural Resources Comm,* 405 Mich 741, 751; 275 NW2d 538 (1979) *(WMEAC)*.

MEPA is intended to prevent conduct that is likely to harm the environment as well as to stop conduct that is presently harming it. In *WMEAC*, this Court ordered that a permanent injunction be entered prohibiting the drilling of oil and gas wells pursuant to a DNR permit. The "issuance of permits was properly before the circuit court as conduct alleged to be likely to pollute, impair, or destroy" natural resources under MEPA. *WMEAC* at 751. The drilling would cause "apparently serious and lasting, though unquantifiable, damage" to elk herd population. *WMEAC* at 760. This Court concluded that the previous MEPA, MCL 691.1203(1), is violated whenever the effects of permit issuance harm the environment to the requisite degree. *WMEAC* at 751, 760.

Unlike permit eligibility for fossil fuel drilling and other activities that may pollute the environment if done improperly,[10] SDMA permit eligibility is severely restricted. The applicant must demonstrate a preexisting mining interest, and no mining may occur until this requirement has been satisfied. It reflects the Legislature's premise that the removal of even one bucket of sand from a critical dune *by an ineligible operator* will inordinately impair the state's critical dune areas. An

[10] See also MCL 324.5505 and 324.3106, requiring permits for activities that may pollute the air and water without imposing stringent eligibility criteria.

action that enables such conduct may be challenged as destruction or impairment under MEPA.

This Court observed in *Nemeth*[11] that a violation of a permitting procedure can support a prima facie claim under MEPA. A "plaintiff's prima facie case is 'not restricted to actual environmental degradation but also encompasses probable damage to the environment as well.' " *Nemeth, supra* at 25, quoting *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 309; 224 NW2d 883 (1975). In the soil erosion and sedimentation control act,[12] the Legislature created a pollution control standard that this Court held could be enforced through MEPA. *Nemeth*, *supra* at 35.

The Legislature chose to make the SDMA more protective of the environment than the soil erosion and sedimentation control act. As already explained,[13] the Legislature determined that any mining of critical dunes by ineligible entities is an unacceptable destruction of this natural resource. Hence, the majority's conclusion that eligibility is unrelated to conduct is premised on an artificial and hypertechnical bifurcation of the permitting process. When concluding that permit eligibility is unrelated to conduct, the majority buries its head in the sand.

Its characterization of the eligibility review as an "initial inquiry"[14] is not based on the language of the statute. The eligibility criteria in MCL 324.63702 are as much a condition to engage in critical sand dune mining as the requirements in §§ 63704 through 63706. The SDMA does not enact a hierarchy or order to be followed by those reviewing a permit application. Unlike this

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[11] See n 3.

[12] MCL 324.9101 *et seq*.

[13] *Supra* beginning at 530.

[14] *Ante* at 515.

Court's recent decision in *Nemeth,* here the majority reads "likely to" out of the statute.

The majority argues that an inquiry into the effect on the environment of the proposed mining "would be pointless unless the DEQ first determined that the applicant was eligible for a permit on the basis of the applicant's status." *Ante* at 515. We could not agree more. It would be pointless for the DEQ to review the effect of the proposed mining if the applicant were ineligible for a permit. If the applicant is not eligible, no mining will occur. Critical dunes will not be destroyed.

The majority attempts to restrict the inquiry into TechniSand's conduct to consideration of the nature of its relationship to the property at issue. This is misleading.[15] The conduct in question is more than TechniSand's "relationship to the mining property." It necessarily encompasses TechniSand's proposal to remove large quantities of sand from designated critical dunes that would otherwise remain untouched. This is the "actual conduct" that the permit at issue allows and that plaintiff alleges is "likely to pollute, impair, or destroy" critical dunes under MEPA. MCL 324.1703(1). Because the critical dunes could not have been mined by TechniSand at all without the erroneous eligibility determination, plaintiff should be allowed to pursue its MEPA cause of action.

Statutory provisions must be read in the context of the entire act so as to produce a harmonious whole. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001). Subsections a and b of § 63702(1) must be read together because of their juxtaposition.

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[15] See, e.g., *ante* at 517-518 n 5. The majority's implicit recognition that "[c]ountless entities apply for and receive permits for conduct that affects Michigan's natural resources," *ante* at 522, demonstrates the internal inconsistency of its argument.

Subsection b applies when the permit holder seeks to expand the permit to include adjacent land that contains a critical dune area that it owned before July 5, 1989. In contrast, subsection a applies to the amendment or renewal of a permit that already authorizes mining in a particular area.

The permit issued to TechniSand authorized mining only in the noncritical dune areas. TechniSand had to apply for a permit amendment to add the adjacent critical dune areas to its permit. Therefore, subsection b applies to this case. However, TechniSand did not own the land or the rights to mine the sand before 1989 as required by the statute. Therefore, it could not have obtained the permit amendment and could not have engaged in any critical sand dune mining.

TechniSand's environmental impact statement[16] acknowledged that mining the critical dunes at issue would "significantly impair the environment and would permanently destroy critical dune." 253 Mich App 269. Witnesses testified from the statement that the mining will change "the nature of the result in the environment . . . for hundreds of years"[17] and a "large percent of the critical dune will be removed."[18] Plaintiff's expert testified that "The critical dune will be gone."[19]

Nonetheless, the majority holds that the DEQ's determination that TechniSand is eligible to mine critical

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[16] The majority criticizes me for citing a document "not in the record." *Ante* at 522. However, it was Exhibit 21 at trial, and witnesses read from it. See Trial Tr at 122, 582, 785, and 932. Plaintiff's brief on appeal in the Court of Appeals quoted it at p 6. The record on appeal includes all original papers filed in the courts below. MCR 7.311(A). Plaintiff included an excerpt in the appendix (p 14b) to its brief on oral argument before this Court. See MCR 7.308.

[17] Trial Tr at 935.

[18] *Id.* at 785.

[19] *Id.* at 122.

dunes is unrelated to whether TechniSand's mining activities will pollute, impair, or destroy a natural resource. Thus, it concludes that plaintiff cannot rely on MEPA to challenge the permit that has been issued. The majority's reasoning undermines the critical dunes protections in the SDMA, the intent of MEPA, and this Court's earlier MEPA decisions.

Plaintiff is not required to challenge issuance of the permit as an administrative decision under either the Administrative Procedures Act (APA) or the Revised Judicature Act (RJA). The MEPA is "supplementary to existing administrative and regulatory procedures provided by law." MCL 324.1706. It was intended to create a common law of environmental protection. *Ray* at 306. It does not require that a plaintiff exhaust administrative remedies. MCL 324.1701(1). Accordingly, the statutory period of limitations of neither the APA nor the RJA apply to plaintiff's MEPA claim.[20] Plaintiff's challenge to TechniSand's permit under the MEPA is not time-barred.

The DEQ does not dispute that TechniSand is ineligible for a permit. Recognizing plaintiff's claim under the environmental protection act expresses no disrespect for an administrative agency's decision. The majority abdicates its responsibility by refusing to review this permit eligibility determination under MEPA.[21]

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[20] The MEPA itself imposes no statutory period of limitations, but equitable claims under the Natural Resources and Environmental Protection Act, which houses MEPA, have been held subject to the six-year statutory period of MCL 600.5813. *Attorney General v Harkins*, 257 Mich App 564, 571; 669 NW2d 296 (2003).

[21] The majority cites *Oscoda Chapter of PBB Action Comm, Inc v Dep't of Natural Resources*, 403 Mich 215, 233; 268 NW2d 240 (1978), to support its finality argument. But its quotation from the case is taken out of context and is from an opinion that did not garner a majority of votes. The statement addressed the court's authority to consider feasible and prudent alternatives to proposed conduct, an issue entirely unrelated to the majority's decision that this permit challenge under MEPA is time-barred.

CONCLUSION

The majority's decision today wrongly insulates Sand Dune Mining Act permit eligibility determinations from judicial review. The decision to issue a sand dune mining permit pursuant to the SDMA inherently includes an environmental component. I would hold that issuance of the permit in this case can be challenged under the Michigan environmental protection act.

The Legislature intended the act to apply to permit determinations. Application of the act to permit determinations is entirely consistent with the Legislature's intent to stringently preserve Great Lakes sand dunes against degradation and to protect the integrity of that environment. The majority's reasoning frustrates that intent.

Plaintiff's cause is not barred by the statutory limitations periods of the APA and the RJA. The Court of Appeals correctly remanded the case for entry of an order granting summary disposition for plaintiff. Its decision should be affirmed.

Because the majority ignores both the reality of the permitting process and the Legislature's intent to protect critical dune areas from destruction, I must dissent.

CAVANAGH and WEAVER, JJ., concurred with KELLY, J.

SHINHOLSTER v ANNAPOLIS HOSPITAL
SHINHOLSTER v ADAMS

Docket Nos. 123720, 123721. Argued April 20, 2004 (Calendar No. 8). Decided July 30, 2004.

Johnnie E. Shinholster, as personal representative of the estate of Betty J. Shinholster, brought an action in the Wayne Circuit Court against Annapolis Hospital; Dennis Adams, M.D.; and Mary E. Flaherty, M.D., alleging medical malpractice by the defendants related to treatment they provided to the decedent. The decedent had high blood pressure but had not regularly taken her hypertension medication. She made several visits to the defendant hospital, where she was seen by the defendant doctors before she suffered a massive stroke, lapsed into a coma that lasted for several months, and died. The court, John A. Murphy, J., entered judgment on a jury verdict and award of damages for the plaintiff. The defendants appealed, and their appeals were consolidated. The Court of Appeals, MURPHY, P.J., and GRIFFIN and METER, JJ., affirmed and remanded for the entry of a judgment in a sum certain. 255 Mich App 339 (2003). The Court of Appeals held that the trial court did not err in limiting the jury's consideration of the plaintiff's decedent's comparative negligence (i.e., the decedent's failure to follow doctors' orders and take prescribed medication) to the period following her first visit to the defendant hospital. The Court also held that the trial court did not err in applying the $500,000 cap on noneconomic damages under MCL 600.1483 rather than the lower cap of $280,000. The Court stated that under the statute, the higher cap applies whenever one of the enumerated conditions is present and that the point of reference for determining whether the injured person fits within an enumerated condition is any time after and as a result of the negligent action. The Court determined that the higher cap applied because the decedent was rendered incapacitated by the defendants' negligence. The Court stated that the fact that the decedent was no longer incapacitated because she was already dead does not mean that she could not fit within the enumerated condition that applies to incapacity. The Court also held that the trial court did not err in refusing to reduce the jury's award of future damages to present value under MCL 600.6306. The Court stated that while MCL

600.6306(1)(c), (d), and (e) mandate that awards of future damages be reduced to present value, MCL 600.6311 provides that the mandate does not apply to a plaintiff who is sixty years of age or older at the time of judgment. The Court noted that in this case, regardless of whether "plaintiff" refers to the plaintiff or his decedent, at the time of judgment the plaintiff was over sixty and the decedent would have been over sixty. The Supreme Court granted leave to appeal to consider the issues: whether, and to what extent, MCL 600.6304 permits a trier of fact in a medical malpractice action to consider the plaintiff's own pre-treatment negligence to offset, at least in part, the defendant's fault; whether the medical malpractice noneconomic damages cap of MCL 600.1483 applies to a wrongful death action based on an underlying claim of medical malpractice and, assuming such cap applies, whether an action filed under the wrongful death act is subject to the higher damages cap of § 1483; and whether, and to what extent, MCL 600.6311 applies in a wrongful death action.

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

Under § 6304(1), a trier of fact is permitted in personal injury, property damage, or wrongful death tort actions, which necessarily include medical malpractice actions, to consider a plaintiff's pre-treatment negligence in appropriate circumstances in offsetting a defendant's fault where reasonable minds could differ with regard to whether such negligence constituted a proximate cause—a foreseeable, natural, and probable cause—of the plaintiff's injury and damages.

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

On the basis of the decision in *Jenkins v Patel*, 471 Mich 158 (2004), the medical malpractice noneconomic damages cap of § 1483 applies to a wrongful death action based on an underlying claim of medical malpractice.

In an opinion by Justice MARKMAN, joined in part by Justices CAVANAGH, WEAVER, and KELLY, the Supreme Court *held*:

The higher medical malpractice noneconomic damages cap of § 1483 applies in this case.

In an opinion by Justice MARKMAN, joined in part by Justices CAVANAGH, WEAVER, and KELLY, the Supreme Court *held*:

The term "plaintiff," as used in § 6311 refers, for purposes of a wrongful death action, to the decedent, and because Mrs. Shinhol-

ster, the decedent, was sixty-one at her death and at the time of judgment, the future damages awarded to the plaintiff should not be reduced to their present value.

Reversed and remanded to the trial court for proceedings consistent with the opinions.

Justice MARKMAN, who agreed in full with the majority's analysis, concurred in a separate opinion to elaborate with regard to section III (A)(1) of the majority's opinion.

The clear language of MCL 600.6304 supports the interpretation of the majority, which interpretation is consistent with this Court's jurisprudence concerning an original tortfeasor's liability in light of subsequent medical malpractice.

Section 6304 requires the trier of fact be permitted to consider the negligence of each plaintiff, be it pre-treatment negligence or post-treatment negligence, if such negligence was a proximate cause of the plaintiff's injury and subsequent damages. Only where the defendant presents sufficient relevant evidence, which generally will be based on substantiated scientific or other documented, reliable, and verifiable findings, that a reasonable person could have foreseen that his injury and subsequent damages were the natural and probable consequence of his own conduct, will § 6304 require that the trier of fact determine whether such conduct contributed to the plaintiff's injury and subsequent damages, thereby offsetting to some degree the defendant's exclusive liability. In this case, there is a close and direct connection between the plaintiff's negligent conduct and her injury and such conduct should be considered by the trier of fact as a proximate cause of her injury and subsequent damages.

The judgment of the Court of Appeals should be reversed and the matter should be remanded for the calculation of damages only.

Chief Justice CORRIGAN, joined by Justices TAYLOR and YOUNG, concurring in part and dissenting in part, stated that the noneconomic damages cap of § 1483 applies to wrongful death actions alleging malpractice. In addition, a jury is permitted in all personal injury, property damage, or wrongful death tort actions to consider a plaintiff's pretreatment negligence as comparative negligence to offset a defendant's fault, provided evidence has been admitted that would allow a reasonable person to conclude such negligence was a proximate cause of the plaintiff's injury. She dissented with regard to the remaining issues.

The proper remedy in this matter should be to reverse the decision of the Court of Appeals and remand for a new trial on all

issues, rather than a trial on damages only, because the defendants were precluded from submitting evidence that arguably would have allowed a reasonable person to find that the plaintiff's pretreatment negligence was a proximate cause of her fatal stroke.

The question of the applicability of § 1483 is solely an issue for the trial court, not the jury. The higher damages cap of § 1483 does not apply to wrongful death actions alleging medical malpractice. The lower cap applies unless one of the enumerated exceptions applies. Death is not an enumerated exception. Further, subsection 1483(1) indicates that an exception to the low cap, if it is applicable, must apply at the time that the trial court makes its postverdict determination concerning whether the cap requires adjustment of the verdict. Therefore, the lower cap applies in wrongful death actions alleging medical malpractice.

MCL 600.6311 cannot apply to wrongful death cases because the true plaintiff in such cases is the estate, which is not a person and does not have an age. Therefore, the jury's award of future damages should have been reduced to present value pursuant to MCL 600.6306.

Justice CAVANAGH, joined by Justice KELLY, concurring in part and dissenting in part, stated that MCL 600.6311 applies in this case and joins that portion of the majority decision in full. He concurs in the result only with respect to the issue regarding the applicability of the medical malpractice noneconomic damages cap. He dissents from the decision of the majority to allow the trier of fact to consider the plaintiff's alleged pretreatment negligence. The decision of the Court of Appeals should be affirmed.

The majority subverts the text of § 6304 by focusing on the plaintiff's injury, rather than the plaintiff's damage. The plaintiff's damage in a medical malpractice action is determined by the difference between the decedent's hypothetical life without the negligence of the doctor and the actual result.

Justice WEAVER, joined by Justice KELLY with respect to sections I, III, and IV, concurring in part and dissenting in part, dissented from the lead opinion's holding that pursuant to MCL 600.6304 the plaintiff's pretreatment negligence may be considered by the jury in assessing comparative negligence because it may have been a proximate cause of the plaintiff's death. She would affirm the decision of the Court of Appeals on all counts.

Justice WEAVER agrees with the part of Justice CAVANAGH's opinion that states that it would be improper for the jury to consider the plaintiff's pretreatment negligence. The proper focus of § 6304 is on the plaintiff's damage, not the plaintiff's injury. The

plaintiff's damage in a medical malpractice action is determined by the difference between the decedent's hypothetical life without the negligence of the doctor and the actual result.

Further, the plaintiff's pretreatment negligence did not fall within the definition of "fault" in MCL 600.6304 for the purposes of comparative negligence. To be allocated as "fault" under § 6304, a plaintiff's negligence must be a *proximate cause* of the plaintiff's damages. The plaintiff's pretreatment negligence caused the need for the treatment that led to the alleged medical malpractice, but such pretreatment negligence was not a proximate cause of the plaintiff's damages.

The patient's conduct before seeking medical treatment is merely a factor the physician should consider in treating the patient. The lead opinion, in holding that the plaintiff's pretreatment negligence may be considered a proximate cause of the plaintiff's damages for purposes of comparative negligence, abandons the longstanding principle of tort law that the defendant takes the plaintiff as he finds her.

Justice WEAVER joins section III(B) of the lead opinion, holding that the medical malpractice noneconomic damages cap of MCL 600.1483 applies to a wrongful death action based on an underlying claim of medical malpractice. The higher cap of § 1483 applies when the injured person, at any time while still living and as a result of a defendant's negligent conduct, fits within the ambit of § 1483(1).

Justice WEAVER joins section III(C) of the lead opinion, holding that the term "plaintiff" in MCL 600.6311 refers, for purposes of a wrongful death action, to the decedent. Because the decedent was sixty-one years old at her death and at the time of judgment, the damages awarded to the plaintiff should not be reduced to their present value.

Justice KELLY, concurring in part and dissenting in part, concurred fully with the opinion of Justice CAVANAGH, and also joined the opinion of Justice WEAVER with regard to sections I, III, and IV.

1. NEGLIGENCE — MEDICAL MALPRACTICE — COMPARATIVE NEGLIGENCE — PRETREATMENT NEGLIGENCE.

The trier of fact in a personal injury, property damage, or wrongful death tort action, including a wrongful death action based on an underlying claim of medical malpractice, may consider the plaintiff's pretreatment negligence in offsetting a defendant's fault where reasonable minds could differ with regard to whether such

negligence constituted a proximate cause—a foreseeable, natural, and probable cause—of the plaintiff's injury and damages (MCL 600.6304).

2. NEGLIGENCE — WRONGFUL DEATH — WORDS AND PHRASES — PLAINTIFF.

The term "plaintiff" as used in MCL 600.6311 refers, for purposes of a wrongful death action, to the decedent.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *The Thurswell Firm* (by *Judith A. Susskind*) for the plaintiff.

Tanoury, Corbet, Shaw & Nauts (by *Linda M. Garbarino*) and *Dolenga & Dolenga, P.L.L.C.* (by *Michael D. Dolenga*), for Annapolis Hospital.

Fraser Trebilcock Davis & Dunlap, P.C. (by *Graham K. Crabtree*), for Mary Ellen Flaherty, M.D., and Katherine Adams, Personal Representative of the Estate of Dennis E. Adams, M.D., deceased.

Amici Curiae:

Kerr, Russell and Weber, PLC (by *Richard D. Weber* and *Joanne Geha Swanson*), for Michigan State Medical Society.

Robert W. Powell for Ford Motor Company.

MARKMAN, J. We granted leave to appeal to consider the following three issues: (1) whether, and to what extent, MCL 600.6304 permits a trier of fact in a medical malpractice action to consider the plaintiff's own pre-treatment negligence to offset, at least in part, the defendant's fault; (2) whether the medical malpractice noneconomic damages cap of MCL 600.1483 applies to a wrongful death action based on an underlying claim of medical malpractice, and assuming such cap applies, whether an action filed under the wrongful death act is subject to the higher medical malpractice noneconomic

damages cap of § 1483; and (3) whether, and to what extent, MCL 600.6311 applies in a wrongful death action. Regarding the first issue, the Court of Appeals affirmed the trial court's decision that MCL 600.6304(1) did not permit the trier of fact to offset defendants' fault on the basis of plaintiff's alleged pre-treatment negligence.[1] On the basis of the clear and unambiguous language of § 6304(1), we hold that a trier of fact is permitted in "personal injury, property damage, [and] wrongful death" tort actions, which necessarily include medical malpractice actions, to consider a plaintiff's pre-treatment negligence in offsetting a defendant's fault where reasonable minds could differ with regard to whether such negligence constituted "a proximate cause"—a foreseeable, natural, and probable cause—of the plaintiff's injury and damages. Further, on the basis of the evidence presented, we believe that reasonable minds could find that plaintiff's pre-treatment negligence in this case—her failing to regularly take her prescribed blood pressure medication during the year preceding her fatal stroke—constituted a foreseeable, natural, and probable cause of her fatal stroke, and thus we remand this case to the trial court for proceedings consistent with the opinions of this Court.

Regarding the second issue, the Court of Appeals affirmed the trial court's decision that the higher medical malpractice noneconomic damages cap of § 1483 applies to a wrongful death action. Consistent with our recent decision in *Jenkins v Patel*, 471 Mich 158, 173; 684 NW2d 346 (2004), in which we held that the medical malpractice noneconomic damages cap of MCL 600.1483 applies to a wrongful death action based on an underlying claim of medical malpractice, we affirm the decisions of both lower courts and hold that the higher

[1] 255 Mich App 339, 352-354; 660 NW2d 361 (2003).

medical malpractice noneconomic damages cap of § 1483 applies where the injured person, at any time before his death and as a result of a defendant's negligent conduct, fits within the ambit of MCL 600.1483(1)(a), (b), or (c).

Regarding the third issue, the Court of Appeals, finding that MCL 600.6311 applies in this case because both the personal representative and the decedent were or would have been sixty years of age or older at the time of judgment, affirmed the trial court's decision that plaintiff's award of future damages should not be reduced to present value. Because the term "plaintiff," as used in § 6311, refers, for purposes of a wrongful death action, to the decedent, and because Mrs. Shinholster, the decedent, was sixty-one at her death and at the time of judgment, we agree with the trial court's interpretation of § 6311, and hold that, on remand, the trial court cannot reduce any future damages awarded to plaintiff to their present value.

I. BACKGROUND

In this medical malpractice action, Betty Shinholster (Shinholster), the decedent, made four visits to defendant Annapolis Hospital in April 1995, complaining of dizziness. Defendant Dr. Dennis Adams (Adams)[2] examined plaintiff on April 7 and April 10, and defendant Dr. Mary Ellen Flaherty (Flaherty) examined Shinholster on April 14. Shinholster's fourth visit on April 16 was precipitated by a massive stroke, after which she entered a coma for several months and died at the age of sixty-one. On behalf of his deceased wife, Johnnie Shinholster filed suit against Adams, Flaherty, and

[2] Because Adams died during the pendency of this case, his wife, Katherine Adams, was appointed as the personal representative of his estate and substituted as a party.

Annapolis Hospital, alleging that they had negligently treated his wife on April 10 and April 14 by failing to recognize that she had been experiencing transient ischemic attacks, or "mini-strokes" that often precede a full-blown, serious stroke.

The jury found in plaintiff's favor and awarded the following damages: (1) $220,000 for past economic damages; (2) $564,600 for past noneconomic damages; (3) $9,700 each year in future economic damages for the years 1999 through 2003; and (4) $62,500 each year in future noneconomic damages for the years 1999 through 2003. The jury further concluded that Shinholster had been twenty percent comparatively negligent in her actions after April 7, 1995, by not regularly taking her prescribed blood pressure medication. Consistent with the jury's verdict, the trial court entered judgment for plaintiff in the amount of $916,480, "subject to any applicable statutory limitation, statutory cap, adjustment regarding the computation of comparative negligence or adjustment pursuant to the collateral source rule." The trial court denied defendants' motion for reconsideration. The Court of Appeals affirmed but remanded for the recalculation of damages. *Shinholster v Annapolis Hosp*, 255 Mich App 339, 360; 660 NW2d 361 (2003). Defendants now appeal to this Court.

II. STANDARD OF REVIEW

Statutory interpretation is an issue of law that is reviewed de novo. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

III. ANALYSIS

This Court's primary task in construing a statute is to discern and give effect to the intent of the Legisla-

ture. *Murphy v Michigan Bell Tel Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). "The words of a statute provide 'the most reliable evidence of [the Legislature's] intent . . . .' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). 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). The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.' " *Sun Valley, supra* at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." *Sun Valley, supra* at 237. "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Id*. at 236.

A. PLAINTIFF'S PRE-TREATMENT NEGLIGENCE

1. MCL 600.6304

MCL 600.6304 generally provides that the trier of fact in a tort action shall determine by percent the comparative negligence of all those who are a proximate cause of the plaintiff's injury and subsequent damages. In relevant part § 6304 provides:

> (1) In an action based on tort . . . seeking damages for personal injury . . . or wrongful death involving fault of more than 1 person, . . . the court . . . 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 . . . .

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

* * *

(6) If an action includes a medical malpractice claim against a person or entity described in section 5838a(1), 1 of the following applies:

(a) If the plaintiff is determined to be without fault under subsections (1) and (2), the liability of each defendant is joint and several . . . .

(b) If the plaintiff is determined to have fault under subsections (1) and (2) . . . the court shall determine whether all or part of a party's share of the obligation is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties . . . .

* * *

(8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.[3]

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[3] See, also, MCL 600.2959, which provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based . . . .

On the basis of this statute, defendants contend that the trial court erred in not allowing the jury to consider Shinholster's behavior as manifesting comparative negligence when she failed to regularly take her prescribed blood pressure medication for at least a year before her first visit to the emergency room.

While the Court of Appeals acknowledged that § 6304, on its face, requires a trier of fact to consider such negligence, it nonetheless relied on inferences drawn from this Court's decision in *Podvin v Eickhorst*, 373 Mich 175; 128 NW2d 523 (1964), and authority from other states to reach its holding that the statute did not control the situation.

The Court of Appeals erred, in our judgment. Subsection 6304(1)(b) is unambiguous and calls for the trier of fact to assess by percentage "the total fault of *all* persons that contributed to the death or injury, *including each plaintiff*," (emphasis added), as long as that fault constituted a proximate cause of the plaintiff's injury and subsequent damage.[4]

With regard to what cause constitutes proximate cause,[5] in *Parks v Starks*, 342 Mich 443, 448; 70 NW2d 805 (1955), we quoted with approval the following from 38 Am Jur, Negligence, § 55, p 703:

> "The proximate cause of an injury is not necessarily the immediate cause; not necessarily the cause nearest in time,

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[4] Moreover, MCL 600.6304(6) expressly acknowledges that a plaintiff may be determined "to have fault" in "a medical malpractice claim . . . ."

[5] See, also, *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994), and M Civ JI 15.01 which provides the following definition of proximate cause:

> When I use the words "proximate cause" I mean first, that the negligent conduct must have been a cause of plaintiff's injury, and second, that the plaintiff's injury must have been a natural and probable result of the negligent conduct.

> distance, or space. Assuming that there is a direct, natural, and continuous sequence between an act and an injury, * * * the act can be accepted as the proximate cause of the injury without reference to its separation from the injury in point of time or distance."

Thus, under § 6304, if a defendant presents evidence that would allow a reasonable person to conclude that a plaintiff's negligence constituted a proximate cause of her injury and subsequent damage,[6] the trier of fact must be allowed to consider such evidence in apportioning fault.[7]

With regard to the Court of Appeals and Justice CAVANAGH and Justice WEAVER'S reliance, in their concurrence/dissents, on out-of-state authority reaching a different conclusion than our Legislature did on this issue, we presume that the legislators were aware of those approaches and chose to depart from them in establishing Michigan law.[8]

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[6] Because damage cannot arise on its own, but must flow from an injury, we disagree with Justice CAVANAGH'S assertion in his concurrence/dissent that the majority "subverts the text of MCL 600.6304" by focusing on "plaintiff's injury" rather than "plaintiff's damage." *Post* at 598. Damage can only be the result of an injury. That is, first an injury to plaintiff must exist and the trier of fact must then determine whether plaintiff constituted a proximate cause of such injury before there is any need for the trier of fact to focus on plaintiff's damages. Thus, we believe we are correct when we state at p 552 that § 6304 applies where plaintiff's pre-treatment negligence constituted a proximate cause of her "injury and subsequent damage . . . ."

[7] In her opinion, Justice WEAVER criticizes the majority because it "does not offer any analysis regarding *why* it is appropriate to consider plaintiff's pretreatment negligence as a proximate cause of her death, but simply states that it may be considered." *Post* at 603. However, on pp 551-552, we analyze the language of § 6304 in support of this holding. Such language is the only reason why it is "appropriate" to consider pretreatment negligence.

[8] In her opinion, Justice WEAVER asserts that "all the other state courts that have considered the question whether a patient's own pretreatment

Moreover, the Court of Appeals reliance on inferences drawn from *Podvin* (the plaintiff's negligence in causing a car accident could not be cited as contributory negligence for subsequent medical malpractice in treating car accident injuries) is misplaced. This case is not relevant because it was decided at a time when any contributory negligence barred a plaintiff's lawsuit. If it was ever relevant, it stopped being so when this Court adopted pure comparative negligence. *Placek v Sterling Hts*, 405 Mich 638, 701; 275 NW2d 511 (1979). Moreover, to the extent that the inferences drawn from *Podvin* are inconsistent with MCL 600.6304, the statute must prevail.

The Court of Appeals also erred by mischaracterizing Shinholster's conduct as merely creating the *condition* that led her to seek treatment. Decedent's conduct may have done more than that. Her failure to properly take her medications may in fact have constituted a proximate cause of her death.[9]

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negligence could be considered a proximate cause of the patient's damages for purposes of comparative negligence have ultimately decided that it should not." *Post* at 603. We simply note the obvious, *to wit*, no other state was interpreting the specific language of Michigan law, MCL 600.6304. See also *Wyatt v United States*, 939 F Supp 1402, 1412 (ED Mo, 1996) (holding that under Missouri law, Mo Rev Stat 538.230, which requires the trier of fact "[i]n any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services" to "apportion fault among . . . parties," it was proper for the trial court to reduce the plaintiff's medical malpractice damages in accord with the plaintiff's own negligence that "substantially contributed to initially cause" the reason for which the plaintiff sought medical treatment).

[9] It is possible to hypothesize situations where a plaintiff's pretreatment negligence will do nothing more than create the condition leading the plaintiff to seek treatment. In such a situation, the negligent practitioner might be found to constitute a superseding cause that produced an injury different in kind. For example, if a person negligently broke her leg and during surgery to set the leg the doctor cut an artery causing her to bleed to death, the decedent's original negligence could be said to have done no more than bring the plaintiff to the operating table.

2. LIMITED REMAND

Because the trial court ruled that not all decedent's pre-treatment negligence could be considered, defendants were limited to submitting evidence that decedent was comparatively negligent only from April 7 onward, when she first visited the emergency room. Yet, it is apparent from that testimony that, had a wider scope of questioning been allowed, just as defendants' expert testimony supported the proposition that failure for ten days (April 7 through April 16) to regularly take her medications constituted a proximate cause,[10] it may

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But, if the surgeon merely set the broken leg negligently, such an injury would constitute a natural and foreseeable result of the plaintiff's original negligence.

[10] One of defendants' experts, Dr. Bradford Walters, testified as follows:

Q. Does Mrs. Shinholster have a duty to take her medication as prescribed?

A. She does.

* * *

Q. I want you to assume for this next question that as of April 7, 1995 and continuing through April 16th, 1995 when Mrs. Shinholster went into the hospital, I want you to assume that she did not take her Procardia as prescribed.

A. So assumed.

Q. I want you to assume she maintained her normal habit and routine regarding that, and she only took it when she didn't feel well[.]

A. I will assume that.

Q. Assuming that to be true, do you have an opinion based upon a reasonable degree of medical certainty that Mrs. Shinholster's failure to take the Procardia as prescribed from April 7 through April 16, 1995 was a proximate cause of her stroke and ultimate death?

well have supported the same conclusion for a greater period. Accordingly, the trial court clearly erred in precluding evidence made admissible by § 6304, and this prevented defendants from receiving a fair trial

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A. I think it was one of the reasons, yes. It was a proximate cause.

Q. Why would her failure to take her medication as prescribed be a proximate cause of her stroke and death?

A. One of the worst things that can happen to a patient who has high blood pressure is to take their medication intermittently. The blood pressure comes down. The medication wears off. The blood pressure soars up. The blood pressure comes down. If and when they take it again, it's sort [of] like a hammer hit to the brain each time that happens.

When blood pressure medications are taken on a regular basis there's a much smoother lowering of blood pressure and you don't get those spikes up and down and up and down.

Those spike[s] up and down can possibly cause what happened to Mrs. Shinholster and a stroke like this . . . .

* * *

Q. So one of the things you have [a] problem with Betty Shinholster is she must not have been taking her meds as prescribed. Is that what you believe?

A. That's what I believe.

Q. Do you believe that caused her death?

A. I believe it was one of several factors. Whether I can say it is the cause, the ultimate cause, would be nice for black and white purposes. But nothing is quite that black and white. But I think it was one part of a jig saw puzzle, and that was definitely one piece.

Q. Let me ask you this, sir: If she had taken her blood pressure medication exactly as the doctor told her to do you believe she would be alive?

A. I think there was a good chance that she may have been.

with regard to the apportionment of damages. MCR 2.611(A)(1)(a). Because the jury in this case has already determined that defendants breached their standard of care, a determination that I note defendants have never appealed,[11] I would reverse the judgment of the Court of Appeals and remand this case for calculation of damages only, ordering that the jury be permitted to consider Shinholster's pre-treatment negligence in apportioning fault concerning plaintiff's damages.

While I do not dispute the correctness of the Chief Justice's analysis in her concurrence/dissent concerning the prima facie elements of a tort cause of action, *post* at 586-587, I nonetheless believe that such analysis must be placed within the proper context. In a tort action, the plaintiff bears the burden of proving his prima facie case by demonstrating, as the Chief Justice has noted: (1) duty, (2) breach, (3) proximate causation, and (4) damages. If in this case, plaintiff had been permitted to present evidence demonstrating defen-

[11] While a remand for a determination of damages only is generally disfavored by this Court, see *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich 485, 489; 129 NW2d 897 (1964), such remand is proper "when liability is clear." *Burns v Detroit*, 468 Mich 881; 658 NW2d 468 (2003), citing *Bias v Ausbury*, 369 Mich 378, 383; 120 NW2d 233 (1963). See, also, *Peisner v Detroit Free Press, Inc,* 421 Mich 125, 129; 364 NW2d 600 (1984); *Smith v Chippewa Co Bd of Co Rd Comm'rs*, 381 Mich 363, 381; 161 NW2d 561 (1968). Here, neither at trial nor on appeal have defendants argued that plaintiff's pre-treatment negligence affected the proper standard of care defendants owed to plaintiff. Defendants have only sought to admit evidence of plaintiff's pre-treatment negligence in an effort to offset the extent of their liability. That is, while defendants acknowledge that they have breached the appropriate standard of care, and, thus, are liable to some extent for plaintiff's injuries because they were "a" proximate cause of such injuries, they also assert that plaintiff's pre-treatment negligence also was "a" proximate cause of plaintiff's injuries and, thus, have requested that such negligence be considered by the jury in determining which party is responsible for what percentage of proximate causation. Accordingly, given the particular facts and circumstances of this case, I would remand for damages only.

dant's breach—which evidence was later held to be inadmissible—a remand for an entirely new trial might well be required, because such evidence would, in fact, implicate whether defendant had breached a duty, and, therefore, whether plaintiff had satisfied the prima facie elements of a tort action.

In the instant case, as in all tort actions, plaintiff bore the burden of proving her prima facie case, irrespective of her own negligent conduct. It was only after the jury determined that plaintiff had satisfied this burden, and that defendants were liable, that the jury should have considered whether defendants satisfied *their* burden of demonstrating that, despite their own liability, they were not exclusively liable because plaintiff herself was also negligent. Because the challenged evidence in this case has nothing to do with defendants' conduct, and thus nothing to do with whether plaintiff has satisfied her prima facie tort case, I believe that the Chief Justice's assertion that "[l]imiting the new trial to damages only ignores the important fact that proximate cause is essential to a plaintiff's prima facie case," is incorrect. *Post* at 587.

It is important to remember that the conduct of plaintiff, not that of defendants, is at issue here, and that the issue is whether defendants satisfied their burden of demonstrating that, although liable, they are not exclusively liable for plaintiff's injury.[12] That is, we

[12] In response to Chief Justice CORRIGAN'S assertion in her concurrence/dissent that "defendants have preserved the argument that a new trial on all issues is required because the proximate cause issue affects liability," *post* at 586 n 2, I note that in the quoted portion of defendants' brief, defendants only contend that, had plaintiff's pre-treatment negligence been considered by the jury, it may have found that "such negligence was *a* proximate cause of the fatal stroke" (emphasis added). That is, defendants never contend that they are not liable because, had plaintiff's pre-treatment negligence been considered by the

are not considering whether plaintiff satisfied her initial burden of proof relating to whether defendants were a proximate cause of her injury and, thus, are liable.[13]

Certainly, defendants could have argued that, had the jury been permitted to consider plaintiff's pre-treatment negligence, it would not have found that defendants had breached their standard of care at all or that defendants' breach constituted a proximate cause of plaintiff's injury. However, defendants did not make such an argument. Instead, they argued only that evidence of plaintiff's own negligence should be considered by the jury in order to

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jury, it would have determined that they were not a proximate cause of plaintiff's injury, but they contend only that, had the jury been able to consider such negligence, the extent of their own liability would have been reduced.

Further, I find the citations of MCL 600.2959 and M Civ JI 11.01 unpersuasive in support of such position. *Post* at 588-589. Both the statute and the jury instruction expressly address comparative fault, which generally comes into play only during the damages phase of trial, *after* the jury has determined that a plaintiff has proven her prima facie tort case. While, as the Chief Justice correctly asserts, evidence may be presented throughout trial regarding a plaintiff's comparative fault, *post* at 589, such evidence generally does not affect whether a defendant was liable at all for a plaintiff's injury, but rather the *extent* of his liability. Where such evidence *is* sufficiently intertwined with liability, however, there is absolutely no barrier to the appellate court remanding for an entirely new trial. Because defendants themselves, unlike the concurrence/dissent, have never argued that, "had the jury been permitted to consider plaintiff's pre-treatment negligence, it would not have found that defendants breached their standard of care or that defendants' breach was a proximate cause of plaintiff's injury," I continue to believe that a remand for damages only is warranted under the circumstances of this case.

[13] A majority of this Court favors remanding this case to the trial court, but there is no majority in favor of any specific type of remand. Three justices favor remanding this case for an entirely new trial, one justice favors remanding this case for a determination of damages only, and three justices favor no form of remand at all. It is regrettable that no further guidance can be offered to the trial court.

determine the *extent* to which defendants were liable for plaintiff's injury. (Defendants alleged: "Had the jury been properly instructed [concerning plaintiff's pre-treatment negligence], it is likely that the percentage of her comparative fault would have been determined at a much higher level.")[14]

B. CAP ON NONECONOMIC DAMAGES

For the reasons stated in *Jenkins, supra* at 166-173, we hold that the noneconomic damages cap found in MCL 600.1483 applies to a wrongful death action based on an underlying claim of medical malpractice.

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[14] I am concerned that, if this Court were to accept Chief Justice CORRIGAN'S assertion that this case be remanded for an entirely new trial, we would be required to remand for an entirely new trial in virtually all cases in which not *every* single aspect of a plaintiff's pre-treatment negligence was fully considered at trial. For instance, assume a case in which a defendant-doctor is found to be liable in a medical malpractice action in which he has breached the appropriate standard of care and has been determined to have been a proximate cause of the plaintiff's injury and subsequent damages. The trial judge has allowed the defendant to present evidence regarding the plaintiff's own alleged negligence and the jury accordingly has found the plaintiff to be ten percent liable for the damages and the doctor to be ninety percent liable. However, the defendant wanted evidence admitted at trial of one additional, albeit slight, instance of the plaintiff's own negligence that the trial judge ruled inadmissible. The defendant believes that, had this evidence been admitted, the jury would have found the plaintiff to have been twelve percent liable rather than ten percent and, thus, the defendant to have been eighty-eight percent rather than ninety percent liable. If an appellate court finds that the trial judge erred in ruling the additional evidence of the plaintiff's negligence inadmissible, should a remand for an entirely new trial be required? In my judgment, it makes considerable sense, and represents a far more prudent use of judicial resources to remand for a redetermination of damages only in such a case, which would allow the defendant to present the additional evidence and the jury to determine whether the plaintiff's percentage of liability should be increased, and the defendant's percentage of liability decreased, accordingly. Nothing, of course, would prohibit an appellate court from remanding for an entirely new trial in subsequent cases if the facts require.

MCL 600.1483 contains two caps on noneconomic damages and provides:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:
>
> (a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:
>
> (i) Injury to the brain.
>
> (ii) Injury to the spinal cord.
>
> (b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.
>
> (c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

While defendants have not contested that, as a result of her stroke, Shinholster satisfied § 1483(1)(a) and (b), they and the Chief Justice contend that the higher damages cap applies only if the injured person continues to suffer one of the enumerated conditions set forth in § 1483 *at the time of judgment*. *Post* at 592-593. Because Mrs. Shinholster was dead at the time of judgment, defendants and the Chief Justice reason that the higher cap cannot apply. In support of their position, they rely upon the fact that the statute specifically uses the present tense of verbs, i.e., "is" and "has," and that the statute provides that the lower tier is to apply

unless, as the result of the negligence of 1 or more of the defendants, "1 or more of the following exceptions apply *as determined by the court pursuant to section 6304* . . . ." *Post* at 593 (emphasis added). Because a trial court reduces damages pursuant to § 6304 only after the jury has rendered its verdict, defendants and the Chief Justice conclude that the present tense verbs in the statute refer to that precise moment in time at which "the trial court makes its post-verdict determination concerning whether the cap requires adjustment of the verdict." *Post* at 592-593.[15] While the trial court noted that the Legislature used the present tense words "is . . . hemiplegic," it also observed that the Legislature did not specify at which time plaintiff must have sustained that condition for the higher cap to apply. The trial court disagreed with defendants' construction of the statute and ruled:

> [T]he only sensible way to interpret the statute is to hold that the Legislature intended [the higher cap] to apply to people who had been rendered cognitively incapable, quadriplegic, etc., from the accident in question. Betty Shinholster met this condition here: as the jury found, she suffered the requisite injuries from the accident—she endured these injuries in the several months she lay in a coma before she died. We thus hold that the higher, $500,000 cap applies.

The Court of Appeals agreed with the trial court:

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[15] Thus, for example, assume that a jury renders a $500,000 verdict at 5 P.M. on a Monday in favor of an injured party who, at the time of such verdict, was alive and clearly satisfied one of the enumerated higher cap injuries of § 1483. However, later that evening, the injured party dies. The next morning at 9 A.M., the trial court, expecting to grant damages pursuant to the higher tier, prepares to enter his post-verdict determination as required by § 6304. He is informed, however, that the injured party has died the prior evening. In accordance with the Chief Justice's understanding, the judge would now be required to award the decedent's survivors damages pursuant to the lower tier.

> We construe the statute in accordance with the trial court's ruling. Indeed, the adoption of defendants' position would lead to absurd and unfair results. For example, a person who endured months of paraplegia caused by medical malpractice but died of an unrelated and independent cause before the court's verdict adjustments would be subject to the lower cap, whereas a similar person who died a day after the court's verdict adjustments would be subject to the higher cap. We view the better approach to be that advocated by plaintiff and adopted by the trial court. Under this approach, the point of reference for determining whether the injured person fits within MCL 600.1483(1)(a), (b), or (c) is any time after and as a result of the negligent action. Therefore, because Shinholster was rendered incapacitated by defendants' negligence, the higher cap applies. [*Shinholster, supra* at 354.]

We agree with the results reached by the lower courts and hold that § 1483 permits a plaintiff to recover a maximum of $500,000 in medical malpractice noneconomic damages if, as a result of the defendant's negligent conduct, the plaintiff at some point thereafter, and while still living, suffered one of the enumerated conditions of § 1483. We base this interpretation on several textual indicators contained in § 1483 and other pertinent statutes.

First, this interpretation of § 1483 is consistent with the text of the statute itself, which, as noted, provides that the lower tier applies "unless, *as the result of the negligence of 1 or more of the defendants*, 1 or more of the following exceptions apply . . . ." (Emphasis added.) As long as, at some point after the defendant's alleged negligence occurred and before the decedent's death, it could be said that, "as the result of the negligence of 1 or more of the defendants . . . [t]he plaintiff is hemiplegic" or the plaintiff "has permanently impaired cognitive capacity" or "[t]here has been permanent loss of or damage to a reproductive organ," the higher damages

cap tier applies.[16] Not only is this understanding of § 1483, and specifically its use of the present tense of verbs, consistent with this Court's decision in *Michalski v Bar-Levav*, 463 Mich 723, 732-733; 625 NW2d 754 (2001) (construing provisions of the Handicappers Civil Rights Act, MCL 37.1101, which are also written in the present tense, yet holding that the "present" tense refers to events existing during the pendency of the plaintiff's employment, when her cause of action arose), but it also avoids the arguably incongruous results about which the trial court and Court of Appeals were concerned.[17]

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[16] In asserting that, because the "death exception was eliminated when the statute was amended in 1993 to its current form," this shows "that the Legislature intended to exclude death from the exceptions giving rise to application of the higher cap," *post* at 592, we believe that the Chief Justice accords unmerited weight to the elimination of the "death exception" in interpreting the current version of § 1483. The 1986 version of § 1483 provided, in relevant part:

> (1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:
>
> (a) There has been a death.

Thus, under the former § 1483, which had a *single*-tiered system of noneconomic damages cap, if a death occurred, there was no cap on damages. However, the current § 1483 contains a *two*-tiered system of noneconomic damages cap, and no longer contains a "death exception." By eliminating the "death exception," we believe the Legislature intended nothing more than that one of the statute's two caps apply to limit noneconomic damages in every medical malpractice action, including those filed under the wrongful death act. We are unclear about the rationale relied upon by the Chief Justice in assuming that, because the Legislature eliminated death as an outright exception to the application of any cap, that it must have intended that death always fall under the *lower* cap. We see no rationale for assuming such a conclusion from the Legislature's actions.

[17] We note that defendants' and the Chief Justice's positions, taken to their inevitable conclusions, might just as well require that, if the injured

Second, we believe that the text of the wrongful death act, MCL 600.2922(1), (2), and (6), provides additional support for our understanding of § 1483. These provisions state that "the personal representative of the estate of the deceased person" be able to "maintain an action and recover damages [against] the person who or the corporation that would have been liable, if death had not ensued . . . ." Subsection 2922(6) expressly permits the deceased's estate to recover "reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death . . . ." Accordingly, while we agree with the Chief Justice that the Legislature is free to make "a policy decision that the survivors of dead medical malpractice victims are entitled to lesser damages than are living medical malpractice victims who are suffering from one of the three types of permanent conditions enumerated in [§ 1483]," *post* at 592, we see no indication in the statute that the Legislature, in fact, *made* such a decision; rather, we believe that the Legislature made a quite contrary policy decision in § 2922(1), (2), and (6) by permitting a decedent's estate to recover *everything* that the decedent would have been able to recover had she lived.

Third, we believe that the interplay between the wrongful death act, particularly § 2922(6), and § 1483 provides additional textual support for our understand-

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party is deceased at the time of judgment, the higher cap tier would *always* apply. This is because: (1) a deceased person always "has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living"; and (2) if the injured person is deceased, "[t]here has [always] been permanent loss of or damage to a reproductive organ resulting in the inability to procreate."

ing of § 1483. Subsection 2922(6) states that in a wrongful death action "the court or jury may award . . . *reasonable compensation* for the pain and suffering, while conscious, undergone by the *deceased* person during the period intervening between the time of the injury and death . . . ." (Emphasis added.) Section 1483 provides that pain and suffering resulting from certain enumerated injuries are compensable at a higher rate. Thus, the Legislature has apparently determined that "reasonable compensation" for such pain and suffering may sometimes be in excess of $280,000. However, by concluding that, no matter what type of injuries resulted in a decedent's death, survivors in a wrongful death action may *never* recover under § 1483's higher cap if the decedent is dead at the time of judgment, defendants and the Chief Justice effectively preclude the awarding of "reasonable compensation" under § 2922(6) for the conscious pain and suffering undergone by at least some decedents before their death, where such pain and suffering resulted from one of the enumerated injuries in § 1483. That is, we believe that defendants and the Chief Justice overlook the express directive of § 2922(6) that the jury may award "reasonable compensation" for a decedent's conscious pain and suffering—compensation which, in the Legislature's estimation, may sometimes be in excess of $280,000 if conscious pain and suffering results from an injury enumerated in § 1483.

Finally, in asserting that the higher damages cap of § 1483 applies only where the plaintiff is suffering one of the conditions enumerated in the statute *at the time of judgment*, we believe that defendants and the Chief Justice give extraordinary and undue weight to the fact that the Legislature has used the present tense of the verbs in § 1483(1)(a) and (b). Particularly, in concluding that "the structure of § 1483(1) indicates that the

Legislature intended that an exception, if it is applicable, apply at the time [of judgment]," *post* at 592, we note that the Chief Justice fails to ensure that her own interpretation of § 1483 is consistent with the Legislature's use of the verb tense "has been" in § 1483(1)(c). This use of the *past* tense of the verb indicates an intention by the Legislature that an injured party need not always be alive at the time of judgment for the higher cap to apply, but rather only have suffered, at some point in the past as the result of a defendant's negligent conduct, the type of injury enumerated in § 1483(1)(c).

Further, we note that, had the Legislature truly intended that an injured party must continue to suffer the higher tier injury at the time of judgment, it knew how to make that intent specific, as shown by MCL 600.6311, *infra*, in which the Legislature states that this provision is to apply if "a plaintiff . . . is 60 years of age or older *at the time of judgment*." (Emphasis added.) Unlike § 6311, § 1483 does not provide such a clear temporal framework. Moreover, had the Legislature intended that the term "is," as used in § 6311, mean what defendants and the Chief Justice assert it means in § 1483 (i.e., at the time of judgment), we see no indication in § 6311 that the Legislature qualified the term within the temporal framework of "at the time of judgment."

Defendants and the Chief Justice fail to explain why the use of the present tense of verbs in § 1483(1)(a) and (b) demonstrates that the Legislature intended that a plaintiff suffer from one of the enumerated conditions at the time of judgment, rather than at the time the action is filed, the jury is selected, opening statements are made, the first witness takes the stand, closing statements are made, at the beginning of jury delibera-

tions, or at the time at which the jury renders its verdict.[18] Defendants and the Chief Justice assert that the Legislature showed an intent to set the temporal framework at the time of judgment by stating that the higher tier exception applies "*as determined by the court pursuant to section 6304* . . . ." However, in our judgment, references in § 1483 to § 6304 serve merely to clarify under which statute the court is authorized and required to reduce the damages award consistent with § 1483. We do not read into this reference a legislative intent to bar a plaintiff, whose decedent has suffered while still alive and has suffered "as the result of the negligence of 1 or more of the defendants, 1 or more of the following [injuries]," from recovering pursuant to the higher tier merely because the plaintiff's decedent was unfortunate enough to die before the post-verdict damages determination. Rather, on the basis of the statutory language previously discussed, we believe that the better interpretation of the statute is that, as long as a plaintiff suffers, while still living and as a result of a defendant's negligent conduct, one of the enumerated conditions set forth in § 1483, the statute's higher damages cap applies.

Because plaintiff in this case presented evidence from which it could be rationally concluded that, "as the

[18] Absent specific language in § 1483 stating otherwise, and in light of the textual evidence set forth in this section, we are simply not persuaded that, whether the higher tier applies is to be viewed as a function of wholly arbitrary facts and circumstances concerning the specific time at which final judgment is rendered, such as the nature and congestion of the trial court's docket, the existence of scheduling conflicts of the parties and their attorneys, or the sheer length of a trial. Nor can it reasonably be dispositive of whether the higher tier applies that a plaintiff has died shortly before or after the end of trial, or shortly before or after the post-verdict damages and cap determinations. See n 15. Nor do we understand why delaying tactics in the justice process should be incentivized in the perverse expectation that a plaintiff may not survive trial and judgment.

result of the negligence of 1 or more of the defendants," it could have been said at some time before her death that she "is hemiplegic, paraplegic, or quadriplegic [as a result of] [i]njury to the brain," or "has permanently impaired cognitive capacity," we agree with the determination made by the lower courts that the higher damages cap of § 1483 applies under the circumstances of this case.

C. MCL 600.6311

While MCL 600.6306(1)(c), (d), and (e) provide that all future damages awarded to a plaintiff be reduced to gross present value,[19] MCL 600.6311 creates an exception to this general rule by stating, "Sections 6306(1)(c), (d), and (e) . . . do not apply to a plaintiff who is 60 years of age or older at the time of judgment." Thus, only when a plaintiff is younger than sixty years of age at the time of judgment, must the trial court reduce the plaintiff's future damages to present cash value.

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[19] Section 6306 provides, in part:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court . . . in the following judgment amounts:
>
> * * *
>
> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.
>
> (d) All future medical and other health care costs reduced to gross present cash value.
>
> (e) All future noneconomic damages reduced to gross present cash value.

Plaintiff asserts that, for purposes of § 6311, the term "plaintiff" in a wrongful death action is either the personal representative or the decedent, based on the age that the decedent would have been had she been alive at the time of judgment. On the other hand, defendants and the Chief Justice contend that § 6311 is a limited exception that does not apply to a wrongful death action because the "plaintiff" in such an action is the estate, which cannot have an age. *Post* at 596.

The trial court held that, for purposes of § 6311, the term "plaintiff" refers to the decedent in a wrongful death case, and that because Shinholster was sixty-one at the time of her death, she necessarily would have been "60 years of age or older at the time of judgment." Thus, § 6306(1)(c), (d), and (e) do not apply. Although the Court of Appeals found that § 6311 is "ambiguous with regard to the term 'plaintiff' as applied to wrongful death cases," *Shinholster, supra* at 357, that Court declined to resolve the issue, holding that § 6311 applies because *both* the personal representative and the decedent were or would have been sixty years of age or older at the time of judgment:

> MCL 600.6311 specifically refers to "a *plaintiff* who is 60 years of age or older . . ." (emphasis added). Accordingly, we could potentially hold that because the plaintiff here—Shinholster's personal representative—was over sixty, the MCL 600.6311 exception applied. However, we note that MCL 600.6306 also uses the term "plaintiff" in referring to comparative negligence. See MCL 600.6306(3)("the total judgment amount shall be reduced . . . by an amount equal to the percentage of plaintiff's fault"). Clearly, this reference to "plaintiff" is not a reference to a personal representative in a wrongful death case, because the personal representative would not be the one evaluated for comparative negligence; instead, the decedent would be so evalu-

> ated. We conclude that the statues at issue are essentially ambiguous with regard to the term "plaintiff" as applied to wrongful death cases.
>
> However, it is not necessary, in the instant case, to resolve the ambiguity in MCL 600.6311. Indeed, both the "plaintiff" (i.e., the personal representative and the person who brought the lawsuit) and the decedent in this case satisfied the MCL 600.6311 exception. Accordingly, the trial court did not err by refusing to reduce the amount of future damages to present value. [*Shinholster, supra* at 356-357.]

The doctrine of *noscitur a sociis*, i.e., that "a word or phrase is given meaning by its context or setting," affords us some assistance in interpreting § 6311. See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). We apply this doctrine to include the other provisions of Chapter 63 of the Revised Judicature Act because the term "plaintiff" does not stand alone here, and cannot be read in a vacuum. Instead, "[i]t exists and must be read in context with the entire act, and the words and phrases used there must be assigned such meanings as are in harmony with the whole of the statute . . . ." *Arrowhead Dev Co v Livingston Co Rd Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context." *G C Timmis & Co, supra* at 421.

MCL 600.6305(2) provides, in part:

> In the event of death, the calculation of future damages shall be based on the losses during the period of time the plaintiff would have lived but for the injury upon which the claim is based.

Further, MCL 600.6306(3) provides, "If the plaintiff was assigned a percentage of fault . . . the total judgment amount shall be reduced . . . by an amount equal

to the percentage of plaintiff's fault." As described by the Court of Appeals, these "reference[s] to 'plaintiff' [are] not . . . reference[s] to a personal representative [or an estate] in a wrongful death case, because [neither] would . . . be the one evaluated for comparative negligence; instead, the decedent would be so evaluated." *Shinholster*, *supra* at 357.[20] We agree with the trial court and hold that, for purposes of § 6311, the term "plaintiff" refers to the decedent, Mrs. Shinholster.

However, our inquiry into the application of § 6311 in the instant case does not stop there. Rather, § 6311 states that it applies if the plaintiff is "60 years of age or older *at the time of judgment*." (Emphasis added.) Because the term "plaintiff" refers to the decedent in a wrongful death action, and because Shinholster was sixty-one at her death and at the time of judgment,[21] we agree with the trial court's interpretation of § 6311, and hold that, on remand, the trial court cannot reduce any future damages awarded to plaintiff to their present value.

IV. CONCLUSION

Because § 6304(1) requires, without exception, that a trier of fact be permitted in all "personal injury, property damage, [and] wrongful death" tort actions to consider the conduct of all parties whose conduct has constituted a proximate cause of plaintiff's damages,

[20] Further, no section in Chapter 63 of the Revised Judicature Act uses the term "plaintiff" in reference to the personal representative or the decedent's estate.

[21] At death, a deceased no longer continues to age, and by that same token, we hold that, at death, a deceased does not surrender her age or become without an age, but rather, reasonably, for purposes of § 6311, retains her age.

and because, on the basis of the evidence presented by defendants, reasonable minds could find that plaintiff's pre-treatment negligence here constituted "a proximate cause"—a foreseeable, natural, and probable cause—of her fatal stroke, we remand this case to the trial court for proceedings consistent with the opinions of this Court. Further, based on our decision in *Jenkins,* where we held that the medical malpractice noneconomic damages cap of § 1483 applies to a wrongful death action based on an underlying claim of medical malpractice, we affirm the decisions of both lower courts and hold that the higher cap of § 1483 applies when the injured person, at any time while still living and as a result of a defendant's negligent conduct, fits within the ambit of § 1483 (1)(a), (b), or (c). Finally, because the term "plaintiff," as used in § 6311, refers, for purposes of a wrongful death action, to the decedent, and because Mrs. Shinholster, the decedent, was sixty-one at her death and at the time of judgment, we agree with the trial court's interpretation of § 6311, and hold that the trial court cannot reduce any future damages award to plaintiff to their present value.

CORRIGAN, C.J., and TAYLOR and YOUNG, JJ., joined in section III(A) and with the determination in section III(B) that the medical malpractice cap of § 1483 applies to a wrongful death action based on an underlying claim of medical malpractice.

CAVANAGH and KELLY, JJ., joined in section III(C) and concurred in the result only with regard to section III(B).

WEAVER, J., joined in sections III(B) and III(C).

MARKMAN, J. (*concurring*). Although I agree fully with the majority analysis, I write separately to elaborate on my views concerning § II(A)(1) of the opinion.

I. PREVIOUS JURISPRUDENCE

Not only does the clear language of MCL 600.6304 support the majority interpretation, but I believe that this interpretation is consistent with this Court's previous jurisprudence concerning an original tortfeasor's liability in light of subsequent medical malpractice.[1] In the context of medical malpractice, it has long been held that negligent medical treatment of an injury is foreseeable and is ordinarily not a superseding cause that cuts off the causal contribution of the act that

[1] I believe that the distinctions plaintiff, the trial court, the Court of Appeals, and other courts have attempted to draw between "pre-treatment" negligence and "post-treatment" negligence are, not only without statutory basis, but also irrelevant. Why should a doctor who has treated the plaintiff in the past be held less at fault for his negligence than a doctor who has not treated the plaintiff in the past? Take, for example, the instant case, where Dr. Normita Vicencio, approximately one year before plaintiff's fatal stroke, prescribed to plaintiff medication to lower her blood pressure. Assuming that plaintiff had sought additional treatment from Dr. Vicencio, instead of defendants, and assuming further that Dr. Vicencio had acted in the same alleged negligent manner as defendants, plaintiff's alleged negligence would be considered "post-treatment" negligence, and, thus, admissible under both the lower courts' and plaintiff's interpretation of § 6304. However, because defendants had not treated plaintiff in the past, plaintiff's alleged negligence would be considered "pre-treatment" negligence, and, thus, inadmissible under both the lower courts' and plaintiff's interpretation of § 6304. Accordingly, defendants would be held more at fault because the trier of fact would not be permitted to consider plaintiff's "pre-treatment" negligence in apportioning fault in relation to determining plaintiff's damages. Because I see no basis in treating defendants any differently than Dr. Vicencio, I cannot agree with the lower courts' and plaintiff's interpretation of § 6304. Plaintiff's alleged negligence should be considered regardless of whether defendants had treated plaintiff in the past.

caused the injury. In *People v Townsend*, 214 Mich 267; 183 NW 177 (1921), the defendant was driving drunk when he ran off the road and hit a tree, severely lacerating a passenger's legs. Although the passenger was immediately taken to the hospital, her lacerations became infected because of medical malpractice committed by the hospital's doctors, and she died twelve days later from blood poisoning. As a result of this death, the defendant was charged with and convicted of involuntary manslaughter. The defendant appealed his conviction, contending that his passenger's death was a natural and probable result, not of the defendant's drunk driving, but rather of the doctors' negligence. This Court disagreed and stated:

> "If a wound or other injury cause a disease, such as gangrene, empyema, erysipelas, pneumonia, or the like, from which deceased dies, he who inflicted the wound or other injury is responsible for the death. . . . He who inflicted the injury is liable even though the medical or surgical treatment which was the direct cause of the death was erroneous or unskilful, or although the death was due to the negligence or failure by the deceased to procure treatment or take proper care of the wound. . . . This rule is sometimes stated with the qualification that the wound must have been mortal or dangerous; but it is usually held that defendant is liable, although the wound was not mortal."
>
> . . . Defendant cannot exonerate himself from . . . liability by showing that under a different or more skilful treatment the doctor might have saved the life of the deceased and thereby have avoided the natural consequences flowing from the wounds. Defendant was not entitled to go to the jury upon the theory claimed unless the medical treatment was so grossly erroneous or unskilful as to have been the cause of the death, for it is no defense to show that other or different medical treatment might or would have prevented the natural consequences flowing from the wounds.

> The treatment did not cause blood poisoning; the wounds did that, and the most that can be said about the treatment is that it did not prevent blood poisoning but might have done so had it been different. [*Id.* at 278-279 (citation omitted).]

Accordingly, under *Townsend*, the original tortfeasor may be liable for a doctor's subsequent negligence where such negligence merely failed to prevent a result that was a "natural consequence[] flowing from" such tortfeasor's actions. See also *People v Bailey*, 451 Mich 657, 679; 549 NW2d 325 (1996) ("In the medical treatment setting, evidence of grossly negligent treatment constitutes evidence of a sole, intervening cause of death. Anything less than that constitutes, at most, merely a contributory cause of death, in addition to the defendant's conduct.").[2] Where evidence exists in a medical malpractice action that a doctor's negligence was not the sole proximate cause of the plaintiff's injury, the trier of fact must be permitted to consider other proximate causes for such injury, including the plaintiff's own pre-treatment negligence.[3]

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[2] "The assumption of a duty to protect the decedent while in defendant's custody merely establishes a legal basis for holding defendant negligent. The mere existence of a duty does not automatically lead to the conclusion that the decedent's fault should not be considered" when appointing fault. *Hickey v Zezulka (On Resubmission)*, 439 Mich 408, 448; 487 NW2d 106 (1992) (opinion by RILEY, J., joined by three other justices).

[3] In permitting the trier of fact in a medical malpractice case to consider a plaintiff's negligence in apportioning fault and in determining the extent of a defendant's liability, the majority is not altering the law of this state regarding the application of comparative fault in a tort action. See *Brisboy v Fibreboard Corp*, 429 Mich 540, 551-552, 556; 418 NW2d 650 (1988) (opinion by CAVANAGH, J.) (affirming the jury's determination that the decedent's smoking habit, as well as his exposure to the defendant's asbestos, were both proximate causes, fifty-five and forty-five percent respectively, of the decedent's lung cancer and subsequent death, and remanding the case to the trial court for the appointment of damages

II. COMPARATIVE NEGLIGENCE

In holding that in a medical malpractice action, the trier of fact should not be permitted to consider a plaintiff's pre-treatment negligence in apportioning fault, the Court of Appeals failed to recognize that § 6304 is predicated upon a comparative negligence scheme that "reduces the amount of the plaintiff's recovery, allocating liability in proportion to fault," *Jennings v Southwood*, 446 Mich 125, 131; 521 NW2d 230 (1994), rather than upon a contributory negligence scheme that "act[s] as an absolute bar to plaintiffs who were only slightly at fault," *Klinke v Mitsubishi* Motors Corp, 458 Mich 582, 607; 581 NW2d 272 (1998) (KELLY, J., dissenting).[4]

The Court of Appeals stated:

> "It would be anomalous to posit, on the one hand, that a health provider is required to meet a uniform standard of care in its delivery of medical services to all patients, but permit, on the other hand, the conclusion that, where a breach of that duty is established, no liability may exist if

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in accordance with such determination); *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29, 40; 323 NW2d 270 (1982) (holding that "it would be 'anomalous' to hold a defendant liable for damages in excess of the amount causally related to his negligence"); *Placek v Sterling Hts*, 405 Mich 638, 661; 275 NW2d 511 (1979) (holding that " '[t]he doctrine of pure comparative negligence does not allow one at fault to recover for one's own fault, because damages are reduced in proportion to the contribution of that person's negligence, whatever that portion is.' " (Citation omitted.)

[4] The authorities relied on by the Court of Appeals have also sometimes been confused by the doctrines of contributory and comparative negligence. See *Harding v Deiss*, 300 Mont 312, 318; 3 P3d 1286 (2000) (citing contributory negligence cases and stating, "Under [comparative fault], in any case where the patient was responsible for events that led to her hospitalization, the treating physician would not be liable for negligent treatment." This is simply a misstatement of the doctrine of comparative negligence.

> the patient's own preinjury conduct caused the illness or injury which necessitated the care."
>
> * * *
>
> [W]e conclude that the trial court did not err in ruling that the jury could not consider Shinholster's potential negligence in causing the condition for which she sought medical treatment in the first place. Given the preventable nature of many illnesses, to accept a contrary position would allow many health-care professionals to escape liability for negligently treating ill patients. [*Shinholster v Annapolis Hosp,* 255 Mich App 339, 347-348; 660 NW2d 361 (2003), quoting *Harvey v Mid-Coast Hosp*, 36 F Supp 2d 32, 38 (D Maine, 1999).]

Stemming from its concern that " 'no liability may exist if the patient's own preinjury conduct caused the illness or injury which necessitated the care,' " or that if a trier of fact was permitted to consider a plaintiff's pretreatment negligence in apportioning fault, "many health-care professionals [would] escape liability for negligently treating ill patients," the Court of Appeals apparently believed that § 6304 set forth a contributory negligence scheme that barred a plaintiff from recovering for injuries resulting from a defendant's negligence if the plaintiff was even slightly at fault for such injuries. These beliefs are unfounded because, as previously mentioned, § 6304 sets forth a comparative negligence scheme. Nothing in § 6304 states or implies that it constitutes a contributory negligence scheme. By adopting a comparative negligence scheme in § 6304, the Legislature recognized, as this Court did in *Placek v Sterling Hts*, 405 Mich 638, 660; 275 NW2d 511 (1979), that such doctrine "most nearly accomplishes the goal of a fair system of apportionment of damages . . . [by] 'truly distribut[ing] responsibility according to fault of the respective parties.' " (Citation omitted.) The fact

that a doctor negligently undertook to treat an existing condition may be an important, and in many cases the overriding, factor in the trier of fact's apportionment of fault in determining damages.[5] There is no reason to believe that a reasonable trier of fact will not accord that circumstance as much weight and consideration as it deserves in the particular case. However, there may sometimes be additional factors that will also be relevant in the apportionment of fault in determining damages, including evidence that the plaintiff's own conduct was either negligent, grossly negligent, or even intentional.[6]

III. ADMISSIBILITY OF EVIDENCE

The majority opinion states that "under § 6304, if a defendant presents evidence that would allow a reasonable person to conclude that a plaintiff's negligence

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[5] "[A]pplying the principles of comparative fault to a medical malpractice action, a physician is liable only for that portion of the plaintiff's damages that were proximately caused by the physician's negligence." *Gray v Ford Motor Co*, 914 SW2d 464, 467 (Tenn, 1996) (holding that the doctrine of comparative fault could properly be applied to medical malpractice actions so as to require an apportionment of fault between the estate of a decedent who acted negligently in causing her original injury and a physician who acted negligently in treating such injury). See also *Wyatt v United States*, 939 F Supp 1402, 1412 (ED Mo, 1996) (holding that under Missouri law, Mo Rev Stat 538.230, which requires the trier of fact "[i]n any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services" to "apportion fault among . . . parties," it was proper for the trial court to reduce the plaintiff's medical malpractice damages in accord with the plaintiff's own negligence which "substantially contributed to initially cause" the reason for which the plaintiff sought medical treatment).

[6] "This goal [of a fair apportionment of damages] is not served; rather, it is thwarted when a slightly negligent defendant is held liable for one hundred percent of the damages caused principally by the wrongful intentional conduct of a plaintiff." *Hickey, supra* at 449.

constituted a proximate cause of her injury and subsequent damages, the trier of fact must be allowed to consider such evidence when appointing fault." *Ante* at 552. However, the majority opinion does not elaborate regarding what type of evidence may satisfy this standard. In my judgment, only where the defendant presents sufficient relevant evidence, which generally will be based on substantiated scientific or other documented, reliable, and verifiable findings, that a reasonable person could have foreseen that his injury and subsequent damages were the "natural and probable consequence" of his own conduct, will § 6304 require that the trier of fact determine whether such conduct "contributed" to the plaintiff's injury and subsequent damages, thereby offsetting to some degree the defendant's exclusive liability.[7]

Further, section 6304 does not require a trier of fact to consider *when* the fault occurred, but merely *whether* the fault was "a proximate cause of damage sustained by a party." That is, contrary to the beliefs of the trial court, Court of Appeals, and plaintiff, § 6304 does not apparently distinguish between a plaintiff's "pre-treatment" and "post-treatment" negligence by providing that only the latter may be considered in apportioning fault and determining damages. Rather, § 6304 specifically requires that a trier of fact be permitted to consider the negligence of "each plaintiff," be it pre-treatment or post-treatment negligence, if such negligence was "a proximate cause" of the plaintiff's injury and subsequent damages.[8]

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[7] I believe that the burden is upon the defendant to present relevant evidence substantiated by either scientific or other documented, reliable, and verifiable findings demonstrating that the plaintiff's injury and damages were a genuinely foreseeable, natural, and probable consequence of the plaintiff's alleged negligence.

[8] " 'The pre-treatment health habits of a patient' . . . 'are germane to the issue of proximate cause . . . .' " *Bryant v Calantone*, 286 NJ Super

Concern has been expressed at argument that, if a plaintiff's pre-treatment conduct may be considered under § 6304, this will enable a negligent doctor to avoid, at least in part, liability for his malpractice. For example, assume that a plaintiff, whose doctor has negligently failed to diagnosis her impending heart attack, files a medical malpractice action against the doctor on the basis of such negligence. At trial, the defendant attempts to offset a portion of his fault by introducing evidence that the plaintiff herself was a proximate cause of her heart attack because she had eaten a bag of potato chips daily for the past twenty years. In my judgment, the plaintiff's injuries and subsequent damages in such a circumstance would be far "too insignificantly related to" and "too remotely affected" by such conduct, and thus wholly inadequate to establish "a proximate cause" relationship between the plaintiff's conduct and her injury and damages. See *Davis v Thornton*, 384 Mich 138, 145; 180 NW2d 11 (1970). It is simply not a foreseeable, natural, or probable consequence that such conduct will result in a heart attack. The instant case is clearly distinguishable because plaintiff here failed to regularly take medication that was prescribed by her doctor in order *precisely* to prevent the specific fatal injury that she suffered. That is, there is a far closer and more direct connection between plaintiff's negligent conduct and her injury, and thus I believe that such conduct may reasonably be

362, 368; 669 A2d 286 (1996) (citations omitted). "This does not mean, however, that the patient's poor health is irrelevant to the analysis of a claim for reparation. While the doctor may well take the patient as she found her, she cannot reverse the frames to make it appear that she was presented with a robust vascular condition; likewise, the physician cannot be expected to provide a guarantee against a cardiovascular incident. All that the law expects is that she not mistreat such a patient so as to become a proximate contributing cause to the ultimate vascular injury." *Ostrowski v Azzara*, 111 NJ 429, 445; 545 A2d 148 (1988).

considered by a trier of fact as "a proximate cause" of her injury and subsequent damages.

In summary, in a medical malpractice action in determining whether the plaintiff's own negligence has been "a proximate cause" of her injury and damages, I believe that the trial court must ensure that the defendant has sustained its burden of proof in presenting relevant evidence, that such evidence is sustained by either scientific or other reliable and verifiable findings, and that such evidence demonstrates that the plaintiff's specific injury and damages were a genuinely foreseeable, natural, and probable consequence of her negligence. In cases such as this, in which a plaintiff's allegedly negligent conduct relates to a specific diagnosed condition, combined with a failure to comply with a doctor's prescribed regimen for that specific condition, I agree with the majority that a question of fact for the jury regarding whether plaintiff's own conduct constitutes a sufficiently "proximate cause" of her own injury has been presented. Because in most instances I do not believe that such matters bear a "proximate cause" relationship to injuries and damages suffered by a medical malpractice plaintiff, I do not view § 6304 as allowing defendants to speculate about, or to engage in generalized investigations concerning, a plaintiff's lifestyle, exercise habits, or diet.

IV. CONCLUSION

Here, there was one indivisible injury, Shinholster's fatal stroke, allegedly caused by the separate, independent acts of Shinholster herself and defendants. Had the injury been caused by the separate, independent negligent acts of defendants and another tortfeasor, the liability of each would be determined by the fault attributable to each. See *Townsend, supra* at 279.

Under § 6304, the principle is the same where evidence exists that the negligence of Shinholster herself was a proximate cause of her fatal stroke and subsequent damages. Further, because the jury in this case has already determined that defendants breached their standard of care, a determination that I note defendants have not appealed, I would reverse the judgment of the Court of Appeals and remand this case for calculation of damages only.

CORRIGAN, C.J. (*concurring in part and dissenting in part*). Although I agree with the majority that the noneconomic damages cap found in MCL 600.1483 applies to wrongful death actions alleging malpractice and that a jury is permitted in all "personal injury, property damage, or wrongful death" tort actions to consider a plaintiff's pretreatment negligence as comparative negligence to offset a defendant's fault (provided evidence has been admitted that would allow a reasonable person to conclude such negligence was "a proximate cause" of the plaintiff's injury), I cannot join the majority's treatment of the remaining issues and respectfully dissent.

First, because defendants were precluded from submitting evidence that arguably would have allowed a reasonable person to find that Betty Shinholster's pretreatment negligence of failing to regularly take her prescribed blood pressure medication during the year preceding her fatal stroke was a proximate cause of her fatal stroke, I would reverse and remand for a new trial on all issues, rather than a trial on damages only.

I would further hold that the higher damages cap found in MCL 600.1483 does not apply to wrongful death actions alleging medical malpractice. MCL

600.1483(1) provides that the lower cap applies *unless* one of the enumerated exceptions applies. Death is not an enumerated exception. This Court is not free to question the Legislature's policy choices; rather, the statutory language must be applied as written.

Finally, I would hold that the jury's award of future damages should have been reduced to present value pursuant to MCL 600.6306. MCL 600.6311 provides that the reduction to present value does not apply to "a plaintiff who is 60 years of age or older at the time of judgment." I believe that MCL 600.6311 cannot apply in wrongful death cases because, in such cases, the true "plaintiff" is the estate, which is not a person and does not have an "age."

I. ANALYSIS

A. A NEW TRIAL ON ALL ISSUES IS REQUIRED

Although I agree with the majority that decedent's pretreatment negligence is a matter properly submitted to the jury, I do not agree that the new trial should be limited to damages only. Because of the trial court's ruling that all decedent's pretreatment negligence could not be considered, defendants were limited to submitting evidence that decedent was comparatively negligent from April 7 onward, when she first visited the emergency room. Yet, it is apparent from that testimony that had a wider scope of questioning been allowed, just as defendants' expert testimony supported the proposition that her failure for ten days (April 7 through April 16) to take her medications was a proximate cause,[1] it surely would have supported the same conclusion for a greater period—the previous year.

[1] One of defendants' experts, Dr. Bradford Walters, testified as follows:

Accordingly, the trial court clearly erred in precluding evidence made admissible by MCL 600.6304 and this

Q. Does Mrs. Shinholster have a duty to take her medication as prescribed?

A. She does.

* * *

Q. I want you to assume for this next question that as of April 7, 1995 and continuing through April 16th, 1995 when Mrs. Shinholster went into the hospital, I want you to assume that she did not take her Procardia as prescribed.

A. So assumed.

Q. I want you to assume she maintained her normal habit and routine regarding that, and she only took it when she didn't feel well[.]

A: I will assume that.

Q. Assuming that to be true, do you have an opinion based upon a reasonable degree of medical certainty that Mrs. Shinholster's failure to take the Procardia as prescribed from April 7 through April 16, 1995 was a proximate cause of her stroke and ultimate death?

A. I think it was one of the reasons, yes. It was a proximate cause.

Q. Why would her failure to take her medication as prescribed be a proximate cause of her stroke and death?

A. One of the worst things that can happen to a patient who has high blood pressure is to take their medication intermittently. The blood pressure comes down. The medication wears off. The blood pressure soars up. The blood pressure comes down. If and when they take it again, it's sort [of] like a hammer hit to the brain each time that happens.

When blood pressure medications are taken on a regular basis there's a much smoother lowering of blood pressure and you don't get those spikes up and down and up and down.

prevented defendants from receiving a fair trial.[2] MCR 2.611(A)(1)(a). New trials limited only to damage issues are disfavored. See *Burns v Detroit*, 468 Mich 881; 658

> Those spike[s] up and down can possibly cause what happened to Mrs. Shinholster and a stroke like this. . . .
>
> * * *
>
> *Q*. So one of the things you have [a] problem with Betty Shinholster is she must not have been taking her meds as prescribed. Is that what you believe?
>
> *A*. That's what I believe.
>
> *Q*. Do you believe that caused her death?
>
> *A*. I believe it was one of several factors. Whether I can say it is the cause, the ultimate cause, would be nice for black and white purposes. But nothing is quite that black and white. But I think it was one part of a jig saw puzzle, and that was definitely one piece.
>
> *Q*. Let me ask you this, sir: If she had taken her blood pressure medication exactly as the doctor told her to do you believe she would be alive?
>
> *A*. I think there was a good chance that she may have been.

[2] I further note that, although Justice MARKMAN argues, *ante* at 556 and n 11, that defendants have not argued that a new trial on all issues is required, defendants have preserved this issue on appeal. Defendants preserved the issue at trial by objecting to the trial court's refusal to admit evidence regarding the decedent's pretreatment negligence. Defendants also objected to the trial court's modified jury instruction regarding the decedent's comparative negligence, arguing that the jury should have been able to consider all of the decedent's conduct.

On appeal, defendants again preserved the argument regarding liability and proximate cause. Issue I of defendants' brief argues that "defendants were denied a fair trial by the trial court's instruction on comparative negligence, which improperly restricted the jury's consideration and proper allocation of the decedent's comparative fault." Defendants argued that the trial court's limitation of evidence regarding the decedent's comparative negligence, and the resulting modified jury instruction, "denied [defendants'] right to have their responsibility determined in accordance with the facts and the law, and for this, they must be granted a new trial." Finally, defendants argued that defendants

NW2d 468 (2003); *Garrigan v LaSalle Coca-Cola Bottling Co,* 373 Mich 485, 489; 129 NW2d 897 (1964).

More importantly, the jury must make a determination of *liability* (including comparative fault), taking into account the improperly excluded evidence; thus, a new trial limited to damages only would not be appropriate. Whether defendants contested the jury's finding that the standard of care was breached is irrelevant. In order to establish a prima facie case, plaintiff must prove: (1) a breach of the standard of medical care; (2)

"presented expert testimony supporting their claim that [the decedent's] persistent failure or refusal to comply with [] clearly communicated medical advice was a proximate cause of [the decedent's] death. The trial court's instruction, however, prevented the Jury from considering this negligence on [the decedent's] part as a cause of her injury."

On appeal to this Court, defendants also argued that a new trial was required because the trial court improperly limited evidence of comparative negligence, thus precluding the jury from considering all evidence regarding proximate cause:

> The jury should have been allowed to consider whether the injury was proximately caused by the separate, independent act of the plaintiff's decedent . . . . If the stroke was caused by the separate and independent negligent acts of these doctors or even another tortfeasor . . . , the liability of each would be determined by the fault attributed to each. . . .
>
> * * *
>
> Based on the evidence that was presented, and further evidence that could have been presented, it can only be concluded that a jury could have found that the decedent was negligent prior to April 7, 1995 and that such negligence was a cause of the fatal stroke. The trial court's limitation on the admission of evidence and its instructions to the jury were erroneous and inconsistent with substantial justice and not harmless error.

Thus, defendants have preserved the argument that a new trial on all issues is required because the proximate cause issue affects liability, as well as the argument that, in the alternative, their damages should be reduced.

injury; (3) proximate cause—a definitive legally recognized linkage between the breach and the injury; and (4) damages. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 10; 651 NW2d 356 (2002). Simply proving that there was a breach of the standard of care, without more, does not prove liability. A breach of the standard of care is only relevant if the trier of fact determines that that breach is a *proximate cause* of the plaintiff's injury. It is entirely possible for a defendant to admit negligence and still argue there is no liability because the negligence was not the proximate cause of the injury. Here, defendants were precluded from offering evidence that any breach of the standard of care was not the proximate cause of the decedent's injury, given her pretreatment negligence. Had the evidence been presented, the jury could reasonably have concluded that even if defendants had breached the standard of care, they still were not liable because any breach was not a proximate cause of the decedent's injuries. Therefore, a new trial on all issues, including liability, is necessary. Limiting the new trial to damages only ignores the important fact that proximate cause is essential to a plaintiff's prima facie case, and improperly conflates two separate and necessary elements of liability: of a breach of a standard of care *and* a showing that that breach was a proximate cause of the injury.[3]

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[3] In fact, this view is supported by the standard jury instruction regarding the burden of proof for malpractice cases. M Civ JI 30.03 provides:

> The plaintiff has the burden of proof on each of the following:
>
> a. that the defendant was professionally negligent in one or more of the ways claimed by the plaintiff as stated in these instructions
>
> b. that the plaintiff sustained injury and damages

In fact, under our statutory scheme, the issues of liability and damages, as they relate to comparative negligence, are inextricably linked. MCL 600.2959 provides:

> In an action *based on tort* or another legal theory seeking damages for personal injury, property damage, *or wrongful death*, the court shall reduce the damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306. *If that person's percentage of fault is greater than the aggregate fault of the other person or persons*, whether or not parties to the action, the court shall reduce economic damages by the percentage of comparative fault of the person upon whose injury or death the damages are based as provided in section 6306, *and noneconomic damages shall not be awarded*. [Emphasis added.]

In addition, M Civ JI 11.01, the standard jury instruction regarding comparative negligence, provides:

> The total amount of damages that the plaintiff would otherwise be entitled to recover shall be reduced by the percentage of plaintiff's negligence that contributed as a proximate cause to [*his* / *her*] [*injury* / *property damage*].
>
> This is known as comparative negligence.

> c. that the professional negligence or malpractice of the defendant *was a proximate cause of the injury* and damages to the plaintiff
>
> Your verdict will be for the plaintiff if the defendant was negligent, *and such negligence was a proximate cause of the plaintiff's injuries*, and if there were damages.
>
> Your verdict will be for the defendant if the defendant was not professionally negligent or did not commit malpractice, or if the defendant was professionally negligent or did commit malpractice *but such professional negligence or malpractice was not a proximate cause of the plaintiff's injuries* or damages, or if the plaintiff was not injured or damaged. [Emphasis added.]

(The plaintiff, however, is not entitled to noneconomic damages if [*he* / *she*] is more than 50 percent at fault for [*his* / *her*] injury.)

In other words, the standard jury instruction simply reduces MCL 600.2959 to its mathematical equivalent: in order for the plaintiff or the decedent's fault to be more than the aggregate sum of the fault of all other applicable persons, the jury must place the plaintiff's fault at more than fifty percent.

Thus, both MCL 600.2959 and M Civ JI 11.01 assume that the jury has properly heard all evidence regarding liability and reached a determination of fault before damages can be assessed. If, during the trial, the jury was improperly precluded from considering evidence regarding the decedent's comparative negligence, it follows that the jury's determination of liability is flawed. If this determination of liability is flawed, it is impossible to ascertain the correct amount of damages. Therefore, I do not believe that it is possible to separate the issues of liability and damages, and believe a new trial on all issues is required. I would reverse the judgment of the Court of Appeals and remand this case for a new trial.

B. THE LOWER DAMAGES CAP APPLIES

For the reasons stated in *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004), I agree with the majority that the noneconomic damages cap found in MCL 600.1483 applies to wrongful death actions alleging medical malpractice. I cannot agree, however, that the higher tier of the damages cap applies to such cases. Instead, I would hold that the lower tier applies to wrongful death actions alleging medical malpractice.

MCL 600.1483(1) provides:

In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions *apply as determined by the court pursuant to section 6304*, in which case damages for noneconomic loss shall not exceed $500,000.00:

(a) The plaintiff *is* hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff *has* permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There *has been* permanent loss of or damage to a reproductive organ resulting in the inability to procreate. [Emphasis added.][4]

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[4] In the former version of § 1483, a one-tiered cap included "death" as an exception to the then-$225,000 cap:

(1) In an action for damages alleging medical malpractice against a person or party specified in section 5838a, damages for noneconomic loss which exceeds $225,000.00 shall not be awarded unless 1 or more of the following circumstances exist:

(a) There has been a death.

(b) There has been an intentional tort.

(c) A foreign object was wrongfully left in the body of the patient.

(d) The injury involves the reproductive system of the patient.

As an initial matter, MCL 600.1483(1) requires the *trial court* to determine whether one of the statutory exceptions, and thereby the higher cap, applies. Here, however, the *jury* was improperly instructed to return a special verdict that required answers to the following questions: "Did [the decedent] suffer hemiplegia, paraplegia, or quadriplegia resulting in a total or permanent functional loss of one or more limbs caused by injury to the brain?" and "Did [the decedent] suffer permanently impaired cognitive capacity rendering her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living?" The jury answered "yes" to both questions, and the trial court determined that the higher, $500,000 cap was therefore applicable.

These questions should not have been submitted to the jury because the applicability of § 1483 is a question for the court. I would, therefore, take this opportunity to clarify that the question of the application of § 1483 is solely an issue for the trial court, not the jury.

Further, I believe that the lower tier damages cap of § 1483 applies in wrongful death actions alleging malpractice. In any wrongful death action, the plaintiff is seeking to recover for the decedent's *death*, and death is not one of the statutory exceptions giving rise to the application of the higher cap. This Court does not have the authority to create an exception the Legislature has

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(e) The discovery of the existence of the claim was prevented by the fraudulent conduct of a health care provider.

(f) A limb or organ of the patient was wrongfully removed.

(g) The patient has lost a vital bodily function. [1986 PA 178, effective October 1, 1986.]

not included in the statute. Had the Legislature wished to include negligence causing death as an exception, it could have done so.

In fact, it *did* do so in the previous version of the statute, but this death exception was eliminated when the statute was amended in 1993 to its current form. 1993 PA 78, effective October 1, 1993. The history of the current version of § 1483 indicates that the Legislature intended to exclude death from the exceptions giving rise to the application of the higher cap. Although death was one of the exceptions enumerated in the prior version of the statute, it is conspicuously absent from the present version of the statute. The Legislature apparently made a policy decision that the survivors of dead medical malpractice victims are entitled to lesser damages than are living medical malpractice victims who are suffering from one of the three types of permanent conditions enumerated in the statute. This choice makes sense because it is not the surviving, permanently, and severely injured patient who is recovering damages in a wrongful death action, but the patient's relatives or other survivors who have not suffered from these permanent conditions. Further, in enacting this aspect of tort reform legislation, the Legislature could well have chosen a policy that would help to limit the cost of malpractice insurance. Whether one agrees with such policy decisions, those decisions are solely within the Legislature's authority to make. This Court may not question the wisdom of the Legislature's policy choices; rather, this Court must enforce the statutory language as written.

Finally, the structure of § 1483(1) indicates that the Legislature intended that an exception, if it is applicable, apply *at the time* that the trial court makes its postverdict determination concerning whether the cap

requires adjustment of the verdict. First, § 1483(1) imposes the $280,000 cap unless "1 or more of the . . . exceptions *apply* as determined by the court pursuant to section 6304 . . . ." (Emphasis added.) Section 6304(5), in turn, directs the trial court to "reduce an award of damages" as required by the limitations set forth in § 1483(1). This language supports the conclusion that the exception must be applicable at the time the verdict is adjusted by the trial court. Second, the language of subsections 1(a) and (b) of the cap statute, § 1483, is in the present tense ("[t]he plaintiff *is* hemiplegic"; "[t]he plaintiff *has* permanently impaired cognitive capacity"), clearly requiring that the enumerated conditions *currently* exist. Here, at the time of the postverdict decision regarding the amount recoverable, the decedent would not have been described as someone who was paraplegic or someone who had a permanently impaired cognitive capacity; rather, the decedent would have only been described as deceased.

For the same reasons stated in *Jenkins*, *supra* at 171-173, applying the lower damages cap does not frustrate the purpose of MCL 600.2922(6), which provides that the court or jury in a wrongful death action "may *award* . . . reasonable compensation for the pain and suffering, while conscious, undergone by the deceased person during the period intervening between the time of the injury and death . . . ." (Emphasis added.) As we noted in *Jenkins*, applying the lower damages cap to limit the amount of actual *recovery* by the plaintiff does not in any way limit the amount of the jury's *award*. The jury or court may still award whatever amount it concludes is reasonable under MCL 600.2922(6); that amount, however, is subject to reduction under MCL 600.1483.

Therefore, because MCL 600.1483 does not include death as one of the enumerated exceptions to the lower

damages cap, and because the statutory syntax suggests that the plaintiff must currently fall into one of the enumerated exceptions at the time of the postverdict recovery determination, I believe that the lower tier damages cap applies in wrongful death actions alleging medical malpractice.

C. MCL 600.6311 DOES NOT APPLY TO WRONGFUL DEATH ACTIONS

MCL 600.6306 provides, in relevant part:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> * * *
>
> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.
>
> (d) All future medical and other health care costs reduced to gross present cash value.
>
> (e) All future noneconomic damages reduced to gross present cash value.
>
> * * *
>
> (2) As used in this section, "gross present cash value" means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact as provided in section 6305(1)(b).

MCL 600.6311, however, provides an exception to the requirement in MCL 600.6306 of a reduction to present value:

> Sections 6306(1)(c), (d), and (e), 6307, and 6309 do not apply to a plaintiff who is 60 years of age or older at the time of judgment.

Here, the trial court ruled that in wrongful death cases, the "plaintiff" referred to in § 6311 was the decedent. Because the decedent was over age sixty at the time of judgment, the trial court held that § 6311 applied. The Court of Appeals declined to determine whether § 6311 applied to the decedent or to the personal representative because both the decedent and the personal representative were over age sixty; therefore, the Court held that § 6311 applied in any event.

I believe that the exception does not apply in the case of a decedent: it applies only to a plaintiff who "*is* 60 years of age or older at the time of judgment." At the time of judgment in a wrongful death action, the decedent is dead. Moreover, the decedent is not generally recognized as the "plaintiff" in a wrongful death action.

At common law, a cause of action did not survive death. As we noted in *Hawkins v Regional Med Laboratories, PC*, 415 Mich 420, 428-429; 329 NW2d 729 (1982), "under common law, [causes of action] were terminated by the death either of the person injured or the tortfeasor. 1846 Rev Stats, ch 101, § 5." The Legislature subsequently changed the common-law rule through the wrongful death provisions, allowing causes of actions to survive death through the creation of a "new" plaintiff, the estate. The estate is then represented by the personal representative: MCL 600.2922(2) provides that "[e]very action under this section [the wrongful death provision] *shall be brought*

by, and in the name of, the personal representative of the estate of the deceased person." (Emphasis added.) Indeed, the named plaintiff in the instant case is "Estate of Betty Jean Shinholster," "*by*" the personal representative.

Section 2922(2) does not compel the conclusion that the "plaintiff" in a wrongful death action is the personal representative. Rather, § 2922(2) simply requires that the action be brought "by" and "in the name of" that representative. The true plaintiff remains the decedent's estate. Those who are entitled to share in the proceeds of a judgment obtained in the wrongful death action are enumerated in MCL 600.2922(3), and include relatives, a spouse's children, and devisees and beneficiaries. These persons can be relevant only because they all may be entitled to a portion of the decedent's *estate*. Unlike a living person, an estate does not have an "age"; therefore, § 6311 cannot apply to an estate. Because § 6311 does not apply to estates, it cannot be applied in wrongful death actions.

II. CONCLUSION

I agree with the majority that the clear and unambiguous language of MCL 600.6304(1) and MCL 600.2959 requires that a jury is permitted in all medical malpractice actions to consider a plaintiff's pretreatment negligence as comparative negligence to offset a defendant's fault, provided evidence has been admitted that would allow a reasonable person to conclude such negligence was "a proximate cause" of the plaintiff's injury. I do not agree, however, that a new trial should be limited to damages only; rather, I would reverse and remand for a new trial on all issues.

Further, although I agree that the noneconomic damages cap of MCL 600.1483 applies to wrongful death actions alleging medical malpractice, I do not

agree that the higher tier applies in such cases. Instead, I would hold that the lower cap of MCL 600.1483(1) applies.

Finally, I would hold that MCL 600.6311, which provides that the reduction to present value does not apply to "a plaintiff who is 60 years of age or older at the time of judgment," cannot apply in wrongful death cases, because in such cases the true "plaintiff" is the estate, which is not a person and does not have an "age."

Therefore, I would reverse the decision of the Court of Appeals and remand for a new trial.

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

CAVANAGH, J. (*concurring in part and dissenting in part*). I agree with the majority that MCL 600.6311 applies in this case and join that portion of the lead opinion in full. With respect to the applicability of the medical malpractice noneconomic damages cap, I concur only in the result because I remain committed to my position in *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004). And finally, I must respectfully dissent from the majority's decision allowing the trier of fact to consider plaintiff's alleged pretreatment negligence. I agree with the trial court and the Court of Appeals, as well as the Restatement and a majority of other jurisdictions, that it would be improper for the jury to consider plaintiff's pretreatment negligence. Thus, I would affirm the decision of the Court of Appeals.

Today, a plurality of this Court makes a mockery of tort law by holding that a jury can consider a plaintiff's pretreatment negligence to determine liability. Justice MARKMAN's approach, allowing the jury to consider plaintiff's pretreatment negligence only when deter-

mining damages, is also contrary to general tort principles. While Justice MARKMAN claims that allowing the jury to consider a plaintiff's pretreatment negligence in a medical malpractice action is consistent with prior law, *ante* at 575 n 3, a close reading of this Court's precedent shows that it does not support Justice MARKMAN's argument. Make no mistake, allowing a jury to consider a plaintiff's pretreatment negligence in a medical malpractice action is a sweeping new decision, with no basis in this Court's prior rulings.

It is an axiom of tort law that the defendant takes the plaintiff as he finds her. *Wilkinson v Lee*, 463 Mich 388, 396; 617 NW2d 305 (2000). Potentially eviscerating a defendant's liability or reducing a plaintiff's damages on the basis of a condition that a plaintiff brings to the table ignores this foundational principle of tort law. It also opens the door to scrutiny of a medical malpractice plaintiff's pretreatment health habits and lifestyle in nearly every medical malpractice action. "[W]hatever the wisdom or folly of our lifestyles, society, through its laws, has not yet imposed a normative life-style on its members." *Ostrowski v Azzara*, 111 NJ 429, 444; 545 A2d 148 (1988). Today's majority imposes a judicially created normative lifestyle on the citizens of this state.

The majority also subverts the text of MCL 600.6304 when it holds that § 6304 requires the trier of fact to determine the comparative negligence of all who are a proximate cause of the plaintiff's *injury*. The statute actually states: " 'fault' includes an act . . . that is a proximate cause of *damage* sustained by a party." MCL 600.6304(8) (emphasis added). While the majority focuses on plaintiff's injury, its attention would be more properly focused on the plaintiff's damage.

The plaintiff's damage in a medical malpractice action is determined by the difference between the dece-

dent's hypothetical life without the negligence of the doctor and the actual result. In this case, the damage plaintiff claims is the difference between the life of a woman who suffered a mini-stroke that was properly treated and a dead woman. The majority potentially eliminates all doctors' liability for all negligent behavior by mischaracterizing the damage. It is absurd to assert that plaintiff's pretreatment behavior can be considered the proximate cause of the damage inflicted by the doctor's malpractice.

"As a general rule, negligence by a patient that occurred before the malpractice and provided the occasion for the treatment that is the subject of the malpractice claim cannot give rise to a defense of comparative negligence." Moore & Gaier, *A Plaintiff's Culpable Conduct*, NY Law J 3 (Mar 3, 1998). Comment m to Restatement Torts, 3d, Apportionment of Liability, § 7, provides that the jury in a medical malpractice action cannot consider the plaintiff's conduct that created the condition that the doctor was employed to remedy. So, in this case, the trial court was correct to prevent the jury from considering plaintiff's failure to regularly take her medication.

In addition to the Restatement, I am persuaded by the wealth of authority from other jurisdictions that have refused to allow juries to consider a plaintiff's pretreatment negligence in medical malpractice actions. For example, the Florida Court of Appeals, in *Matthews v Williford*, 318 So 2d 480, 483 (1975), persuasively held that "conduct of a patient which may have contributed to his illness or medical condition . . . simply is not available as a defense to malpractice which causes a distinct subsequent injury . . . ." See, also, *Mercer v Vanderbilt Univ, Inc*, 134 SW3d 121, 129-130 (Tenn, 2004); *DeMoss v Hamilton*, 644 NW2d 302,

306-307 (Iowa, 2002); *Harding v Deiss*, 300 Mont 312, 318; 3 P3d 1286 (2000); *Smith v Kennedy*, 2000 US Dist LEXIS 9897, 11-12 (D Kan, 2000); *Harvey v Mid-Coast Hosp*, 36 F Supp 2d 32, 37-38 (D Me, 1999); *Durphy v Kaiser Foundation Health Plan of Mid-Atlantic States, Inc*, 698 A2d 459, 465-467 (DC App, 1997); *Fritts v McKinne*, 934 P2d 371, 374 (Okla Civ App, 1996); *Spence v Aspen Skiing Co*, 820 F Supp 542, 544 (D Colo, 1993); *Van Vacter v Hierholzer*, 865 SW2d 355, 359 (Mo App, 1993); *Martin v Reed*, 200 Ga App 775, 777; 409 SE2d 874 (1991); *Jensen v Archbishop Bergan Mercy Hosp*, 236 Neb 1, 15; 459 NW2d 178 (1990); *Cowan v Doering*, 215 NJ Super 484, 495; 522 A2d 444 (1987); *Owens v Stokoe*, 115 Ill 2d 177, 183; 503 NE2d 251 (1986).

Justice MARKMAN attempts to make a distinction between a distinct subsequent injury and an injury that would be part of the "natural and foreseeable result of the plaintiff's original negligence." *Ante* at 554 n 9. This distinction, however, is a distinction without a difference when examining the proper damage in a medical malpractice action. Because a tortfeasor must take a plaintiff as he finds her, the plaintiff in Justice MARKMAN's examples would be taken as a plaintiff with a broken leg. Without the negligence of the doctor, a plaintiff with a broken leg could expect full recovery. Regardless of whether the doctor's negligence results in death or in a poorly set leg, the damage in the case is the difference between the expected full recovery and the actual result. In neither example, can the plaintiff's negligence in breaking her leg be a proximate cause of the damage.

Because the majority mischaracterizes the damage and allows the jury to consider plaintiff's pretreatment negligence, I must respectfully dissent. I refuse to take

part in the judicial determination of what is and is not socially acceptable behavior. Smokers, couch potatoes, and fast food connoisseurs pick your doctors carefully because after today, no matter how negligent a doctor is in treating you, the jury will be able to consider your poor health habits when deciding whether to hold the doctor liable. I would affirm the holding of the trial court and the Court of Appeals.

KELLY, J., concurred with CAVANAGH, J.

WEAVER, J. (*concurring in part and dissenting in part*).

I

I dissent from the majority's holding that pursuant to MCL 600.6304, plaintiff's pretreatment negligence may be considered by the jury in assessing comparative negligence because it may have been a proximate cause of plaintiff's death. *Ante* at 546.[1] I agree with Justice CAVANAGH's concurring and dissenting opinion that it would be improper for the jury to consider plaintiff's pretreatment negligence to determine comparative negligence, *ante* at 597, and I would affirm the Court of Appeals decision on this point.

To determine the comparative negligence of the parties, MCL 600.6304 provides that the trier of fact in a tort action shall determine the percentage of the total fault of all persons that contributed to the death or

[1] The plaintiff's negligence *after* seeking treatment is not at issue in this case; the parties agree that a plaintiff's negligence *after* seeking treatment may be considered in a comparative negligence analysis. See *Pietrzyk v Detroit,* 123 Mich App 244, 248-249; 333 NW2d 236 (1983), and *Jalaba v Borovoy,* 206 Mich App 17, 23; 520 NW2d 349 (1994). The issue here focuses solely on plaintiff's conduct *before* seeking treatment.

injury, including each plaintiff. MCL 600.6304(8) defines "fault" as "an act, an omission, conduct . . . that is a *proximate cause of damage* sustained by a party." (Emphasis added.)

As Justice CAVANAGH explains, the proper focus of the statute is on the plaintiff's damage, not the plaintiff's injury, and "[t]he plaintiff's damage in a medical malpractice action is determined by the difference between the decedent's hypothetical life without the negligence of the doctor and the actual result." *Ante* at 598-599.[2]

Further, I would hold that the plaintiff's pretreatment negligence did not fall within MCL 600.6304's definition of "fault" for the purposes of comparative negligence. While plaintiff's pretreatment negligence caused the need for care or treatment that led to the alleged medical malpractice, the plaintiff's pretreatment negligence was not a *proximate cause* of plaintiff's damages.

Proximate cause, or legal cause, as it is also known, involves examining the foreseeability of consequences, and considering whether a defendant should be held legally responsible for such consequences. *Skinner v Square D Co,* 445 Mich 153, 163-164; 516 NW2d 475 (1994). Deciding proximate cause is a policy determination of the courts:

> "Proximate cause"—in itself an unfortunate term—is merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the ac-

[2] It should be noted that plaintiff's pretreatment conduct and general health will be considered when the jury determines the *amount* of plaintiff's damages. For example, in this case, the jury found that decedent had a life expectancy of eight years, rather than the 15.44-year life expectancy provided by the mortality tables for a sixty-one-year-old woman in good health, or the ten to fifteen-year life expectancy that plaintiff's expert opined.

> tor's conduct. In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond. But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would "set society on edge and fill the courts with endless litigation. As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set to liability for the consequences of any act, upon the basis of some social idea of justice or policy. [Prosser & Keeton, Torts (5th ed), § 41, p 264.]

To be allocated as "fault" for the purposes of comparative negligence under MCL 600.6304, a plaintiff's negligence must be a *proximate cause* of the plaintiff's damages. The majority does not offer any analysis regarding *why* it is appropriate to consider plaintiff's pretreatment negligence as a proximate cause of her death, but simply states that it may be considered.

I note that all the other state courts that have considered the question whether a patient's own pretreatment negligence could be considered a proximate cause of the patient's damages for purposes of comparative negligence have ultimately decided that it should not.[3] *Owens v Stokoe,* 115 Ill 2d 177, 183; 503 NE2d 251 (1987) (dental patient's failure to obtain second opinion, prior poor oral hygiene, and alleged refusal to

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[3] Although in 1996 the Tennessee Supreme Court held that a decedent's negligence in causing the initial injury would be considered in apportioning fault for the purposes of comparative negligence, *Gray v Ford Motor Co,* 914 SW2d 464, 467 (Tenn, 1996), that case was overruled in May of 2004, by *Mercer v Vanderbilt Univ, Inc,* 134 SW3d 121, 125 (Tenn, 2004). In *Mercer* the court held that "a patient's negligent conduct that occurs prior to a health care provider's negligent treatment and provides only the occasion for the health care provider's subsequent negligence may not be compared to the negligence of the health care provider." *Id.* at 130.

permit X-ray to be taken of his teeth were insufficient to raise issue of contributory negligence because parasthesia was proximately caused by damage to the left interior alveolar nerve during surgery and conduct of patient did not prevent surgeon from properly performing surgery); *Eiss v Lillis,* 233 Va 545, 553-554; 357 SE2d 539 (1987) (the plaintiff's negligently taking aspirin along with heart medicine before the physician's alleged negligence was not a proximate cause of the plaintiff's death); *Jensen v Archbishop Bergan Mercy Hosp,* 236 Neb 1, 15-16; 459 NW2d 178 (1990) (although the plaintiff's failure to lose weight may have been causally related to his injury, his conduct regarding his weight problem merely furnished an occasion or condition for the medical care that was the basis of the medical malpractice action, and it was improper to instruct the jury to consider whether the plaintiff had been contributorily negligent); *Harding v Deiss,* 300 Mont 312, 318; 3 P3d 1286 (2000) (the plaintiff's negligence in riding a horse when she had asthma and was allergic to horses could not be compared to physician's failure to immediately intubate her upon her arrival at the hospital); *DeMoss v Hamilton,* 644 NW2d 302, 307 (Iowa, 2002) (the plaintiff's failure to stop smoking, have regular follow-up examinations, lose weight, and begin an exercise program after a heart attack provided the occasion for medical treatment, but was irrelevant to the question of defendant's medical negligence). See also *Harvey v Mid-Coast Hosp*, 36 F Supp 2d 32, 37-38 (D Me, 1999), *Spence v Aspen Skiing Co*, 820 F Supp 542, 544 (D Colo, 1993), *Van Vacter v Hierholzer*, 865 SW2d 355, 359 (Mo App, 1993), and *Nelson v McCreary,* 694 A2d 897 (DC App, 1997).[4]

[4] But see, contra, *Wyatt v United States,* 939 F Supp 1402 (ED Mo, 1996).

In holding that plaintiff's pretreatment negligence may be considered a proximate cause of plaintiff's damages for purposes of comparative negligence, the majority abandons the long-standing principle of tort law that the defendant takes the plaintiff as he finds her. See 2 Restatement Torts, 2d,§ 461, p 502; *Rawlings v Clyde Plank & Macadamized Rd Co,* 158 Mich 143, 146; 122 NW 504 (1909). As recently as 2000 this Court, including the majority, recognized and applied this principle of law. *Wilkinson v Lee,* 463 Mich 388, 396; 617 NW2d 305 (2000). The patient's conduct before seeking medical treatment is merely a factor the physician should consider in treating the patient. *Harding, supra* at 318. Rather than retreating from such a long-established principle, I would affirm the Court of Appeals on this issue.

II

I join in full § III(B) of the lead opinion, recognizing that the medical malpractice noneconomic damages cap of MCL 600.1483 applies to a wrongful death action based on an underlying claim of medical malpractice and concluding that the higher cap of MCL 600.1483 applies when the injured person, at any time while still living and as a result of a defendant's negligent conduct, fits with the ambit of MCL 600.1483(1).[5]

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[5] MCL 600.1483 provides:

> (1) In an action for damages alleging medical malpractice by or against a person or party, the total amount of damages for noneconomic loss recoverable by all plaintiffs, resulting from the negligence of all defendants, shall not exceed $280,000.00 unless, as the result of the negligence of 1 or more of the defendants, 1 or more of the following exceptions apply as determined by the court pursuant to section 6304, in which case damages for noneconomic loss shall not exceed $500,000.00:

III

I also join in full § III(C) of the lead opinion, concluding that because the term "plaintiff," as used in MCL 600.6311, refers, for purposes of a wrongful death action, to the decedent, and because Mrs. Shinholster, the decedent, was sixty-one years old at her death and at the time of judgment, the damages awarded to plaintiff should not be reduced to their present value.[6]

(a) The plaintiff is hemiplegic, paraplegic, or quadriplegic resulting in a total permanent functional loss of 1 or more limbs caused by 1 or more of the following:

(i) Injury to the brain.

(ii) Injury to the spinal cord.

(b) The plaintiff has permanently impaired cognitive capacity rendering him or her incapable of making independent, responsible life decisions and permanently incapable of independently performing the activities of normal, daily living.

(c) There has been permanent loss of or damage to a reproductive organ resulting in the inability to procreate.

(2) In awarding damages in an action alleging medical malpractice, the trier of fact shall itemize damages into damages for economic loss and damages for noneconomic loss.

(3) As used in this section, "noneconomic loss" means damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss.

(4) The state treasurer shall adjust the limitation on damages for noneconomic loss set forth in subsection (1) by an amount determined by the state treasurer at the end of each calendar year to reflect the cumulative annual percentage change in the consumer price index. As used in this subsection, "consumer price index" means the most comprehensive index of consumer prices available for this state from the bureau of labor statistics of the United States department of labor.

[6] MCL 600.6311 provides: "Sections 6306(1)(c), (d), and (e), 6307, and 6309 do not apply to a plaintiff who is 60 years of age or older at the time of judgment."

IV

Because I would hold that the plaintiff's pretreatment negligence in this medical malpractice action did not fall within MCL 600.6304's definition of "fault," and therefore could not be considered for the purposes of comparative negligence, I would affirm the Court of Appeals on all counts.

KELLY, J., concurred with respect to sections I, III, and IV.

KELLY, J. (*concurring in part and dissenting in part*). I fully agree with Justice CAVANAGH's opinion. In addition, I join sections I, III, and IV of Justice WEAVER's opinion.

NATIONAL WILDLIFE FEDERATION v
CLEVELAND CLIFFS IRON COMPANY

Docket No. 121890. Argued January 13, 2004 (Calendar No. 5). Decided July 30, 2004.

The National Wildlife Federation and the Upper Peninsula Wildlife Council, on behalf of their members, filed a petition for a contested case hearing with the Department of Environmental Quality (DEQ) in an effort to stop Cleveland Cliffs Iron Company and Empire Iron Mining Partnership from expanding mining operations at the Empire Mine. The DEQ had issued a permit for the expansion. A DEQ hearing referee dismissed the petition, ruling that the plaintiffs lacked standing. The Marquette Circuit Court affirmed, and the Court of Appeals denied leave to appeal. The federation and the council then brought an action against the mining entities and the DEQ pursuant to the Michigan environmental protection act, MCL 324.1701 *et seq*., and sought injunctive relief. Venue was changed to the Marquette Circuit Court, where Garfield W. Hood, J., denied injunctive relief on the basis that the plaintiffs lacked standing. The Court of Appeals, GRIFFIN, P.J., and HOOD and SAWYER, JJ., reversed in an unpublished memorandum opinion (Docket No. 232706). The defendants Cleveland Cliffs Iron Company and Empire Iron Mining Partnership appealed.

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

Under the particular circumstances of this case, the plaintiffs had standing to bring the suit because their supporting affidavit provided the necessary factual support for the averred injuries of individual members. To resolve this case, there is no need to determine the constitutional issue of standing under the Michigan environmental protection act.

The plaintiffs, on behalf of their members, have standing on the basis of the principles of standing set forth in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001), which principles are indispensable to our constitutional system of separation of powers.

Justice WEAVER, concurring in result only, stated that the majority is correct that the plaintiffs have standing to bring the

suit, but that standing is legislatively established by MCL 324.1701(1), the Michigan environmental protection act (MEPA), without regard to the judge-made standing test from *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001).

Art 4, § 52 of the Michigan Constitution requires the Legislature to provide for the protection of Michigan's natural resources. The Legislature fulfilled the people's art 4, § 52 mandate by enacting MEPA, which grants standing to "any person" to maintain an action in circuit court for declaratory and other equitable relief against anyone for the protection of Michigan's environment. The Legislature has the authority to create a cause of action and define who has standing to pursue that action in court. *Lee* unnecessarily and incorrectly imposed federally-based standing limitations on the exercise of judicial power in Michigan. By applying *Lee* in this case, the majority violates the separation of powers in Michigan by allowing the judiciary to supercede the Legislature's grant of standing to "any person" under MEPA. The majority's decision disregards the intent of the Legislature, overrules 30 years of Michigan case law, and utterly ignores the people's mandate in art 4, § 52 of the Michigan Constitution.

Although the majority purports to not decide this question, it clearly implies that the Legislature's grant of standing in MEPA is unconstitutional because it is broader than *Lee's* judge-made standing test.

Justice CAVANAGH, concurring in result, stated that he agreed with the result reached by the majority and Justice WEAVER, and agreed with Justice WEAVER that the test for the determination of standing adopted from *Lujan v Defenders of Wildlife*, 504 US 555 (1992), should not be used to determine standing in Michigan.

Justice KELLY, joined by Justice CAVANAGH, concurring in result only, stated that the Court should not have adopted the test in *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 (2001), and that it should not be applied to cases like this one. The Legislature did not violate the Michigan Constitution by granting standing under the environmental protection act (MEPA), MCL 324.1701 *et seq*., despite the fact that MEPA lacks a requirement for particularized injury for standing. The Legislature carefully devised the MEPA test for standing, and, because it gave standing to "any person," any person should have standing.

The Legislature has the authority to grant standing to a party who does not satisfy the judge-made standing requirements of *Lujan v Defenders of Wildlife*, 504 US 555 (1992), incorporated into Michigan law in *Lee*. Although the Court should not import

requirements for access to the courts that are not founded on our Constitution, the majority has created one such requirement by adopting the *Lujan* "case and controversy" rule. Michigan's standing provisions before *Lee* sufficiently ensured that judicial power was properly constrained while allowing vigorously pursued suits to proceed. The decision in *Lee* wrongly blocked access to Michigan's courts. Just as the Governor may delegate some of her power, the Legislature may vest some of its power in an agency. Similarly, the Legislature may return it to the people. That is what MEPA standing does.

Affirmed and remanded to the circuit court.

F. Michelle Halley and *Neil S. Kag*an (*Jane Reyer*, of counsel) for the plaintiffs.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross* and *Karl A. Weber*), for defendants The Cleveland Cliffs Iron Company and Empire Iron Mining Partnership.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *Harold J. Martin*, Assistant Attorney General, for defendant Department of Environmental Quality.

Amici Curiae:

Joseph L. Sax in support of the plaintiffs-appellees.

John F. Rohe for Camp Quality Michigan.

Ellen J. Kohler for the Tip of the Mitt Watershed Council.

Olson, Bzdok & Howard, P.C. (by *James M. Olson* and *Scott W. Howard*), for William G. Milliken, League of Women Voters of Michigan, etc.

MARKMAN, J. This case presents the question of whether plaintiffs have standing to bring a suit on behalf of their members under the Michigan environ-

mental protection act (MEPA), MCL 324.1701 *et seq*. We conclude that, under the particular circumstances of this case, plaintiffs have standing. We affirm the decision of the Court of Appeals and remand this case to the trial court for further proceedings.

I. BACKGROUND

Defendant Cleveland Cliffs Iron Company (Cleveland Cliffs), in partnership with defendant Empire Iron Mining Partnership, planned to expand operations at the Empire Mine in Michigan's Upper Peninsula. Cleveland Cliffs applied for a permit through the Michigan Department of Environmental Quality (MDEQ), which held a public hearing to receive public comment. Eventually, the MDEQ issued the permit.

Plaintiffs, on behalf of their members, filed a petition for a contested case hearing with the MDEQ. The hearing referee held that plaintiffs lacked standing and dismissed the matter. Plaintiffs then appealed to the Marquette Circuit Court, which affirmed the referee's dismissal, and the Court of Appeals denied plaintiffs' application for leave to appeal.

Meanwhile, plaintiffs filed suit in Ingham Circuit Court (venue was later changed to Marquette County), including a count asserting a claim under MEPA.[1] Plaintiffs sought a temporary restraining order and a pre-

[1] MCL 324.1701(1) provides:

> The attorney general or any person may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction.

MCL 324.1704(1) provides:

liminary injunction of further mine expansion. The trial court denied the injunction, finding that plaintiffs lacked standing. Plaintiffs appealed, and the Court of Appeals reversed.[2] The Court analyzed the statute and found that it simply permitted "any person" to bring suit.

This Court granted leave, limited to the issue of "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing. See *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726 [629 NW2d 900] (2001)."[3]

II. STANDARD OF REVIEW

Whether a party has standing is a question of law that we review de novo. *Lee, supra* at 734.

III. STANDING

First, contrary to the three concurring/dissenting opinions, one of which "disavows" its past support for *Lee, supra*, one of which reaffirms its past opposition to *Lee,* and one of which maintains its support for *Lee* while distinguishing it into nothingness, we reaffirm our support for the principles of standing set forth in *Lee,* and explain the importance of *Lee* for our constitutional system of separated powers and for the preservation of a judiciary operating within proper boundaries.[4]

> The court may grant temporary and permanent equitable relief or may impose conditions on the defendant that are required to protect the air, water, and other natural resources or the public trust in these resources from pollution, impairment, or destruction.

[2] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, unpublished memorandum opinion, issued June 11, 2002 (Docket No. 232706).

[3] 468 Mich 944 (2003).

[4] Justice WEAVER'S concurrence/dissent views the majority's ultimate determination concerning whether plaintiffs possess standing as a fore-

The Michigan Constitution provides that the Legislature is to exercise the "legislative power" of the state, Const 1963, art 4, § 1, the Governor is to exercise the "executive power," Const 1963, art 5, § 1, and the judiciary is to exercise the "judicial power," Const 1963, art 6, § 1. The importance of these allocations of power is reaffirmed in Const 1963, art 3, § 2, which states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise. "[T]here [is] no liberty . . . if the power of judging be not separated from the legislative and executive powers." Madison, The Federalist No 47.[5]

As a term that both defines the role of the judicial branch and limits the role of the legislative and execu-

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gone conclusion in light of the majority's continued support for *Lee*. It is wrong in this assertion. In fact, we agree with the United States Supreme Court in *Lujan v Defenders of Wildlife*, 504 US 555, 578; 112 S Ct 2130; 119 L Ed 2d 351 (1992), which, although holding, as *Lee* does, that standing is of constitutional dimension, proceeds to observe that "[n]othing in this contradicts the principle that 'the . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.' " This is affirmed in the concurring opinion of Justice Kennedy, joined by Justice Souter, in which they similarly observe, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, and we do not read the Court's opinion to suggest a contrary view." *Id*. at 580.

[5] The separation of powers provision in each of Michigan's Constitutions is "in harmony with American political theory, the State government [being] divided into the three historic departments, the legislative, executive, and judicial . . . ." *Schwartz v Flint*, 426 Mich 295; 395 NW2d 678 (1986) (citation omitted).

tive branches, it is clear that the scope of the "judicial power" is a matter of considerable constitutional significance. Given the final authority of the judicial branch to accord meaning to the language of the constitution, the term "judicial power" cannot ultimately be defined by the Legislature any more than "unreasonable searches and seizures"[6] or the "equal protection of the laws"[7] can ultimately be defined by the Legislature.[8]

The "judicial power," although not specifically defined in the Michigan Constitution, is distinct from both the legislative and executive powers. As former Justice THOMAS COOLEY has written:

> It is the province of judicial power [] to decide private disputes between or concerning persons; but of legislative power to regulate public concerns, and to make law for the benefit and welfare of the state. [Cooley, A Treatise on the Constitutional Limitations (Little, Brown & Co, 1886) at 92.]

The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of

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[6] Const 1963, art 1, § 11.

[7] Const 1963, art 1, § 2.

[8] In short, the deference that the concurrence/dissents purport to give to the Legislature is misplaced for the deference owed by this Court must first be to the constitution and only then to the coordinate branches of our state government.

unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.

Perhaps the most critical element of the "judicial power" has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, *Muskrat v United States*, 219 US 346; 31 S Ct 250; 55 L Ed 246 (1911), and one in which the plaintiff has suffered a "particularized" or personal injury. *Massachusetts v Mellon*, 262 US 447, 488; 43 S Ct 597; 67 L Ed 2d 1078 (1923). Such a "particularized" injury has generally required that a plaintiff must have suffered an injury distinct from that of the public generally. *Id*.

Absent a "particularized" injury, there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate. If a taxpayer, for example, opposed the closing of a tax "loophole" by the Legislature, the legislation might be challenged in court. If a taxpayer opposed an expenditure for a public building, that, too, might be challenged in court. If a citizen disagreed with the manner in which agriculture officials were administering farm programs, or transportation officials' highway programs, or social services officials' welfare programs, those might all be challenged in court. If a citizen opposed new prison disciplinary policies, that might be challenged in court.

In each instance, the result would be to have the judicial branch of government—the least politically accountable of the branches—deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government. To allow the judiciary to carry out its responsibilities in this

manner is to misperceive the "judicial power," and to establish the judicial branch as a forum for giving parties who were unsuccessful in the legislative and executive processes simply another chance to prevail. To allow this authority in the judiciary would also be to establish the judicial branch as first among equals, being permitted to monitor and supervise the other branches, and effectively possessing a generalized commission to evaluate and second-guess the wisdom of their policies. As the United States Supreme Court observed in *Mellon*:

> The administration of any statute . . . is essentially a matter of public and not of individual concern. . . . The party who invokes the [judicial] power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with the people generally. . . . To [allow standing under a different understanding] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which we plainly do not possess. [*Id.* at 487-489.]

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. The acceptance by one branch of the expansion of the powers of another branch is not dispositive in whether a constitutional power has been properly exercised. When the Legislature redefines the "judicial power" by expanding the realm of disputes cognizable by the judiciary, such expanded power on the part of the courts invariably comes at the expense of the executive, whose policies then become subject to the perpetual review

and revision of the courts. As the United States Supreme Court observed in *Lujan v Defenders of Wildlife*, 504 US 555, 576-577; 112 S Ct 2130; 119 L Ed 2d 351 (1992):

> Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of the Congress and the Chief Executive. . . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action. We have always rejected that vision of our role . . . . [Citations omitted; emphasis in original.]

"We must as judges recall that, as Mr. Justice Holmes wisely observed, the other branches of Government 'are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' " *Flast v Cohen*, 392 US 83, 131; 88 S Ct 1942; 20 L Ed 2d 947 (1968) (Harlan, J., dissenting), quoting *Missouri, Kansas & Texas R Co v May*, 194 US 267, 270; 24 S Ct 638; 48 L Ed 971 (1904).

Despite the remarkable statement in Justice WEAVER'S concurrence/dissent, *post* at 654, that the majority "expands the power of the judiciary," the exact opposite is true. By its adherence to *Lee*, the majority opinion rejects a constitutional regime in which the judicial branch can be invested with extra-constitutional powers at the expense of the other branches, in particular the executive. One need only be a casual student of

government to recognize the extraordinary rarity of an institution of government, such as this Court, choosing, on the basis of constitutional objection, *not* to exercise a power conferred upon it by another branch of government. It is impenetrable reasoning to equate such an *abnegation* of power with an *enhancement* of power.

The requirement of a genuine case or controversy as a precondition for the exercise of the "judicial power" is not a mere fine point of constitutional law. Rather, as Professor Alexander Bickel once wrote:

> [There are] sound reasons, grounded not only in theory but in the judicial experience of centuries, here and elsewhere, for believing that the hard, confining, and yet enlarging context of a real controversy leads to sounder and more enduring judgments. [Bickel, The Least Dangerous Branch (2d ed) (Yale University Press, 1986) at 115.]

Professor Bickel proceeded to observe that a contrary result in *Mellon*—one failing to recognize the importance of a plaintiff having suffered an "immediate, personal injury" in order to have standing to bring a lawsuit—would have "materially altered the function of judicial review and seriously undermined any acceptable justifications for it." *Id*. at 122.[9] Justice Robert Jackson has similarly written that the case or contro-

[9] Professor Kenneth Karst has written in the Oxford Companion to the Supreme Court (Oxford University, 1992), "By tying the courts' power of constitutional interpretation to their power to decide cases, Marshall founded the legitimacy of judicial review on its connection to that case-deciding function." *Id*. at 458. Professor Karst writes further:

> In general, when governmental officials act, only someone who is personally injured by those acts has standing to complain that they are unlawful. Generally, a plaintiff does not satisfy the requirement of standing by alleging that governmental action was unconstitutional, if the only harm alleged has been caused by someone else, or if the illegality in question is only a violation of some other person's legal right. [*Id*.]

versy requirement of the federal constitution is "perhaps the most significant limitation upon judicial power." The Role of the Supreme Court in the American System of Government (Harvard University Press, 1955) at 101. And Justice Antonin Scalia has observed:

> The Judiciary would be, "from the nature of its functions, . . . the [department] least dangerous to the political rights of the constitution," not because its acts were subject to legislative correction, but because the binding effect of its acts was limited to particular cases and controversies. [*Plaut v Spendthrift Farms*, 514 US 211, 223; 115 S Ct 1447; 131 L Ed 2d 328 (1995), quoting Hamilton, The Federalist, No 78.]

The concurrence/dissents, stating that they would overrule *Lee,* would erode one of the most significant barriers protecting the people from government by the judiciary. As Justice Harlan warned in his dissent in *Flast, supra* at 130, "There is every reason to fear that unrestricted public actions might well alter the allocation of authority among the three branches of the Federal Government." In *United States v Richardson*, 418 US 166, 188; 94 S Ct 2940; 41 L Ed 2d 678 (1974), Justice Powell observed, "[r]elaxation of standing requirements is directly related to the expansion of judicial power . . . significantly alter[ing] the allocation of power at the national level, with a shift away from a democratic form of government." And in *Lewis v Casey*, 518 US 343, 349-350; 116 S Ct 2174; 135 L Ed 2d 606 (1996), the Supreme Court opined:

> It is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as

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See also *Lujan*, *supra* at 562.

> to comply with the laws and the Constitution. . . . [T]he distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly.

When courts exceed the "judicial power," the interests of some other branch of government necessarily must be implicated and, as already observed, these normally will be the interests of the executive branch. As then-Professor, later-Justice Scalia put it:

> [T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of majorities, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interests *of the majority itself*. [Scalia, *The doctrine of standing as an essential element of the separation of powers*, 17 Suffolk U L Rev 881, 894 (1983).]

Professor Kenneth Karst has described some of the practical implications of relaxing the case or controversy requirement in greater detail:

> These developments in jurisdictional doctrine are representative of the emergence of what Abram Chayes has called "public law" litigation. In the traditional common-law model of a lawsuit there is one plaintiff and one defendant; the plaintiff personally initiates the lawsuit, and on both sides the parties control the conduct of the case; the parties' dispute concerns legal obligations founded on facts in the past; the remedies requested are closely fitted to the specific rights of the plaintiff; and the case culminates in a single trial and a single judgment. If, however, a class of plaintiffs sues a governmental institution such as a school board or the managers of a state hospital or prison, the lawsuit is likely to diverge from the common-law model. Public interest lawyers may invent the lawsuit and then go out to find some plaintiffs. . . . The

> whole process has a "legislative" or even "administrative" look. The interests of the particular parties in whose name the suit was filed seem secondary. [Oxford Companion to the Supreme Court, *supra* at 458-459.]

In this process, the authority of the executive branch is replaced by the authority of the judiciary, public policy decisions increasingly come to be made exclusively by lawyers in robes, the negotiation and compromise and give-and-take of the representative processes is replaced by the absolutist "rights" analyses of individual judges, and local control of public decision making comes increasingly to be replaced by unaccountable judicial decision making. One committed to a governmental system in which most important public policy decisions are eventually made by the courts, and in which the representative processes increasingly become little more than a prelude to judicial decision making, would, almost certainly, begin by dismantling long-standing and traditional preconditions to the exercise of the "judicial power" reflected in the concept of standing.[10]

Thus, we continue to adhere to *Lee*, and conclude that *Lee* was correct in its holding that questions of standing implicate the constitutional separation of powers, and that forsaking this proposition "would imperil the constitutional architecture . . . ." *Id*. at 735. As the United States Supreme Court observed in *Allen v Wright*, 468 US 737, 751-752; 104 S Ct 3315; 82 L Ed 2d 556 (1984):

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[10] "This explicit requirement [of a case or controversy] is the constitutional key to understanding the forms and limits of judicial power." McDowell, Curbing the Courts (Louisiana State Press, 1988) at 195. Standing was restricted to certain forms "so as not to allow the judges a 'roving commission to do good.' " *Id*. at 172.

> The requirement of standing . . . has a core component derived directly from the Constitution.
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> [T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers. . . . [Q]uestions . . . relevant to the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and as a necessity," and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process." [Quoting *Chicago & Grand Trunk R Co v Wellman,* 143 US 339, 345; 12 S Ct 400; 36 L Ed 176 (1892), and *Flast, supra* at 97.]

See also *Lujan*, *supra* at 561.

If the Legislature were permitted at its discretion to confer jurisdiction upon this Court unmoored from any genuine case or controversy, this Court would be transformed in character and empowered to decide matters that have historically been within the purview of the Governor and the executive branch. If there is dispute over the manner in which the Governor is enforcing or administering a law, such dispute, in the normal course, must be resolved through the executive process. If there are citizens who believe the Governor is wrongfully or inadequately enforcing or administering the state's consumer protection or occupational safety or worker's compensation or revenue laws, it is their right to petition or lobby the Governor in order to alter these policies. It is also the right of such citizens to petition or lobby the Legislature in order to cause them to alter these laws. Finally, of course, it is the right of citizens to participate in the channels of public debate, and in the political processes, in order to influence public policies, or to place in public office persons who are more

accommodating to their points of view. Unless there is an individual who has personally been injured by the Governor's enforcement or administration of these laws, it is not normally the role of the judicial branch to monitor the work of the executive and determine whether it is carrying out its responsibilities in an acceptable fashion. That the Legislature—perhaps even with the acquiescence of the executive—has purported to impose this role upon the judicial branch does not alter this constitutional reality. See, e.g., *Hayburn's Case*, 2 US (2 Dall) 409; 1 L Ed 436 (1792), in which the United States Supreme Court refused to accept as part of its "judicial power" the responsibility imposed upon it by the Congress of examining the pension claims of Revolutionary War veterans. The Court concluded that the Congress could not "constitutionally assign to the Judiciary any duties, but such as are properly judicial, and to be performed in a judicial manner," *id*. at 410; see also *Osborn v Bank of United States*, 22 US (9 Wheat) 738; 6 L Ed 204 (1824).[11]

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[11] Almost certainly, the analyses of the concurrence/dissents invite further efforts to redefine the "judicial power" in questionable ways. See, e.g., *Plaut v Spendthrift Farms*, *supra*, in which the Congress sought to require the Supreme Court to retroactively reopen final judgments, judgments that were apparently unpopular with the Congress. Two justices, Stevens and Ginsburg, in dissent indicated their willingness to accept this modified conception of the "judicial power." "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." *Id*. at 266 (Stevens, J., dissenting), quoting *Bain Peanut Co v Pinson*, 282 US 499, 501; 51 S Ct 228; 75 L Ed 482 (1931). Nor, when the "judicial power" becomes a mere function of legislative determination, is there any guarantee that this authority will only be broadened. The concurrence/dissents have no principled way of addressing efforts by the legislative branch to contract, rather than to expand, the "judicial power." In this regard, see the brief amicus curiae of Joseph L. Sax at 9 in which Professor Sax appears to argue that Const 1963, art 6, § 13, conferring jurisdiction upon the circuit courts "in accordance with rules of the Supreme Court," enables this Court to

Justice WEAVER's efforts to distinguish between the United States and the Michigan constitutions in defining the "judicial power" are unconvincing. She misapprehends both of these constitutions.

In the first section of the judicial articles of the federal and the Michigan constitutions, their respective judicial branches are vested simply with the "judicial power." The federal constitution states, "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." US Const, art III, § 1. The Michigan Constitution states, "The judicial power of the state is vested exclusively in one court of justice . . . ." Const 1963, art 6, § 1. The purpose of these sections is to define—equivalently to what has been done earlier in the first sections of the legislative and executive articles—the scope of authority of the judicial branch. That authority consists exclusively of the "judicial power."

Nothing further is said in either of these constitutions specifically defining the "judicial power," with three exceptions in the Michigan Constitution, each of which undercuts the argument of the concurrence/dissents that there is no fixed meaning to the "judicial power" and that it is susceptible to constant redefinition at the discretion of the other branches.[12] Const

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confer jurisdiction upon the circuit court through our rules without regard to the boundaries of the "judicial power."

[12] If the "judicial power" can be redefined at the behest of the legislative or executive branches, one wonders why, under the analyses of the concurrence/dissents, it cannot also be redefined at the behest of the judicial branch itself, for why should that branch *alone* be disabled in its ability to give new meaning to this constitutional term? There is no principled reason from the perspective of the concurrence/dissents why a court could not expand upon its own authority by disregarding traditional restraints upon the exercise of the "judicial power." By transform-

1963, art 3, § 8 allows either house of the Legislature to request the Court to issue an "advisory opinion" on the "constitutionality of legislation"; Const 1963, art 9, § 32 confers upon "any taxpayer of the state" standing to bring suit to enforce the provisions of the so-called Headlee Amendment; and Const 1963, art 11, § 5 empowers "any citizen of the state" to bring injunctive or mandamus proceedings to enforce the civil service laws of the state. To the extent that the people of Michigan, through their Constitution, have chosen to confer upon the judiciary three specific authorities potentially beyond the traditional "judicial power," it seems unlikely that the people intended that any other such nontraditional authority could simply be incorporated as part of the "judicial power" by a simple majority of the Legislature.[13]

The concurrence/dissents find relevant that the federal constitution diverges from the Michigan Constitution where, in art III, § 2, it states:

> The judicial Power shall extend to all *Cases*, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all *Cases* affecting Ambassadors, other public Ministers and Consuls;—to all *Cases* of admiralty and maritime Jurisdiction;—to *Controversies* to which the United States shall be a Party;—to *Controversies* between two or more States;—between a State and Citi-

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ing the "judicial power" from a concept of constitutional stature into a mere prudential concept, to be decided absent any readily discernible standards, the concurrence/dissents would give considerable impetus to a more powerful judicial branch at the expense of coordinate branches of government.

[13] Justice KELLY interprets these provisions, conferring broader-than-traditional standing in *specific* areas of the law, as conferring broader-than-traditional standing in *any* area of the law in which the Legislature chooses to confer such standing. *Post* at 680 n 5. The majority draws exactly the opposite inference from these provisions.

> zens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign states, Citizens or Subjects. [Emphasis added.][14]

Contrary to what is implicit in the concurrence/dissents, this is not a definitional provision that seeks to give meaning to the "judicial power." Rather, art III, § 2 is a provision defining the *limited* judicial power of the federal judiciary, in contrast to the *plenary* judicial power of the state judiciary. The respective legislative articles of the two constitutions are analogous to the judicial articles: the legislative article of the Michigan Constitution does not purport to define the authority of its Legislature (for example, nothing is said therein concerning its authority over marriage, divorce, child custody, child support, alimony, or foster care), while the legislative article of the federal constitution *does* affirmatively confer authority upon the Congress, article I, § 8. The state judicial power, as with the state legislative power, is plenary, requiring no affirmative grant of authority in the state Constitution. The federal judicial power, on the other hand, as with the federal legislative power, is limited. Such power is exclusively a function, or a creation, of the federal constitution, and, therefore, must be affirmatively set forth. In similar fashion, the federal judicial power must also be affirmatively set forth, for it is also a function, or creation, of the federal constitution. Thus, US Const, art III, § 2 does not *define* the "judicial power"; rather it defines what *part* of the "judicial power" within the United States belongs to the federal judiciary, with the remaining part belonging exclusively

[14] Although it is not relevant to the instant analysis, several of these provisions have been subsequently rendered effectively null and void by the Eleventh Amendment.

to the state judiciary. That art III, § 2 variously employs the terms "cases" or "controversies" is not to confer a particular meaning upon the "judicial power," but merely is to employ words that are necessary to the syntax of allocating the "judicial power" between the federal and state governments.[15] The concurrence/dissents would confuse the allocation of a power with its definition, and would thereby define the federal "judicial power" in the narrowest possible manner by limiting it through reference *alone* to the existence of a "case."[16] Even from the perspective of the concurrence/dissents, is there *no* more permanent aspect of the "judicial power" than that it pertain to a "case"?

In fact, the "judicial power" in the Michigan Constitution, with the several exceptions enumerated above, is the same "judicial power" as in the federal constitution,[17] and it is the same "judicial power" that has

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[15] "In the Constitution of the United States, we perceive, not the express creation of a judicial power, but the recognition of it as a necessary part of the government . . . ." Rawle, A View of the Constitution of the United States (Nicken, Philadelphia, 1829) ch 21, pp 199-200.

[16] Although Madison suggested at the constitutional convention that the federal "judicial power" ought to be "limited to cases of a Judiciary Nature," II Farrand, Records of the Federal Convention of 1787 (Yale University, 1966) at 430, there is remarkably little discussion in the Federalist Papers, the records of the convention, or in other constitutional source materials concerning the precise meaning of the "judicial power." Similarly, there is virtually no discussion concerning the meaning of this term in the "Official Record" of the Michigan constitutional convention of 1961, or in source materials surrounding Michigan's earlier constitutions. We attribute this to the fact that the term was sufficiently well understood by scholars, lawyers, judges, and even laymen of the time as not to require further elucidation. No one would have understood the "judicial power" to constitute an essentially empty constitutional vessel into which majorities of the Legislature were free to pour in novel meanings.

[17] In accord, *Daniels v People*, 6 Mich 381, 388 (1859); *Sutherland v Governor*, 29 Mich 320, 324 (1874); *Risser v Hoyt*, 53 Mich 185, 193; 18

informed the practice of both federal and state judiciaries for centuries.[18] These historical principles were recognized by *Lee*, and we continue to adhere to them today.[19]

At the same time that the concurring/dissenting justices extol their own commitment to preservation of the natural environment, they might well devote equal attention to the preservation of our constitutional environment. By their diminishment of a traditional check and balance upon the exercise of the "judicial power," the concurring/dissenting justices would, if their position were ever to gain a majority, inflict considerable injury upon our system of separation of powers and the rule of law that it has produced.

IV. APPLICATION

At a minimum, standing consists of three elements:

> 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

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NW 611 (1884); *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258; 98 NW2d 586 (1959); *House Speaker v State Admin Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993), all cited in *Lee*, *supra* at 738.

[18] One constitutional framer observed, "The third great division of the powers of government is the judicial authority. . . . The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them." James Wilson, 1 Lectures on Law, pp 296-297 (1791).

[19] With all due respect, Justice WEAVER, *post* at 653, 656, is breathtakingly mistaken in peremptorily describing as a "judge-made standing test" an element of the "judicial power" that would have been viewed by the framers of both the federal and the Michigan constitutions as essential to the separation of powers, itself perhaps the most essential pillar of our constitutional structure.

> conduct complained of—the injury has to be "fairly . . . traceable to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [*Lee, supra* at 739, quoting *Lujan, supra* at 560-561.]

Plaintiffs seek injunctive relief on behalf of their members. Nonprofit organizations, such as plaintiffs, have standing to bring suit in the interest of their members where such members would have standing as individual plaintiffs. See, generally, *Trout Unlimited, Muskegon White River Chapter v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992); *Karrip v Cannon Twp*, 115 Mich App 726, 733; 321 NW2d 690 (1982). Thus, plaintiffs must allege that their members suffered either an actual injury or an "imminent" injury. *Lee, supra* at 739-740, citing *Lujan, supra*. The United States Supreme Court in *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167, 183; 120 S Ct 693; 145 L Ed 2d 610 (2000), found "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity" (citation omitted). The Court continued, contrasting the allegations with those found insufficient in *Lujan* and *Los Angeles v Lyons*, 461 US 95; 103 S Ct 1660; 75 L Ed 2d 675 (1983) (regarding anticipated use of chokeholds by the LAPD):

> [W]e see nothing "improbable" about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District

> Court found it was true in this case, and *that is enough for injury in fact*. [*Friends of the Earth, Inc, supra* at 184-185 (emphasis added).]

Plaintiffs here provided affidavits from three individuals, members of their organizations who reside near the mine, who alleged they bird-watched, canoed, bicycled, hiked, skied, fished, and farmed in the area, they plan to continue to do so as long as the area remains unspoiled, and they are "concerned" that the mine expansion will irreparably harm their recreational and aesthetic enjoyment of the area. One affiant also alleged that his well, on property adjacent to the mine, was almost dry and he had to construct a new, deeper well due to the local aquifer dropping too low. He alleged this was because of defendants' mining activities. These affidavits are nearly identical to those found adequate in *Laidlaw*, and we find they sufficiently meet the test for standing we set forth in *Lee*.

However, we note that plaintiffs may not simply rely on these affidavits throughout the entire proceedings to prove that standing exists. Subject-matter jurisdiction is a matter that may be raised at any time. MCR 2.116(D)(3). The United States Supreme Court explained the requirements in *Lujan, supra* at 561:

> The party invoking federal jurisdiction bears the burden of establishing these elements [i.e., injury in fact, causation, redressibility]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presume that general allegations embrace those specific facts that are necessary to support

> the claim." In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." [Citations omitted.]

Thus, a plaintiff must include in the pleadings "general factual allegations" that injury will result from the defendant's conduct. If the defendant brings a motion for summary disposition, the plaintiff must further support the allegations of injury with documentation, just as he has to support the other allegations that make up his claim. Finally, when the matter comes to trial, the plaintiff must sufficiently support his claim, including allegations of injury, to meet his burden of proof.[20]

In this case, the response to defendants' motion is met by the affidavit of plaintiff's expert, Christopher Grobbel. Included in that document is an explanation of the expected effect on groundwater flow and recharge rate; effects on stream flow and water quality; and the expected effects on birds, fish, and plants resulting from the planned extensive habitat destruction. Grobbel's affidavit serves to provide the necessary factual support for the individuals' averred injuries. Plaintiffs will, of course, be required at trial to meet their burden of proof regarding the alleged injuries and the alleged effects of the expansion plans.

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[20] It was with regard to these last two steps that Justices Scalia and Thomas dissented from the majority in *Laidlaw*. They would have found that although "[g]eneral allegations of injury may suffice at the pleading stage, . . . at summary judgment plaintiffs must set forth 'specific facts' to support their claims." *Friends of the Earth, Inc, supra* at 198.

Because we hold that plaintiffs have standing without regard to MCL 324.1701(1), we find it unnecessary to reach the constitutionality of § 1701(1).

V. RESPONSE TO CONCURRENCE/DISSENTS

Justice WEAVER expresses dissatisfaction with the fact that plaintiffs have been found by the majority to possess standing to pursue their MEPA claims, but not on the constitutional grounds that she would prefer. It seems that it is not enough that plaintiffs prevail, but that their victory must be predicated, not upon the resolution of a mere case or controversy, but upon the constitution itself. The majority concludes that it is unnecessary in this case to resolve a constitutional issue where the case can be fully resolved on nonconstitutional grounds. Just as respect for the requirements of standing is an essential element of the responsible exercise of the "judicial power," so too is respect for the need to address constitutional issues only where necessary. Given her very different views of standing, it is understandable why Justice WEAVER, unlike this majority, would find the constitutional question here to be an easy one. However, notwithstanding the merits of our respective views on standing, constitutional issues—whether easy or difficult—are to be avoided where a case can be resolved adequately on non-constitutional grounds.[21]

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[21] As Justice COOLEY has remarked:

> While the courts cannot shun the discussion of constitutional questions when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a coordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to

Several other aspects of Justice WEAVER'S opinion deserve comment, as does the opinion of Justice KELLY:

(1) Justice WEAVER asserts that, despite *Lee,* Michigan's standing requirement is not constitutional, but rather is nothing more than "judge-made" law. *Post* at 653 n 4.[22] It is hard to know what to make of this dismissive observation. Justice WEAVER does not explain why *Lee* constitutes "judge-made" law any more than any other interpretation of the constitution, except that she disagrees with *Lee*. Whatever "judge-made" law is, *Lee* does not constitute "judge-made" law any more

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> which no extra-judicial disquisition is entitled. In any case, therefore, where a constitutional questions is raised, though it may be legitimately presented by the record, yet if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, the court will take that course, and leave the question of constitutional power to be passed upon when a case arises which cannot be otherwise disposed of, and which consequently renders a decision upon such question necessary. [Constitutional Limitations, ch 7, § 2 (1868) (citations omitted).]

See also *Weimer v Bunbury*, 30 Mich 201, 218 (1874); *People v Quider*, 172 Mich 280, 289; 137 NW 546 (1912); *J & J Constr Co v Bricklayers & Allied Craftsmen*, 468 Mich 722, 733-734; 664 NW2d 728 (2003). Justice WEAVER characterizes judicial restraint of the type described by Justice COOLEY, and honored by judges from time immemorial, as "dodging" the issue. *Post* at 672.

[22] It is difficult to reconcile Justice WEAVER'S position that there is no constitutional limitation on what constitutes the "judicial power" with her concurring statement in *In re Certified Question (Kenneth Henes v Continental Biomass Industries, Inc)*, 468 Mich 109, 121; 659 NW2d 597 (2003), in which she asserts that she would decline to answer a certified question presented in that case because the court rule pertaining to certified questions "represents an *unconstitutional* expansion of judicial power." (Emphasis added.) She further observed in *Certified Question* that, "it is proper to examine the common-law understanding of 'judicial power' in order to determine . . . the scope of that power . . . . '[J]udicial power' is 'the power to hear and determine controversies between adverse parties, and questions in litigation.' " (Citations omitted). On this basis, she then concludes that the court rule is unconstitutional.

than *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803); *McCulloch v Maryland*, 17 US 316; 5 L Ed 579 (1819), or *Brown v Bd of Ed*, 347 US 483; 74 S Ct 686; 98 L Ed 2d 873 (1954). Some judicial opinions interpreting the Constitution, of course, may be more persuasive than others, but all are presumed to articulate the meaning of the Constitution rather than the personal views of a judge. In *Lee*, this Court, expounding upon the constitutional status of standing in Michigan, relied upon federal and state judicial precedents, as well as historical understandings, and in the instant opinion, we elaborate upon this analysis by looking to the meaning of the "judicial power" under the constitution. While Justice WEAVER is certainly free to disagree with the majority's analysis, and while there is room for reasonable debate, the majority's constitutional holding is no more properly characterized as "judge-made" law than any other interpretation of the constitution. What constitutes the "judicial power," just as what constitutes "equal protection of the laws," "due process," and "cruel and unusual punishment," cannot be determined by some mechanical process, but must be given *meaning* by judges attempting in good faith to understand the intentions of those who ratified these provisions. If constitutional interpretations with which she disagrees are mere "judge-made" law, how would Justice WEAVER characterize interpretations with which she agrees, perhaps even those interpretations produced by her own pen?

(2) Justice WEAVER asserts that the majority discussion of standing is, by virtue of Const 1963, art 4, § 52, "irrelevant to the important questions of Michigan law presented in this case." *Post* at 651 n 1. Art 4, § 52 states, in part, "The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruc-

tion." Justice WEAVER contends that, pursuant to this provision, "the people of Michigan have required that the Legislature provide for the protection of Michigan's natural resources. The Legislature properly acted in fulfillment of its constitutional responsibility through enactment of the MEPA citizen-suit provision . . . ," and thus any constitutional standing concerns are irrelevant where MEPA is concerned. *Post* at 651-652.

What Justice WEAVER overlooks, however, is that there are many requirements that are imposed upon the Legislature by the constitution. For example:

> — The Legislature "shall implement" legislation protecting civil rights. Const 1963, art 1, § 2.
>
> — The Legislature "shall enact" laws to preserve the integrity of elections. Const 1963, art 2, § 4.
>
> — The Legislature "shall implement" the rules of initiatives and referendums in Michigan. Const 1963, art 2, § 9.
>
> — The Legislature "shall further implement" rules against conflicts-of-interests by legislators. Const 1963, art 4, § 10.
>
> — The Legislature "shall implement" the provisions of the Headlee Amendment pertaining to tax limitations. Const 1963, art 9, § 34.[23]

While undoubtedly making clear what some of the priorities and obligations of government are, these constitutional provisions do not state that the Legislature may pursue these goals, as Justice WEAVER implies, *by whatever means*. Rather, it is implicit in these provisions that the Legislature is to pursue these goals *by appropriate means*. The Legislature cannot pursue the objects of these "shall do" provisions by methods that

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[23] See also Const 1963, art 2, § 1; art 4, §§ 12, 15, 51, 53; art 5, §§ 10, 12, 14, 15, 17, 18, 20; art 6, § 25; art 7, §§ 20, 21, 28; art 8, §§ 2, 4, 7, 9; art 9, §§ 1, 3, 5, 21, 35, 35a; art 10, § 5.

are otherwise unconstitutional. Does Justice WEAVER think that the Legislature is empowered under art 4, § 52 to do *anything at all* so long as it is done ostensibly with the goal of protecting the environment? Can it disregard due process in the criminal prosecution of environmental polluters? Can it disregard the requirements of just compensation in taking property in order to construct a wilderness area? Can it ignore the prohibition against ex post facto laws by criminalizing conduct that was legal at the time it took place?

Moreover, can the Legislature, under art 1, § 2 (requiring it to implement civil rights laws), expand the "judicial power" by enacting laws allowing "any person" to sue for a civil rights violation committed against "any other person," even if the actual victim chooses not to sue? Can the Legislature, under art 9, § 34 (requiring it to implement tax-limitation provisions), expand the "judicial power" by authorizing "any person" in Monroe or Hillsdale to sue to prevent a tax increase in Marquette or Escanaba? Can the Legislature, under art 2, § 4 (requiring it to enact election laws), expand the "judicial power" by authorizing "any person" in Kalamazoo or Battle Creek to sue over ballot disagreements in the Alpena city council race?

While clearly identifying an important priority of government, art 4, § 52 does not authorize the Legislature to ignore all other provisions of the constitution in enacting laws to protect the environment. At least to date, the "judicial power" in Michigan has been exercised only on behalf of plaintiffs who have suffered actual and particularized injuries.

(3) Justice WEAVER repeatedly asserts that this Court, in exercising the "judicial power," must act in conformity with MEPA. *Post* at 653, 654, 666. In this assertion,

she fundamentally misapprehends the duties of the judicial branch. As the Michigan Constitution makes clear, the duty of the judiciary is to exercise the "judicial power," art 6, § 1, and, in so doing, to respect the separation of powers, art 3, § 2. While as a *general proposition*, the proper exercise of the "judicial power" will obligate the judiciary to give faithful effect to the words of the Legislature—for it is the latter that exercises the "legislative power," not the judiciary—such effect cannot properly be given when to do so would contravene the constitution itself. Just as the judicial branch owes deference to the legislative branch when the "legislative power" is being exercised, so too does the legislative branch owe deference to the judicial branch when the exercise of the "judicial power" is implicated. Even with the acquiescence of the legislative and executive branches, the judicial branch cannot arrogate to itself governmental authority that is beyond the scope of the "judicial power" under the constitution. See *Marbury v Madison*, *supra*. The "textual" approach of the concurring/dissenting justice is a caricatured textualism, in which the Legislature is empowered to act *beyond* its authority in conferring powers upon other branches that are also *beyond* their authority.[24]

In the final analysis, the constitutional responsibility of the judiciary is to act in accordance with the constitution and its system of separated powers, by exercising the judicial power and only the judicial power.[25]

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[24] One assumes, for example, that the concurring/dissenting justice would recognize the impropriety of the Legislature purporting to confer authority upon the executive branch to exercise the "executive power" to condemn property for a "non-public" use, see *Wayne Co v Hathcock*, 471 Mich 445; 684 NW2d 765 (2004), or of the Legislature purporting to exercise the "legislative power" by pardoning criminals.

[25] The concurring/dissenting justice's repeated references to the "people's mandate" (or the "will of the people") in MEPA, must, of course, be

(4) Justice WEAVER asserts that the majority's decision "overrules 30 years of Michigan case law that held that the Legislature meant what it said when it allowed 'any person' to bring an action in circuit court to protect natural resources from actual or likely harm." *Post* at 652. In support of this proposition, she cites *Eyde v Michigan*, 393 Mich 453, 454; 225 NW2d 1 (1975), and *Ray v Mason Co Drain Comm'r*, 393 Mich 294, 305; 224 NW2d 883 (1975). However, neither of these decisions, issued in the aftermath of MEPA'S passage, offer the slightest support for the concurrence/dissent's conclusion. Unlike the present case, neither *Eyde* nor *Ray* concerned the issue of standing and neither involved plaintiffs concerning whom there was any question of standing. Rather, in *Eyde* and *Ray*, this Court did nothing more than describe, in passing, the substance of the various provisions of the new act. Such statements do not even rise to the level of dictum since in neither *Eyde* nor *Ray* did this Court even purport to comment upon the propriety of the standing provision, much less comment upon it approvingly. The statements in *Eyde* and *Ray* make no pretense of being statements of law; they are merely passing, but accurate, descriptions of what was contained in the new act. Because of what these statements constituted—mere

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read in connection with the ultimate "people's mandate," which is that found in their constitution. There, "we the people" have created for themselves a government in which, in at least four separate provisions, they have set forth as clearly as possible that the boundaries of governmental power are to be taken seriously. Const 1963, art 3, § 2; art 4, § 1; art 5, § 1; art 6, § 1.

Further, the concurring/dissenting justice seems considerably less enthusiastic about deferring to the "people's mandate" in the context of the Sand Dune Mining Act, see *infra* at 52-54*; Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508, 530-532; 684 NW2d 847 (2004), in which the "people," through their Legislature, have also determined that limited mining should be permitted near Michigan's sand dunes.

descriptions of provisions of an act not then in dispute—it is understandable why neither *Eyde* nor *Ray* set forth any analysis of the meaning of these provisions, any analysis of their constitutional implications, any analysis of relevant judicial precedents, and even any acknowledgment of relevant judicial precedents. See *Smith v Globe Life Ins Co*, 460 Mich 446, 461 n 7; 597 NW2d 28 (1999).[26] Yet, it is on the basis of *Eyde* and *Ray* that Justice WEAVER identifies "30 years of Michigan case law" in support of the proposition that matters of standing do not implicate the Constitution.[27]

(5) Justice WEAVER accuses the majority of "expand-[ing] the power of the judiciary at the expense of the Legislature . . . ." *Post* at 654. This accusation turns reality upon its head. It is akin to saying that President Washington was expanding his own powers by turning down congressional invitations to become King. Rather than *expanding* its powers, this Court, by questioning the authority of the Legislature to confer broader powers upon it, and thereby to expand the "judicial power," is *resisting* an expansion of power—not an everyday occurrence in the annals of modern government.

By ensuring that the "judicial power" not be improperly expanded by the Legislature, and the "executive

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[26] It is for these same reasons that we find unpersuasive the additional cases cited by Justice WEAVER in support of her assertion that the majority is overruling "30 years of Michigan case law" concerning standing under MEPA. *Post* at 652 n 3.

[27] Other references by the concurring/dissenting justice to Michigan case law are equally unavailing in support of this conclusion. In *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 643; 537 NW2d 436 (1995) (RILEY, J., concurring), for example, only a single justice of this Court, in pure dictum, indicated support for the proposition that Michigan standing requirements are based on prudential rather than constitutional concerns. *Post* at 658. *House Speaker, supra* at 554, is similarly inapt.

power" not be improperly contracted, this Court is defending the constitutional structure. In similar fashion, the United States Supreme Court in *Marbury v Madison, supra,* concluded that a congressional grant of authority to the Court to issue writs of mandamus could not be exercised because the constitution did not allow the original jurisdiction of that Court to be expanded by mere statute. As Chief Justice Marshall stated, "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it." *Id*. at 177. The Michigan Constitution grants this Court the "judicial power"—nothing more and nothing less—and neither the Legislature nor this Court itself possess the authority to redefine these limits.[28]

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[28] In at least one respect—in her observation that "judicial activism can be disguised as judicial restraint," *post* at 674—we agree with the concurring/dissenting justice. Employing the language of judicial restraint, she would summarily jettison in the name of an (understandably) popular cause one of the most enduring bulwarks against judicial activism, the requirement of standing—the requirement that courts decide only actual cases and controversies between real parties with genuinely adverse interests. By dismantling this historical constraint upon the courts, she would allow the judicial branch—the least accountable and least representative branch of government—to become potentially involved in a sharply expanded range of public policy disputes. To many Americans of a wide range of political and jurisprudential views, this would exacerbate the recent trend in which the constitutional equilibrium between the judiciary, and the other branches of government, has become increasingly imbalanced and distorted in favor of the former.

The majority would restrict the judiciary to its traditional role of resolving actual cases and controversies. The concurring/dissenting justice potentially would allow any person opposed to some aspect of governmental policy, i.e., most persons, to sue in order to substitute their personal preferences of what governmental policy ought to be for the policies actually produced by the representative processes of government. The concurring/dissenting justice would take advantage of the relative lack of public understanding of how traditional standing precepts maintain the constitutional separation of powers to self-characterize her position as one of "judicial restraint," notwithstanding her support for eliminating one of the fundamental underpinnings of genuine judicial

(6) In attempting to understand Justice KELLY'S opinion, it is important to recognize that she takes great care to proclaim, *post* at 676 n 1, that, despite all contrary appearances, she is not "*en toto*" overruling *Lee*. The effect of this analysis on the part of the concurring justice is to allow her to enjoy the freedom to discard traditional principles of standing when it is useful to do so, as in this case, and then to reassert such principles, per *Lee*, when that is equally useful. The concurring justice's decisionmaking is standardless and inconsistent with a predictable rule of law.[29]

(7) Justice KELLY sets forth a torrent of novel constitutional propositions in her opinion whose principal purpose apparently is to justify the abandonment of traditional principles of standing ("to open wide the courthouse doors")—at least in the realm of environmental law. The people will have to wait to see whether the concurring justice is as amenable to the abolition of standing in other areas of the law. A few of the more creative propositions of constitutional law that inhabit her opinion:

> — The "judicial power," although it may require an individualized injury in order to bring a *federal* lawsuit, does not require the same to bring a *state* lawsuit. *Post* at

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restraint. Almost certainly, if the concurring/dissenting justice's position on standing were ever to prevail in Michigan, or nationally, the judicial branch of government would quickly become a far more dominant force, and the representative and accountable branches of government would become far less relevant.

[29] Doubtless in the next case—or at least in the next case in which she is less enthusiastic about "any person" suing "any person" for anything at all—the concurring justice will opine that, unlike in the instant case, the plaintiffs in *that* case do not have the same "strong personal manifestations, called 'passive use' or 'standby value' interests," *post* at 688, that will ensure the same "sincere and vigorous" advocacy as here. "These interests ensure that environmental suits are vigorously pursued by people with a strong personal belief in their claim." *Id*. at 688.

683. Although Justice KELLY correctly remarks upon the differing nature of the federal and state governments, she fails to demonstrate why these differences have any relevance at all for her conclusion that the "judicial power" should be understood differently within these systems.

— The subject-matter jurisdiction of state courts is "plenary," and, therefore, the state "judicial power" is "plenary." *Post* at 683. That there may be plenary state authority "to address any social problem that threatens the public welfare" does not mean that the "judicial power" encompasses all such authority. *Id*. at 683.

— The "people" only have the power to "execute" the environmental laws when they are permitted to sue in court. *Post* at 679. One might have thought that it was the executive branch's responsibility to "execute" the laws, and that they did so on behalf of the "people."

— The gist of the separation of powers principle, rather than to limit the exercise of governmental power by allocating specific responsibilities among the three branches of government, is to ensure that "one individual may not simultaneously hold office in more than one branch of government." *Post* at 681 n 6. Thereby, the concurring justice would transform one of the pillars of our system of limited, constitutional government into the trivial (albeit probably correct) proposition that a legislator cannot at the same time serve as Director of the Department of Community Health.

— The Michigan Constitution allows the "judicial power" to be exercised over all "disputes," and not merely "cases" or "controversies." *Post* at 685-686. Aside from the fact that the concurring justice affords absolutely no guidance on what constitutes a "dispute" or how it differs from a "case" or "controversy"—although clearly it does, in her mind—she invokes no constitutional language, no constitutional history and no constitutional precedent for this blithe assertion. Indeed, in view of the fact that the

Constitution apparently does not address standing at all from her perspective, why is even so much as a "dispute" required?

— An effective substitute for the doctrine of standing are the doctrines of ripeness and mootness. *Post* at 686.

— The state "judicial power" is different in kind from the federal "judicial power" because the latter alone applies to federal questions and diversity cases. *Post* at 684. This is simply one more *non sequitur* in the concurring opinion in search of relevance.

— Federal and state standing requirements are a function of the methods by which judges are selected in these systems. *Post* at 684. "Everything considered, it is not surprising that the qualifications for standing in state courts are broader than in federal courts." *Id*. at 684. We are aware of nothing in their method of selection that justifies state judges in exercising the "judicial power" according to different rules and constraints than federal judges.

— This Court, although it is barred from viewing standing as an issue of constitutional dimension, may nonetheless, in the face of a contrary legislative provision, "constrain its own power and limit standing . . . ." *Post* at 689. That is, a court may not countermand the words of the Legislature on the basis of the constitution, but it may do so on the basis of its own discretion as to when words should be ignored.

— An institution of government is "ill-advised to curb its [own] authority under the guise of respect for another branch of government." *Post* at 689. "Ill-advised," perhaps, in an era in which governmental institutions are expected to accrete as much power as possible; not so "ill-advised" if their premise is to act within the scope of their constitutional charter.

— Separation of powers principles "require" that the judiciary "respect" the Legislature's decision. *Post* at 689. True, although only up to a point. At least since *Marbury v*

Madison anyway, the judiciary is also "required" to "respect" the constitution's decisions.

(8) Justice KELLY argues that the separation of powers provision of the Michigan Constitution should not be read in an "overly rigid" fashion. This is essentially a euphemism for the proposition that this provision should not be read to mean very much of anything at all. It is hardly an "overly rigid" reading to suggest that, "[n]o person exercising powers of one branch shall exercise powers properly belonging to another branch" in art 3, § 2 means that a judge is limited to exercising the "judicial power," and not the powers of another branch. This is made *explicit* in art 6, § 1.[30]

Moreover, Justice KELLY'S understanding of the separation of powers is confused, as reflected in her citation of the dissenting opinions in *Judicial Attorneys Ass'n v Michigan*, 459 Mich 291, 307; 586 NW2d 894 (1998); 228 Mich App 386, 427; 579 NW2d 378 (1998), for the proposition that the "separation of powers doctrine allows limited overlap and interaction between the branches." *Post* at 682. Of course, in pursuit of their *distinct* constitutional powers, it will often be the case that the *exercise* of separated powers overlaps. For example, it may be that the Legislature in exercising its legislative power to enact laws and appropriate monies will sometimes come into conflict with the Governor in exercising her executive power to recommend or veto laws and appropriations. Although the separated *powers* of the legislative and executive branches do not overlap, their *exercise* often does. The separate and distinct

[30] Indeed, the fact that Justice KELLY feels impelled to articulate her "flexible" understanding of the separation of powers provision in the first place suggests an awareness that the imposition upon the judiciary of a duty to resolve non-cases and non-controversies exceeds the traditional "judicial power."

constitutional powers of two branches may be focused on the same subject areas and the operations of state government may occasionally involve a blending of governmental operations as, for example, in the interaction between the legislative and executive branches regarding the drafting of a law or the preparation of a budget. But this is distinct from a blending of powers or functions. However much cooperation there is between the branches, the Legislature exercises only the legislative power and the executive exercises only the executive power. While the exercise of such separated powers may often overlap—this being understood generally as the realm of checks and balances—there is no "sharing" of the legislative or executive powers. There is only a sharing of the sum of all state governmental power.

(9) Justice KELLY makes much of the concepts of citizen suits and private attorneys general, yet fails to note that the history of such suits indicates that they have been brought only by individuals who have suffered an injury. This understanding continues today.

Justice KELLY correctly notes that "citizen suits" have a long pedigree in English history through relator and informers' actions. She fails to explain, however, that those who brought such actions were not strangers to the action, but possessed standing themselves either through a direct injury or through the assignation of the government's injury in fact. The historical use of such actions was explained by the United States Supreme Court in *Vermont Agency of Natural Resources v United States ex rel Stevens*, 529 US 765, 774-777; 120 S Ct 1858; 146 L Ed 2d 836 (2000), using the label "qui tam" actions:

> *Qui tam* actions appear to have originated around the end of the 13th century, when private individuals *who had suffered injury* began bringing actions in the royal courts

> *on both their own and the Crown's behalf*. See, e.g., *Prior of Lewes v. De Holt* (1300), reprinted in 48 Selden Society 198 (1931). Suit in this dual capacity was a device for getting their private claims into the respected royal courts, which generally entertained only matters involving the Crown's interests. See Milsom, Trespass from Henry III to Edward III, Part III: More Special Writs and Conclusions, 74 L. Q. Rev 561, 585 (1958). Starting in the 14th century, as the royal courts began to extend jurisdiction to suits involving wholly private wrongs, the common-law *qui tam* action gradually fell into disuse, although it seems to have remained technically available for several centuries. See 2 W Hawkins, Pleas of the Crown 369 (8th ed. 1824).
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> At about the same time, however, Parliament began enacting statutes that explicitly provided for *qui tam* suits [which] allowed injured parties to sue in vindication of their own interests (as well as the Crown's), see, e.g., Statute Providing a Remedy for Him Who Is Wrongfully Pursued in the Court of Admiralty, 2 Hen. IV, ch. 11 (1400). [Emphasis added.]

Accordingly, the Court held that one who brings a relator suit has standing because he is the assignee of a claim and may assert the injury-in-fact suffered by the assignor, which is normally the government. *Id.* at 773. In such cases, the Court concluded, the government's injury-in-fact suffices to confer standing on the individual relators bringing the suit. *Id.* at 774.

Similarly, a review of modern citizen suit cases almost always includes a review of standing in addition to a review of the statute that confers the right to such suits. See, e.g., *Gwaltney of Smithfield, Ltd v Chesapeake Bay Foundation*, 484 US 49, 65-66; 108 S Ct 376; 98 L Ed 2d 306 (1987). Further, like citizen suits, suits by private attorneys general do not involve those completely divorced from an injury; rather, they involve those who have suffered an injury—generally "noneconomic" injuries—and who have been provided an incen-

tive by the legislature to bring a lawsuit to advance the public interest. See *Middlesex Co Sewerage Authority v Nat'l Sea Clammers Ass'n*, 453 US 1, 17; 101 S Ct 2615; 69 L Ed 2d 435 (1981). As the United States Supreme Court noted, the point of the doctrine is that "directly *injured* victims can be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes v Securities Investor Protection Corp*, 503 US 258, 269-270; 112 S Ct 1311; 117 L Ed 2d 532 (1992) (emphasis added).

Therefore, contrary to Justice KELLY'S assertions, the use of citizen suits or actions by private attorneys general does not undermine the application of traditional standing requirements. If anything, the use of such suits *supports* the application of those requirements, as citizen suits and actions by private attorneys general have always been grounded in a private injury, whether suffered directly or as a result of an assignment by another.

(10) Justice WEAVER, referencing this Court's decision in *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), derides the majority for having "unleashed an assault on MEPA this term." *Post* at 674 n 31.[31] However, the legal issue addressed in *Preserve the Dunes* has utterly *nothing* in common with the legal issue addressed in this decision, and to rhetorically equate these decisions merely

[31] Justice KELLY makes a similarly inappropriate, and irrelevant, connection between these cases in *Preserve the Dunes*, *supra* at 2, asserting that, despite the very different legal issues involved in these cases, and despite the fact that we reach no conclusion at all about the meaning of MEPA in the instant case, that our holdings "compound" one another. Only, perhaps, in the sense that the concurring justice's decisions in entirely unrelated criminal cases, involving entirely different legal issues, "compound" one another.

because they both implicate an environmental statute suggests less a legal analysis on the part of the concurring/dissenting justice than a political statement. It is this Court's responsibility simply to uphold the law and the constitution, not to promote or impede any particular legislative cause or interest, however popular or unpopular. Rather, the obligation of this Court is simply to say what the law *is*. And that is exactly what the justices in the majority have sought to do in this case, as they have each sought to do—however imperfectly—in every case coming before this Court.

The majority cannot read the concurring/dissenting justice's conflation of wholly unrelated legal issues in a single derisive volley as anything other than implying that this Court has some obligation to decide environmental issues with an eye toward their results.[32] However, that the issue of standing has arisen here in the context of MEPA is, from the perspective of the majority, utterly irrelevant. The majority would be addressing this critical constitutional issue in identical terms if it had arisen in any other subject area of the law, and it would be no more of an "assault upon MEPA" than the present decision is an "assault upon MEPA."

Further, in the other case referenced, *Preserve the Dunes*, in which this same majority has also allegedly "assaulted MEPA," this Court addressed the following specific legal question—whether MEPA authorizes a collateral action to challenge the Department of Environmental Quality's decision to issue a permit under the Sand Dune Mining Act, MCL 324.63701, enacted by the

[32] In the interest of perspective, we note once more that the majority has found that the plaintiffs in this case—*environmental* plaintiffs—*possess* standing to pursue their cause of action. They have prevailed. In identifying such standing, however, the majority has found it to exist under traditional precepts of standing and has avoided the resolution of a constitutional issue that it need not prematurely address. See n 21.

Legislature, where that collateral action seeks to challenge flaws in the permitting process *unrelated* to whether the conduct involved has polluted, or will likely pollute, natural resources. We can only invite the reader of the instant opinion to also read *Preserve the Dunes* to determine whether that opinion represents an "assault on MEPA," or instead an honest and impartial effort to resolve the limited question of statutory interpretation presented in that case.

Justice WEAVER'S "assault on MEPA" rhetoric becomes even more groundless when one recognizes that she is dissatisfied with the majority for having concluded that it is *unnecessary to interpret* MEPA at all in resolving the present standing controversy. Instead, we conclude that plaintiffs possess standing on traditional grounds. Thus, in the end, the majority's "assault upon MEPA" amounts merely to the majority *refraining* from interpreting MEPA.[33]

VI. CONCLUSION

In addressing an issue that the majority does not resolve today, Justices WEAVER and KELLY would allow the Legislature to grant plaintiffs standing in environmental lawsuits, regardless of whether any injury has been suffered. Under this view of the "judicial power," "any person," for example, could seek to enjoin "any person" from mowing his lawn with a gas-powered mower because such activity allegedly creates air pollution and uses fossil fuels when other alternatives are available. "Any person" could sue "any person" for using too much fertilizer on his property, or allowing too

[33] Despite characterizing the majority's discussion on standing in section III as "simply dicta," *post* at 677, a point with which we agree, Justice KELLY simultaneously, and perplexingly, concludes that this case "stands for the proposition" addressed in this section. *Id*. at 677.

much runoff from a feedlot on his property. "Any person" could sue "any person" from using excessive amounts of pesticides in his home or garden or farm. "Any person" could sue "any person" for improperly disposing of used petroleum-based oils. "Any person" could sue "any person" for improper backyard grilling practices, excessive use of aerosol sprays and propellants, or wasteful lawn watering.[34]

We can only assume that the concurring/dissenting justices' casualness about eliminating traditional rules of standing suggests that they are not fully aware of the world that they would create. It is a world in which any conduct allegedly affecting the environment might result in litigation if *anyone*, *anywhere*, for *any* reason, felt aggrieved. The potential for abuse under such a circumstance explains at least one of the practical reasons why the enforcement of regulatory laws has generally been limited to officers of the executive branch, and why, from time immemorial, standing has required an individualized injury on the part of a plaintiff. The concurring/dissenting justices would replace the judgment and discretion of the executive branch with an enhanced regime of lawsuits, a regime in which judges increasingly substitute their own views for those of the Governor, the Attorney General, and their appointees.

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[34] In response to Justice WEAVER's assertion that, "[a]fter more than 30 years, MEPA has not spawned an unmanageable stream of citizen-suits . . . ," *post* at 671 n 30, the majority simply reiterates that there has never been a decision of this Court holding under MEPA that "any person" could sue "any person." In response to Justice KELLY, the majority simply notes that it is underwhelmed by the purported safeguards that she identifies to what she characterizes as our "parade of horribles." *Id*. at 690. It is fortunate for the people of Michigan that, at least for the time being, their freedoms and fortunes will not be dependent upon such "safeguards."

This Court reaffirms *Lee* and concludes that, under the circumstances of this case, plaintiffs, on behalf of their members, possess standing to pursue the instant cause of action. Thus, we affirm the decision of the Court of Appeals and remand to the trial court for proceedings consistent with this opinion.

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

WEAVER, J. (*concurring in result only*). I concur in only the result of the majority opinion. I would hold that plaintiffs have standing under MCL 324.1701(1) of the Michigan environmental protection act (MEPA) to bring an action to enjoin mining activities that plaintiffs allege will irreparably harm natural resources.

I dissent from the majority's analysis of "standing" and "judicial power" because this analysis utterly ignores the will of the people of Michigan expressed in art 4, § 52 of our Constitution that

> [t]he conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.[1]

Pursuant to this constitutional provision, the people of Michigan have required that the Legislature provide for the protection of Michigan's natural resources. The Legislature properly acted in fulfillment of its constitu-

[1] The majority ignores the constitutional mandate of art 4, § 52 and attempts to distract the reader with a discussion of federal standing and federal judicial power, a discussion that is irrelevant to the important questions of Michigan law presented in this case.

tional responsibility[2] through enactment of MEPA's citizen-suit provision that provides:

> The attorney general or *any person* may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [MCL 324.1701(1)(emphasis added).]

The majority disregards the intent of the Legislature, erodes the people's constitutional mandate, and overrules 30 years of Michigan case law that held that the Legislature meant what it said when it allowed "any person" to bring an action in circuit court to protect natural resources from actual or likely harm.[3]

In this case, this Court specifically asked the question whether the Legislature may confer standing under MCL 324.1701(1) of MEPA on persons who do not satisfy the judicial test for standing articulated by *Lee v Macomb Co Bd of Comm'rs,* 464 Mich 726; 629 NW2d 900 (2001). The majority purports to not decide this

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[2] As previously recognized by this Court, "Michigan's Environmental Protection Act marks the Legislature's response to our constitutional commitment to the 'conservation and development of the natural resources of the state.' " *Ray v Mason Co Drain Comm'r,* 393 Mich 294, 304; 224 NW2d 883 (1975) (quoting Const 1963, art 4, § 52).

[3] Five years after MEPA was enacted, this Court said that MEPA "provides private individuals and other legal entities with standing to maintain actions in the circuit court" to protect natural resources. *Ray, supra* at 304-305. That MEPA grants standing to "any person" has been unquestioned for over 30 years. See, also, *Eyde v State of Michigan,* 393 Mich 453, 454; 225 NW2d 1 (1975); *West Michigan Environmental Action Council v Natural Resources Comm*, 405 Mich 741; 275 NW2d 538 (1979); *Kimberly Hills Neighborhood Ass'n v Dion,* 114 Mich App 495; 320 NW2d (1982); *Trout Unlimited Muskegon White River Chapter v White Cloud,* 195 Mich App 343; 489 NW2d 188 (1992); *Nemeth v Abonmarche Dev, Inc,* 457 Mich 16; 576 NW2d 641 (1998).

question, but it clearly implies that the Legislature's attempt to confer standing more broadly than *Lee* in MEPA *or any other statute* is unconstitutional.

Fortunately for the plaintiffs in this case the majority concludes that the plaintiffs have standing under the judge-made test articulated in *Lee*.[4] In so holding, the majority purports to exercise judicial restraint, asserting that it is preserving the "separation of powers" by not exercising the "power" conferred upon it by the Legislature under MEPA and applying *Lee's* restrictive standing test to these MEPA plaintiffs. This assertion is untrue because MEPA empowered the *people* to help protect the state's natural resources, not the courts, and because the majority has in fact laid out its position on the constitutional question. Though camouflaged by the correct result, it is clear that the majority would hold that the Legislature may not grant standing more broadly than *Lee*. The majority can wait for a future

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[4] The majority cannot seriously dispute, *ante* at 628 n 19 and 633-634, that *Lee* is a "judge-made" standing test. *Lee* "supplemented" Michigan's previously prudential standing test with a test derived from federal law interpreting a federal constitutional provision that does not apply to the state. Neither the framers nor the ratifiers of the 1963 Constitution, when considering the power of the Michigan judiciary, would have anticipated supplementing Michigan's prudential standing doctrine with the constraints imported by *Lee* from art III of the federal constitution. As defined in 1 Cooley, Constitutional Limitations (8th ed) at 125 n 1:

> "Judge-made law", as the phrase is here employed, is that made by judicial decision which construe away the meanings of statutes, or find meanings in them the legislature never held. The phrase is sometimes used as meaning, simply, the law that becomes established by precedent.

Judges can as easily and with as little restraint find new meanings in constitutions that the ratifiers never intended as they can find new meanings in statutes. This is precisely the effect of the majority's decision in *Lee*.

case that has not drawn public attention[5] to openly and directly declare the MEPA citizen-suit standing provision unconstitutional.

The majority's application of *Lee's* judicial standing test to these plaintiffs imposes unprecedented, judge-made restrictions on MEPA plaintiffs' access to the courts. The majority's decision overrules without discussion 30 years of precedent, imposes on all future MEPA plaintiffs the burden of establishing standing under the restrictive test of *Lee*, and undermines the people's mandate expressed by Const 1963, art 4, § 52 that the Legislature provide for the protection of Michigan's natural resources. While pretending to limit its "judicial power," the majority's application of *Lee's* judicial standing test in this case actually expands the power of the judiciary at the expense of the Legislature by undermining the Legislature's constitutional authority to enact laws that protect natural resources.

The majority's failure to adhere to MEPA's "any person" standard will have far-reaching consequences and will affect plaintiffs' access to courts in more than just the environmental arena. For example, while resolving the case on other grounds, the Court of Appeals in *Cuson v Tallmadge Charter Twp,* unpublished opin-

[5] This case has generated considerable and justifiable concern regarding whether this Court would uphold the Legislature's grant of standing that authorizes "any person," MCL 324.1701(1), to sue to protect the environment or whether the Court would declare such legislatively conferred standing unconstitutional by extending the rationale of *Lee*. Note that the state Attorney General's office on behalf of the Michigan Department of Environmental Quality, appellee before this Court, argues that the Michigan Legislature may grant standing to persons who do not meet the *Lee* standing test. Included among the many amicus opposing the extension of *Lee* is William G. Milliken, the Governor of Michigan who signed MEPA into law. Apparently, the executive branch has not and does not share the majority's fear of MEPA citizen-suits.

ion per curiam, issued May 15, 2003 (Docket No. 234157), applied *Lee* to note that the plaintiffs did not have standing under *Lee* to enjoin future violations of the Open Meetings Act, MCL 15.261 *et seq*. The panel did not address § 11(1) of that Open Meetings Act, which provides:

> If a public body is not complying with this act, the attorney general, prosecuting attorney in which the public body serves, or *a person* may commence a civil action to compel compliance or to *enjoin further noncompliance with this act*. [Emphasis added.][6]

Thus, it cannot be denied that this case concerns more than the people's constitutional mandate that the Legislature protect the environment and the Legislature's attempt through MEPA's citizen-suit provision to do so. It also concerns every statutory grant of standing that is broader than *Lee's* standing test.[7]

Consequently, while I concur with the majority's conclusion that the plaintiffs have standing to bring this action, I dissent from the majority's imposition of *Lee's* judicial standing test in this case. Further, I disagree with the majority's inappropriate suggestion, in its reliance on inapplicable federal law, that the plaintiffs' victory may be short-lived. *Ante* at 630-631

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[6] Also see *People v Van Turbbergen,* 249 Mich App 354; 642 NW2d 368 (2002), where the prosecution raised *Lee* to suggest that a criminal defendant did not have standing to challenge his arrest as being without legal authority, and *Otsego Co Rural Alliance, Inc v Bagley Twp*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 2003 (Docket No. 237277), in which the Court held that the plaintiffs did not have standing under *Lee* to challenge the defendant's establishment of a Downtown Development Authority or a referendum by which the voters approved a contract between the defendant and a utilities authority established by the defendant and another township.

[7] See *ante* at 641.

and 631 n 20. On remand, the parties' burdens of proof are well-established under MEPA.

I would conclude that the Michigan Legislature has the constitutional authority to create a cause of action and to confer standing on any person without this Supreme Court's interference through judge-made standing tests. I would further conclude that the Legislature did expressly confer standing on "any person" under MCL 324.1701(1). Therefore, I would hold that plaintiffs have standing pursuant to MCL 324.1701(1) of MEPA.

I. FACTS

In this case plaintiffs, the National Wildlife Federation and the Upper Peninsula Environmental Coalition, seek to enjoin defendants, Cleveland Cliffs Iron Company and Empire Iron Mining Partnership, from proceeding under a permit issued in August 2000 by the Department of Environmental Quality. Plaintiffs allege that the expansion of iron ore mining activities proposed under the permit will irreparably harm wetlands and streams.

II. MEPA

The people of Michigan through the 1963 Constitution expressly directed the Legislature to provide for the protection of the environment. The Constitution provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction. [Const 1963, art 4, § 52.]

As part of its fulfillment of this mandatory constitutional duty, the Legislature enacted the Michigan environmental protection act (MEPA). *State Hwy Comm v Vanderkloot*, 392 Mich 159, 183; 220 NW2d 416 (1974).[8]

Having determined that "[n]ot every public agency proved to be diligent and dedicated defenders of the environment," the Legislature through MEPA "has provided a sizable share of the initiative for environmental law enforcement for that segment of society most directly affected—the public." *Ray, supra* at 305, and *Eyde, supra*. As this Court previously noted, this citizen-suit provision of MEPA "signals a dramatic change from the practice where the important task of environmental law enforcement was left to administrative agencies without the opportunity for participation of individuals or groups of citizens." *Ray, supra* at 305.

MEPA broadly defines who can sue to protect the environment by providing:

> The attorney general or *any person*[9] may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against any person for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment, or destruction. [MCL 324.1701(1) (emphasis added).]

This Court has explained that MEPA creates "an independent cause of action, granting standing to private individuals to maintain actions in circuit court for declaratory and other equitable relief against anyone

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[8] MEPA is codified as part 17 of the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*.

[9] The definition of "person" in the Natural Resources and Environmental Protection Act, of which MEPA is a part applies throughout the act. MCL 324.301(g) of the act defines "person" as "an individual, partnership, corporation, association, governmental entity, or other legal entity."

for the protection of Michigan's environment." *Eyde, supra* at 454. Indeed, this Court has held that this language confers standing on "any person." *Ray, supra* 304-305.

III. MICHIGAN'S JUDICIAL STANDING TEST

Without standing, a court will not hear a person's complaint—the doors to the court are closed. Unlike other substantive rules governing access to the courts, standing rules focus on the person bringing the claim rather than the claim itself.[10] "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue." *Sierra Club v Morton,* 405 US 727, 731-732; 925 S Ct 1361; 31 L Ed 2d 636 (1972).

In Michigan, the judicial test for standing has focused on prudential, as opposed to constitutional, concerns. *Lee, supra* at 743 (WEAVER, J. concurring); *Detroit Fire Fighters Ass'n v Detroit,* 449 Mich 629, 643; 537 NW2d 436 (1995) (RILEY, J. concurring).[11] Prudential concerns are essentially "matters of judicial self-governance . . . ." *Warth v Seldin*, 422 US 490, 500; 95 S Ct 2197; 45 L Ed 2d 343 (1975). Before Michigan courts will hear a case, they consider whether "a party's interest in the outcome of the litigation . . . will ensure sincere and vigorous advocacy." *House Speaker v State Admin Bd*,

[10] In *Flast v Cohen,* 392 US 83, 102; 88 S Ct 1942; 20 L Ed 2d 947 (1968), the Court noted "in ruling on standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated."

[11] No Michigan case decided before *Lee* held that standing to sue in Michigan courts is a Michigan or federal constitutional question as opposed to a prudential concern. Thus the majority's allegiance to *Lee* is not allegiance to "traditional grounds" for standing. See *ante* at 649.

441 Mich 547, 554; 495 NW 2d 539 (1993). The courts further consider whether the plaintiff has demonstrated that "the plaintiff's substantial interest will be detrimentally affected in a manner distinct from the citizenry at large." *Id*.

In developing prudential standing rules, Michigan courts have often drawn from federal case law discussing prudential standing requirements. *Id.* at 559. Yet the federal courts are bound not only by judicially imposed prudential considerations, but also by federal constitutional limitations on standing imposed by article III of the federal constitution.[12] *Warth, supra at* 498. Federal constitutional standing limitations involve "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of article III of the United States Constitution." *Id.* at 498.[13]

The United States Supreme Court has made clear that article III-based constraints apply to every person who seeks to invoke federal court jurisdiction. *Bennett v Spear*, 520 US 154, 162; 117 S Ct 1154; 137 L Ed 2d 281

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[12] The first mention of standing as an article III limitation was in *Stark v Wickard,* 321 US 288; 64 S Ct 559; 88 L Ed 733 (1944). See Sunstein, *What's standing after* Lujan*? Of citizens suits, "Injuries," and Article III,* 91 Mich L R 163, 169 (1992). The majority's assertion that the founding fathers had the specific concept of standing in mind when enumerating the powers of the federal judiciary through article III is pure speculation.

[13] Art III, § 2 provides in part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,

(1997). However, the United States Supreme Court has also made clear that article III-based constraints are distinguishable from federal prudential constraints, because prudential constraints can be "modified or abrogated by Congress . . . ." *Id.*[14] Before *Lujan, supra,* the United States Supreme Court described the difference between federal constitutional and federal prudential constraints on standing in *Sierra Club, supra* at 732:

> Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," *Baker v. Carr,* 369 US 186, 204 [82 S Ct 691; 7 L Ed 2d 663 (1962)], as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v Cohen,* 392 US 83, 101. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.

There has never been a federal case applying article III's case or controversy based standing constraints to state courts. As noted by Justice Kennedy writing for

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> —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[14] Addressing the legislative standing vis-a-vis federal prudential standing constraints, Justice Scalia writing for the majority in *Bennett, supra* at 165, held that the grant of standing to "any person" under the Endangered Species Act, 16 USC 1540(g), must be taken at "face value" because "the overall subject matter of this legislation is the environment (a matter in which it is common to think that all persons have an interest) and that the obvious purpose of the provision is to encourage enforcement by so-called 'private attorneys general'. . . ."

the Court in *ASARCO, Inc v Kadish*, 490 US 605, 617; 109 S Ct 2037; 104 L Ed 2d 696 (1989):

> We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . . .

Nevertheless, because the majority incorrectly and at length insists that article III's case or controversy constraints do apply to Michigan, it is necessary to review those constraints.

For the purposes of this case, the relevant articulation of the federal article III-based standing test is found in *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992).[15] In *Lujan, supra* at 560, the lead opinion of the United States Supreme Court concluded that the "irreducible constitutional minimum" for standing within the meaning of article III's "case or controversy" limitation is as follows:

> 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 . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [Citations omitted.]

In *Lujan,* six United States Supreme Court justices agreed that the plaintiffs had failed to demonstrate a concrete injury resulting from a lack of opportunity to

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[15] This articulation is relevant because, as will be discussed *infra,* the majority in *Lee* "supplemented" Michigan's standing test with *Lujan's* article III-based test.

consult regarding the impact of certain federally funded overseas activities on its members' ability to observe endangered species on unspecified future trips abroad.[16] The *Lujan* lead opinion, with the qualified support of the concurrence, noted that "[w]e have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an article III case or controversy." *Id.* at 573-574.[17]

Until the decision in *Lee*, it was well-understood by this Court that article III's "case or controversy" limitation was inapplicable to Michigan courts.[18] Until *Lee,*

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[16] The *Lujan* lead opinion was authored by Justice Scalia and joined in whole by Chief Justice Rehnquist and Justices White and Thomas. Justice Kennedy, joined by Justice Souter, concurred separately, agreeing that the respondents failed to demonstrate a concrete injury. Justice Kennedy in his concurrence did not join the part of the opinion that articulated the three-element "irreducible" test, but rather based his concurrence on the respondents' failure to demonstrate a concrete injury that would be sufficient "under our precedents." *Lujan, supra* at 580. The *Lujan* standing test has been applied, however, in subsequent decisions of the United States Supreme Court. See, e.g., *Bennett, supra,* and *Friends of the Earth, Inc v Laidlaw Environmental Services (TOC), Inc*, 528 US 167; 120 S Ct 693; 145 L Ed 2d 610 (2000). Over the dissent of Justices Scalia and Thomas, the United States Supreme Court in *Laidlaw* tempered its application of the *Lujan* concrete injury requirement holding that a plaintiff's "reasonable concerns" that a defendant's conduct would affect their recreational, aesthetic, and economic interest was sufficient. Though *Laidlaw* preceded this Court's decision in *Lee,* it was not mentioned by the *Lee* majority. However, it should be noted that the majority now cites with approval the *Laidlaw* dissent of Justice Scalia. *Ante* at 631 n 20.

[17] Justice Kennedy's concurrence with this portion of the lead opinion was qualified by his view that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Lujan, supra* at 580.

[18] *ASARCO, Inc, supra* at 617, and *House Speaker, supra* at 559 n 20. See also *Lee, supra* at 743 (WEAVER, J. concurring); *Detroit Fire Fighters, supra* at 643 (RILEY, J. concurring).

no decision of this Court characterized standing in Michigan courts as being a constitutional question. Nonetheless, the *Lee* majority adopted *Lujan's* article III-based test, concluding vaguely that *Lujan's* test was "fundamental to standing." *Lee, supra* at 740. The *Lee* majority warned that to neglect standing "would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government." *Lee, supra* at 735.

Obscuring the fact that Michigan's Constitution contains no corollary to article III, §2, the *Lee* majority suggested that Michigan's standing doctrine developed on a parallel track by way of "*additional* constitutional underpinning." *Lee, supra* at 737 (emphasis added). The "additional constitutional underpinning" referenced by the *Lee* majority was Const 1963, art 6, § 1, which vests the state judicial power in the courts,[19] and Const 1963, art 3, § 2, which divides the powers of government into three branches.[20] However, the cases addressing these provisions cited by the *Lee* majority were not standing cases; rather each involved a distinct question regarding the scope of judicial power.[21] In

[19] Const 1963, art 6, § 1 provides: "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house."

[20] Const 1963, art 3, § 2 provides: "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

[21] The *Lee* majority cited *Sutherland v Governor*, 29 Mich 320 (1874), which held that the courts cannot issue a mandamus against the Governor; *Daniels v People*, 6 Mich 381 (1859), which held the authority to set a criminal defendant's bail was a ministerial, not a judicial act; *Risser v Hoyt*, 53 Mich 185; 18 NW 611 (1884), which held the Legislature

other words, the *Lee* majority incorrectly equated Michigan case law addressing unrelated issues of "judicial power" with federal case law addressing article III's "case or controversy" constraints on standing.[22]

The *Lee* majority's analysis, and its adoption of *Lujan's* article III-based standing test, laid the groundwork to question the Legislature's authority to confer standing on plaintiffs who would not survive *Lee's* test. I continue to believe that the adoption of the *Lujan* test for standing by the *Lee* majority was unnecessary. *Lee, supra* at 744 (WEAVER, J. concurring). Further, the majority's application of *Lee's* standing test to a case involving a constitutionally based, expressly legislated grant of standing demonstrates that the adoption of *Lujan* is not only unnecessary, it is wrong for Michigan. Michigan's case law addressing distinguishable issues involving the scope of judicial power before *Lee* already protected the balance of powers among Michigan's three branches of government.[23]

It is simply not true that a judge-made standing test based on a federal constitutional provision that has no corollary in Michigan would, as promised by the *Lee* majority, better preserve Michigan's "constitutional architecture." *Lee, supra at* 735. Certainly, the majority's distracting diversion into contemplations of federal law

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cannot delegate judicial power to circuit judges acting in chambers as opposed to in court; *Johnson v Kramer Bros Freight Lines, Inc,* 357 Mich 254; 98 NW2d 586 (1959), which held the Legislature may delegate to the judiciary the power to determine whether good cause justified a writ of garnishment.

[22] Even the author of *Lujan's* lead opinion, Justice Scalia, recognized a distinction between article III-based standing limitations and the "merely prudential considerations that are part of judicial self-government . . . ." *Lujan, supra* at 560.

[23] See, e.g., *Sutherland*, *supra*; *Daniels*, *supra*; *Risser*, *supra*; *Johnson*, *supra*.

does nothing to clarify or justify its abandonment of thirty years of precedent under MEPA. Nevertheless, it is clear that *Lee* has, and the majority in this case has, constitutionalized Michigan's judicial standing test. In so doing, the majority usurps the Legislature's authority to modify or abrogate the judiciary's prudential standing constraints. It is, thus, the majority's application of *Lee's* article III-based test to this and future MEPA cases that will disrupt Michigan's "constitutional architecture" and the legislatively conferred access to the courts.

IV. PRESERVING MICHIGAN'S CONSTITUTIONAL STRUCTURE

Among the reasons why *Lee's* article III-based standing test or any judge-created standing test should not be applied to MEPA plaintiffs, the most important is that to do so defeats the clear, unambiguous, and readily understandable purpose of art 4, § 52 of the Michigan Constitution.[24] Through art 4, § 52, the people of Michigan directed the Legislature "to provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction." Art 4, § 52 provides that this mandate serves the people's express "paramount concern in the interest of the health, safety and general welfare of the people" specifically with respect to "the "conservation and development of the natural resources of the state." Employing the precise words of art 4, § 52, the Legislature enacted MEPA in fulfillment of art 4, § 52's mandate.

Since MEPA's enactment, this Court has held that the Michigan Legislature could confer standing under MEPA to "any person" who alleges that a defendant's conduct

[24] See, e.g., *Michigan Farm Bureau v Secretary of State,* 379 Mich 387, 393; 151 NW2d 797 (1967) (addressing principles of constitutional construction).

has or is likely to "pollute, impair or destroy the air, water or other natural resources or the public trust therein." *Ray*, *supra*. MEPA plaintiffs have not been required, until now, to overcome any judge-created standing tests to gain access to the courts.[25] It is clear that the Legislature's explicit grant of standing to "any person" under MEPA was intended to operate free from judge-made standing tests. Expanding the application of *Lee*, therefore, undermines art 4, § 52 and the Legislature's policy decisions, by restricting who may bring a MEPA action to court.

Expanding the application of *Lee's* standing test, as the majority does in this case, also infringes the Legislature's power to make laws pursuant to art 4, § 52.[26] The Legislature's decision to allow "any person" to maintain a cause of action under MEPA is consistent with art 4, § 52's environmental mandate and is an exercise of legislative discretion that carries a presumption of constitutionality. *Johnson v Kramer Bros Freight Lines, Inc, supra* at 257. As duly recognized by Justice COOLEY: "no court can compel the Legislature to make or to refrain from making laws, or to meet or adjourn at its command, or to take any action whatsoever, though the

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[25] MEPA requires plaintiffs to show "that the conduct of defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources . . . ." MCL 324.1703(1). The defendant may rebut a plaintiff's case by submitting evidence to the contrary or by way of an affirmative defense showing "that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction." *Id.*

[26] This present case is distinguishable from *Lee* because the statute at issue in *Lee* did not involve a legislated and express cause of action coupled with an unambiguous grant of standing. *Lee* addressed the plaintiff's standing to compel county boards of commissioners to levy a tax establishing a veteran's relief fund in accordance with the soldier's relief act, MCL 35.21 *et seq.*

duty to take it be made ever so clear by the constitution or the laws." *Sutherland*, *supra* at 326.

Through MEPA, the Legislature has given "the private citizen a sizable share of the initiative for environmental law enforcement." *Eyde, supra* at 454. Yet it is strongly implied by the majority that MEPA's citizen-suit provision unconstitutionally transfers to the judiciary the executive power to ensure that the laws are faithfully executed. This argument is unsupportable and incorrect. MEPA's citizen-suit provision does not expand the power of the judiciary; it grants the power to the people of this state to pursue MEPA violations. The court's role in these cases differs in no way from any other controversy that comes before it: the court hears the case, interprets the applicable law, and renders a decision.[27]

Moreover, the Legislature's decision to permit "any person" to sue under MEPA does not interfere with the enforcement of the law by the executive branch, it simply provides every citizen an opportunity to ensure that the laws that are designed to prevent environmental harm are enforced. In this sense, MEPA's citizen-suit provision is consistent with the fact that, "[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Art 1, § 1.

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[27] Similarly, the majority is mistaken that art 3, § 8, art 9, § 32, or art 11, § 5 grant "judicial power." *Ante* at 624-625. Art 3, § 8 grants power to the *Legislature* and the *Governor* to request an advisory opinion on the constitutionality of legislation. Art 9, § 32 grants *any taxpayer* the ability to pursue violations of the Headlee Amendment, though this majority has recently eviscerated that broad grant of standing by applying broad judicially created principles of res judicata to preclude taxpayer claims. See *Adair v Michigan*, 470 Mich 105; 680 NW2d 386 (2004) (WEAVER, J. dissenting in part and concurring in part). Finally, art 11, § 5 grants power to *any citizen* to pursue injunctive or mandamus relief for violations of the provisions.

Further, the majority's application of *Lee's* standing test ignores the fact that the three branches of government cannot "operate in all respects independently of the others, and that what are called the checks and balances of government constitute each a restraint upon the rest." *Sutherland, supra* at 325. Justice COOLEY elaborated:

> The Legislature prescribes rules of actions for the courts, and in many particulars may increase or diminish their jurisdiction; it also, in many cases, may prescribe rules for executive action, and impose duties upon, or take powers from the governor; while in turn the governor may veto legislative acts, and the courts may declare them void where they conflict with the constitution, notwithstanding, after having been passed by the Legislature, they have received the governor's approval. But in each of these cases the action of the department which controls, modifies, or in any manner influences that of another, is had strictly within its own sphere, and for that reason gives no occasion for conflict, controversy or jealousy. The Legislature in prescribing rules for the courts, is acting within its proper province in making laws, while the courts, in declining to enforce an unconstitutional law, are in like manner acting within their proper province, because they are only applying that which is law to the controversies in which they are called upon to give judgment. It is mainly by means of these checks and balances that the officers of the several departments are kept within their jurisdiction, and if they are disregarded in any case, and power is usurped or abused, the remedy is by impeachment, and not by another department of the government attempting to correct the wrong by asserting a superior authority over that which by the constitution is equal. [*Id*.]

The legislative power includes the power to create new legal rights. And, where the Legislature chooses, it may exercise its discretion to create and define new

causes of action.[28] Unlike its federal counterpart, the jurisdiction of the Michigan judiciary is not limited by the case or controversy limitations expressed in article III, § 2 of the United States Constitution nor by the federal court's ever-evolving interpretation of those limitations.

Without a doubt, the constitutionality of MEPA's citizen-suit provision remains "teed up" for a future open and direct ruling that *Lee's* judicial standing test supercedes the Legislature's authority to confer standing. The majority's application of *Lee's* standing test to any person's legislatively conferred and constitutionally based standing under MEPA improperly enlarges the court's power at the expense of the Legislature's power, ironically violating the very "constitutional architecture" the majority purported to protect in *Lee*.[29]

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[28] Art 3, § 7 provides:

> The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

Interestingly, the majority recognized that this constitutional provision grants the Legislature the power to create a cause of action, limit or modify the cause of action, eliminate a cause of action, or take the less drastic step of limiting the damages recoverable for a particular cause of action. *Phillips v Mirac, Inc,* 470 Mich 415; 685 NW2d 174 (2004) (opinion of TAYLOR, J.). Art 3, § 7 is an additional constitutional basis for concluding the Legislature has the authority to define who has standing to pursue a cause of action that it creates and defines. By concluding to the contrary in this case, the majority violates the separation of powers defined in the Michigan Constitution by allowing judge-made standing tests to usurp legislative policy decisions.

[29] With regard to the balance of governmental powers, it is worth noting that because the current majority would interpret the power of the Michigan court as limited by art III, § 2 of the federal constitution, it has freed itself to impose restrictions on access to Michigan courts

V. PLAINTIFFS HAVE STANDING UNDER MCL 324.1701(1)

The circuit court concluded that plaintiffs lack standing to sue under MEPA in light of *Lee*. To reach this conclusion, that court reviewed affidavits of members of plaintiff organizations and made the following comments from the bench:

> They were concerned about this, they were concerned about that, they were concerned that there might not be as many birds around Goose Lake as there used to be. And I'm not going to take the time to go through the affidavits one by one, but I think that anybody who reads them will see how often the words or the phrases "I am concerned" without any stated basis in those affidavits for the reason for being concerned. I am concerned that there will be an impact, I am concerned that there has been a diminishment of the fishery in Goose Lake, and I'm concerned that the mining activities will further diminish the fishery. That's not enough.

Plaintiffs appealed and the Court of Appeals reversed. The Court of Appeals reviewed the plain language of MEPA and, citing *Ray,* correctly held that plaintiffs have standing. The Court of Appeals stated that it "declined defendants' invitation to read an additional requirement of compliance with nonstatutory standing prerequisites," i.e., judge-made standing tests. Unpublished memorandum opinion, issued June 11, 2002 (Docket No. 232706). In a footnote, the Court of Appeals aptly commented that it found no indication in *Lee* that this Court intended to overrule *Ray* and noted that the statute at issue in *Lee* could be distinguished because it did not "contain a provision

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beyond those of the Legislature. Moreover, no other branch of government can check or balance the majority's exercise of its improperly assumed power.

expressly authorizing any person to maintain an action for violations or omissions of the act." Slip op at 2.

I agree with the Court of Appeals that plaintiffs have standing under MEPA. Consistent with the people's mandate in art 4, § 52, the Legislature has determined that actual or threatened pollution, impairment, or destruction of natural resources is an injury that any person may seek to enjoin in circuit court. MCL 324.1701(1). In this case, plaintiffs have alleged that the defendant's proposed mining will harm natural resources. This is sufficient under MEPA to allow the plaintiffs their day in court. Once in the door, plaintiffs must next establish their prima facie case as required by MCL 324.1703(1).[30]

VI. DECODING THE MAJORITY OPINION

The Legislature's grant of standing to "any person" in MCL 324.1701(1) is unquestionably broader than *Lee's* judge-made standing test. The majority retains its firm belief that *Lee's* standing test is grounded in the constitutional separation of powers. By repeatedly asserting that the Legislature may not confer standing more broadly than *Lee,* the majority has impliedly decided the very constitutional question they accuse this dissent of improperly reaching. It appears that, from the majority's mistaken perspective, the MEPA's citizen-suit provision is unconstitutional because the Legislature's attempt to confer standing on "any person" under MEPA violates the separations of powers.

[30] The realities of a MEPA citizen-suit must not be forgotten. Plaintiffs must establish their prima facie case, can receive only declaratory and equitable relief (not money damages), and may be required to bear their own costs. MCL 324.1703 and MCL 324.1701. After more than 30 years, MEPA has not spawned an unmanageable stream of citizen-suits so feared and anticipated by the majority. *Ante* at 649-650.

Moreover, it is the majority who, in *Lee,* created the constitutional dilemma that must be resolved in this case. As previously discussed, *Lee* unnecessarily imported the federal constitution's article III case or controversy constraints on standing into Michigan law. It should also be noted that in *Lee,* the parties had not raised or briefed the applicability of *Lujan* or article III of the federal constitution. On its own initiative, the *Lee* majority raised *Lujan's* standing test and transformed standing in Michigan into a constitutional question.

I fundamentally disagree with the majority's perception of judicial discipline and duty. It is not necessarily evidence of judicial discipline to dodge the ultimate issue in a case, be the issue of constitutional dimension or not. Nor is it disciplined to import into Michigan law federal constitutional constraints that the people—the ratifiers of the Michigan Constitution—have not adopted. Moreover, where the Court specifically requests that an issue be briefed (as this Court did in this case) and the issue is squarely presented, dodging the question destabilizes the law. It is particularly inappropriate where the parties must bear the cost of further unnecessary litigation or where the decision creates confusion for the bench and the bar. In this case, it is a proper exercise of judicial duty and power to answer the constitutional question presented by this Court regarding whether *Lee's* judge-made standing test supercedes the Legislature's authority to confer standing.

Further, while purporting to act with judicial restraint by leaving the constitutionality of MCL 324.1701(1) in doubt, the majority attempts to chart a course for the resolution of issues not even before the Court by suggesting that plaintiffs may not simply rely on the affidavits to prove that standing exists. *Ante* at 630-631. The majority confuses the issue of standing

with a court's subject-matter jurisdiction. *Ante* at 630-631. The majority erroneously suggests that the circuit court can reverse this Court's unanimous decision that plaintiffs have standing. *Id.* However, this Court's decision that plaintiffs have standing controls that issue.

The majority then hints that plaintiffs' affidavits may be insufficient either to survive a motion for summary disposition or to meet the plaintiff's burden of proof. For this, the majority cites an irrelevant and nonbinding United States Supreme Court dissenting opinion in a federal case involving federal law. The plain language of MEPA and this Court's own MEPA decisions are a far more appropriate guide for the circuit court on remand.

MEPA instructs:

> When the plaintiff has made a prima facie showing that the conduct of the defendant has polluted, impaired, or destroyed or is likely to pollute, impair, or destroy the air, water, or other natural resources or the public trust in these resources, the defendant may rebut the prima facie showing by the submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that his or her conduct is consistent with the promotion of the public health, safety, and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment, or destruction. Except as to the affirmative defense, the principles of burden of proof and weight of the evidence generally applicable in civil actions in the circuit courts apply to actions brought under this part. [MCL 324.1703(1).]

As this Court previously held,

> the necessary showing to establish a plaintiff's prima facie case is "not restricted to actual environmental degradation

> but also encompasses probable damage to the environment as well." General rules of evidence govern this inquiry, and a plaintiff has established a prima facie case when his case is sufficient to withstand a motion by the defendant that the judge direct a verdict in the defendant's favor. [*Nemeth v Abonmarche Dev, Inc,* 457 Mich 16, 25; 576 NW2d 641 (1998) (citations omitted).]

This Court has emphasized that MEPA's, "very efficacy . . . will turn on how well circuit court judges meet their responsibility for giving vitality and meaning to the act through detailed findings of fact." *Ray, supra* at 307-308.

VII. CONCLUSION

The majority decision in this case illustrates how judicial activism can be disguised as judicial restraint.[31] Purporting to be concerned about the separation of powers, the majority, in actuality, uses its judicial power to undermine the Legislature's proper exercise of its authority to create a cause of action and define who can pursue that action in court. The clear implication of the majority's constitutional rhetoric combined with its application of *Lee's* standing test to these plaintiffs is that the majority will not yield to any grant of standing by the Legislature that is broader than the majority's own judge-made test. The majority's decision destabilizes the law and overrules 30 years of precedent. See *supra* at 652 n 3. The majority decision forces future MEPA plaintiffs to establish that an actual or threatened environmental harm has actually injured or will immi-

[31] Indeed, the majority has unleashed an assault on MEPA this term. In this case, the majority applies *Lee's* restrictive standing test to MEPA plaintiffs and leaves the future of the more permissive legislatively conferred standing in doubt. By its decision in *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004), the same majority insulates an illegal sand dune mining permit from scrutiny under MEPA, thereby sanctioning the destruction of critical dunes.

nently injure them concretely, that such injury is traceable to the defendant, or that such injury is redressable as required by the majority opinion in *Lee, supra* at 739-740, or risk being kicked out of court for lack of standing. Thus, any characterization of the majority's application of *Lee's* judicial standing test as a narrower ground to resolve this case is judicial gymnastics or gamesmanship, not an example of true judicial restraint.

The people through Michigan's Constitution required the Legislature to pass laws to protect the environment. Art 4, § 52. MEPA and its citizen-suit provision properly implements the constitution's directive. *State Hwy Comm, supra* at 184. *Lee's* more restrictive judge-made standing test should not be imposed on plaintiffs by the majority in this case. Rather, the "any person" standard clearly expressed by the Legislature through MEPA should be applied. To suggest or hold otherwise violates the separation of powers by allowing the judiciary to supercede the Legislature's grant of standing to "any person" under MEPA.

I, therefore, concur only in the majority's result that plaintiffs have standing. I would hold that plaintiffs have standing under MCL 324.1701(1) of the Michigan environmental protection act. I, therefore, dissent from all the majority's reasoning.

CAVANAGH, J. (*concurring in result*). I agree with the result reached by the majority and Justice WEAVER, but write separately to acknowledge my change in position since this Court decided *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001). In that case, I signed Justice KELLY's dissent, which agreed with the majority's adoption of *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351

(1992), as the test for standing in this state. I now disavow that position for the reasons expressed in Justice WEAVER's opinion in *Lee*, as well as her concurrence in this case. *Lujan* should not be used to determine standing in this state.

Thus, I concur with the result reached by the majority and the reasoning espoused by Justice WEAVER.

KELLY, J. (c*oncurring in result only*). I agree with the opinion of Justice WEAVER and with the result reached by the majority.

The Court concludes that plaintiffs have standing and that they satisfy the judicial test that was adopted in *Lee v Macomb Co Bd of Comm'rs,* 464 Mich 726, 747; 629 NW2d 900 (2001) (KELLY, J., dissenting). The concurring justices believe that this Court should not have adopted the test in *Lee,* which incorporates the *Lujan* requirements.[1] I believe that *Lee* should not be applied in cases like this one.

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[1] *Lee* adopted the United States Supreme Court requirements of *Lujan v Defenders of Wildlife*, 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992). *Lujan* requires a plaintiff seeking standing to establish an actual or imminent injury to his or her legal rights that is concrete and particularized. There must be a causal connection between the defendant's action and the plaintiff's injury, and the injury must be one for which the court can grant redress. *Lee* at 739-740, quoting *Lujan* at 560-561. I have come to believe that *Lee* wrongly adopted *en toto* the federal standing requirements. As Justice WEAVER notes, the *Lujan* standing test was not presented by the parties. Also, the statute at issue in *Lee* differed from the statute under consideration here in one important respect: it lacked a provision expressly authorizing an individual to maintain an action for a violation of the act without having suffered a particularized injury. Here the standing issue has been fully presented and discussed. Moreover, I do not believe that rejecting the *Lujan* requirements now would work any unfairness that would mandate their continuing retention in Michigan. *Murray v Beyer Mem Hosp*, 409 Mich 217, 222-223; 293 NW2d 341 (1980).

The majority disagrees. Consequently, this case stands for the proposition that an individual bringing suit under the Michigan environmental protection act (MEPA) must show a particularized injury to satisfy standing.

However, the majority goes on at great length to assert that the standing provision in MEPA would violate the constitutional separation of powers clause absent a particularized injury. The Court's determination on standing renders the majority's discourse on the separation of powers doctrine unnecessary. This discourse is simply dicta. Moreover, it departs from the Court's usual allegiance to the principle that we do not reach a constitutional question when narrower grounds will suffice to resolve an issue. *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722; 664 NW2d 728 (2003).

If a decision were necessary about whether, absent the showing of a particularized injury, MEPA's standing provision violates the separation of powers doctrine, I would hold that it does not. The Legislature has the authority to grant standing to a party who does not satisfy the judge-made standing requirements of *Lujan*. *Lee* wrongly held that the federal requirements are prerequisites that every plaintiff must satisfy.

STANDARD OF REVIEW

We review motions for summary disposition de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). Whether plaintiffs have standing is a question of law that is also reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). When considering a ruling on a motion for summary disposition under MCR 2.116(C)(8), we look only at the pleadings and accept as true all well-pleaded facts. *Radtke v*

Everett, 442 Mich 368, 373; 501 NW2d 155 (1993), citing *Abel v Eli Lilly & Co*, 418 Mich 311, 324; 343 NW2d 164 (1984).

PROCEEDINGS BELOW

The Marquette Circuit Court applied *Lee* and dismissed this lawsuit finding that plaintiffs failed to demonstrate that they had standing.[2] The Court of Appeals disagreed and reinstated the claim, holding that plaintiffs have standing under MEPA. Unpublished memorandum opinion of the Court of Appeals, issued June 11, 2002 (Docket No. 232706). We granted leave to appeal specifically limited to the issue "whether the Legislature can by statute confer standing on a party who does not satisfy the judicial test for standing" that was adopted in *Lee*. 468 Mich 941 (2003).

THE LEGISLATURE MAY CONFER RIGHTS ENFORCEABLE THROUGH THE POWER OF THE JUDICIARY

The Michigan environmental protection act explicitly recognizes the right of "any person" to bring suit in Michigan courts to protect the public trust in our land, water, and other natural resources. The Legislature accomplished this by writing broad standing into the act, supplementing the state's enforcement power with what has been termed "private [a]ttorneys [g]eneral." *Associated Industries of NY State v Ickes*, 134 F2d 694, 704 (CA 2, 1943). As the beneficiaries of that trust, each of us is entitled to bring suit to conserve our environment.

[2] Defendants' motion to dismiss plaintiffs' petition for interlocutory review was brought under MCR 2.116(C)(8). Although the circuit court found that plaintiffs had failed to establish a prima facie case, the order dismissed the case solely for lack of standing.

The act fulfills a state constitutional obligation. *Hwy Comm v Vanderkloot,* 392 Mich 159; 220 NW2d 416 (1974). It springs from Const 1963, art 4, § 52 which provides:

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Intentionally mirroring this language in the act, the Legislature wrote: "any person may maintain an action . . . for declaratory and equitable relief . . . for the protection of the air, water, and other natural resources" of the state. MCL 324.1701(1).

Its decision to open wide the courthouse doors through the act's standing provision merely returns to the people some of the power to ensure that environmental laws are executed. Const 1963, art 1, § 1. The courts should acknowledge and respect this provision as a clear expression of legislative intent. *Dressel v Ameribank,* 468 Mich 557, 562; 664 NW2d 151 (2003).

MICHIGAN'S USE OF PRIVATE ATTORNEYS GENERAL

When interpreting the Constitution, we give its words their common understanding. We assume that they were not intended to have " 'elaborate shades of meaning' " or to require, in order to be understood, " 'the exercise of philosophical acuteness or judicial research.' " *Michigan Farm Bureau v Secretary of State,* 379 Mich 387, 391; 151 NW2d 797 (1967), quoting 1 Story, Constitution (5th ed), § 451, p 345.

We are mindful that the people expect and are entitled that their constitutional rights not be hobbled by the courts. With regard to art 4, § 52, the people may reasonably depend that the courts will not thwart the Legislature's efforts to fulfill its mandate to protect our public's trust in Michigan's natural resources. We must not import requirements for access to the courts that are not founded on our Constitution. Yet the majority has created one such requirement by adopting the *Lujan* "case" and "controversy" rule.

Before *Lee*, other provisions in our state Constitution allowed suits to be brought in state courts by parties who do not satisfy the *Lujan* requirements. For example, art 11, § 5 allows "any citizen" to seek an injunction to enforce its provisions. The Headlee Amendment states, "*Any* taxpayer of the state *shall have standing* to bring suit in the Michigan Court of Appeals to enforce sections 25 through 31"[3] of article 9. Const 1963, art 9, § 32 (emphasis added). This Court may issue advisory opinions.[4] A particularized injury need not be demonstrated in order to sustain suits under these provisions. See *In re Request for Advisory Opinion on Constitutionality of 1997 PA 108,* 402 Mich 83; 260 NW2d 436 (1977).[5]

And citizens' suits have long been accepted in our jurisprudence. They, along with other actions brought by a person who lacks an individualized injury, were known to the framers of the federal constitution. They existed in the legal practice in the United States and England when the federal constitution was written.

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[3] These sections address the state's power to tax and spend.

[4] Const 1963, art 3, § 8.

[5] The inference that I draw from these provisions is that the state's judicial power is broad. The majority draws the opposite inference. See *ante* at 625 n 13.

Individuals were allowed, also, to bring suits for writs of quo warranto and mandamus. Sunstein, *What's standing after* Lujan*? Of citizens suits, "Injuries," and Article III*, 91 Mich L R 163, 170 (1992). Individuals were allowed, also, to bring mandamus actions in the states. See Sunstein at 171. See also *Union Pacific Railroad v Hall*, 91 US 343 (1875).

In England, suits by individuals, private attorneys general, could be brought under the informers' action and the relator action.

> In the informers' action, cash bounties were awarded to strangers who successfully prosecuted illegal conduct. In relator actions, suits would be brought formally in the name of the Attorney General, but at the instance of a private person, often a stranger. [Sunstein at 172.]

Merely because the framers of our state Constitution created a tripartite government like the federal government, it does not follow that they intended to eliminate actions by private attorneys general.

THE SEPARATION OF POWERS ARGUMENT

The state separation of powers doctrine reads simply:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.[6] [Const 1963, art 3, § 2.]

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[6] The most obvious meaning of this sentence is that one individual may not simultaneously hold office in more than one branch of government. See Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions,* (Baton Rouge: La State U Press, 1980), p 96. The federal constitution does not contain this prohibition. See *O'Donaghue v United States,* 289 US 516; 53 S Ct 740; 77 L Ed 1356 (1933).

It has been understood that this provision is not to be applied in an overly rigid fashion. Some overlap is acknowledged to exist in the functioning of the various branches. The state Constitution permits it. For instance, a civil rights commission within the executive branch is vested with some lawmaking power. Const 1963, art 5, § 29. Article 4, § 33 provides the Governor with veto power over legislation, and art 11, § 7 provides the Legislature with impeachment authority. Indeed, any grant of legislative powers to executive agencies would be unconstitutional per se if some overlap between the branches of government were not permissible. See *JW Hampton, Jr, & Co v United States*, 276 US 394; 48 S Ct 348; 72 L Ed 624 (1928).

The courts, also, have recognized that the separation of powers doctrine allows limited overlap and interaction between the branches. *Soap & Detergent Ass'n v Natural Resources Comm,* 415 Mich 728, 752; 330 NW2d 346 (1982). See also *Judicial Attorneys Ass'n v Michigan,* 459 Mich 291, 315-316; 586 NW2d 894 (1998) (TAYLOR, J., dissenting), citing the Court of Appeals dissent of Judge MARKMAN. Accordingly, when one branch exercises its power, it may overlap the exercise of power belonging to another branch. For example, the executive branch may utilize hearing officers to attempt to resolve disputes. The judiciary may review the decisions of those hearing officers, although doing so may appear to infringe on the executive branch's exercise of its power to administer the law.[7]

The majority in *Lee* applied the federal separation of powers and standing doctrines to the state and created a mandatory particularized injury requirement for

[7] To say as the majority does that the powers of the three branches do not overlap while the exercise of their respective powers may, *ante* at 644, is a semantic distinction lacking a difference.

standing. This requirement is not found in the text of either the federal or state constitutions. To exist, it had to be gleaned from the historical context of the constitutions. However, a plumbing of that context reveals no support for a belief that a person must show a particularized injury before gaining standing in order to bring a citizens' suit. See pp 680-681 of this opinion.

Even though the federal separation of powers doctrine has been found to require a particularized injury for standing in federal courts, it does not follow that the same rule applies in Michigan. Our state's courts are not identical to our federal courts. They are part of a government having broader powers and broader jurisdiction than the federal government and having judges who are selected by the people.

Although the state and federal governments are similarly structured, the scope of the powers of their respective branches is different. That is because the natures of the two governments are inherently different. The federal government is one of enumerated powers. The states retain any powers not expressly ceded to the federal government. US Const, Am X.

State sovereignty to address any social problem that threatens the public welfare is plenary. *Washington-Detroit Theatre Co v Moore,* 249 Mich 673, 680; 229 NW 618 (1930). Michigan's Constitution, like that of many other states,[8] includes detailed substantive social and economic provisions. See, e.g., articles 8-10 on education, finance and taxation, and property. Accordingly, the power of the state's judiciary is plenary as well, and Michigan's courts have general, broad subject-matter jurisdiction. Const 1963, art 6, § 1. See MCL 600.775.

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[8] Hershkoff, *State courts and the "Passive Virtues": Rethinking the judicial function,* 114 Harv L Rev 1833, 1855 n 116 (2001).

By contrast, the jurisdiction of federal courts[9] is limited. For instance, a federal case must arise under a federal question or the parties must have diversity of citizenship. Federal judicial power is limited to "cases" and "controversies," a fundamental restriction. *Allen v Wright,* 468 US 737, 750; 104 S Ct 3315; 82 L Ed 2d 556 (1984). Contrary to the majority's assertion,[10] I do not argue that this restriction defines the judicial power. Instead, it limits federal courts' utilization of the judicial power to certain disputes. By contrast, the judicial power inherent in Michigan's courts may be applied under a wider range of circumstances.

The federal standing and separation of powers doctrines adopted by *Lee* from *Lujan* are predicated in part also on the fact that federal judges are not directly accountable to the people. *United States v Richardson,* 418 US 166, 180; 94 S Ct 2940; 41 L Ed 2d 678 (1974) (Powell, J., concurring). Federal judges are appointed by the President[11] and may be removed only by impeachment.[12] By contrast, our state judges are elected by the people.[13]

The United States Supreme Court has recognized that access to state courts is not limited by the federal constitution. *ASARCO, Inc v Kadish*, 490 US 605, 616-617; 109 S Ct 2037; 104 L Ed 2d 696 (1989). Everything considered, it is not surprising that the qualifications for standing in state courts are broader than in federal courts.

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[9] See US Const, art III, § 2.

[10] *Ante* at 627.

[11] US Const, art II, § 2.

[12] US Const, art III, § 1 and art II, § 4.

[13] Const 1963, art 6, §§ 2, 8, 12, 16.

Other states have determined that their judicial power is not constrained by the federal model. For example, Indiana has held:

> While Article III of the United States Constitution limits the jurisdiction of federal courts to actual cases and controversies, the Indiana Constitution does not contain any similar restraint. Thus, although moot cases are usually dismissed, Indiana courts have long recognized . . . an exception to the general rule when the case involves questions of "great public interest." [*In re Lawrance*, 579 NE2d 32, 37 (Ind, 1991).]

Similarly, Minnesota has recognized that federal standing concerns historically have been related to whether a dispute brought for adjudication is in an adversary context and is capable of judicial resolution. However, when standing has been conferred by a state statute, "there is no constitutional basis for imposing a more stringent standing requirement [than that] which is set by the governing statute." *Minnesota Pub Interest Research Group v Minnesota Dep't of Labor & Industry*, 311 Minn 65, 73; 249 NW2d 437 (1976), citing *Ass'n of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 151; 90 S Ct 827; 25 L Ed 2d 184 (1970). See also *Dep't of Revenue v Kuhnlein*, 646 So 2d 717 (Fla, 1994), *Chester Co Housing Auth v Pennsylvania State Civil Service Comm*, 556 Pa 621; 730 A2d 935 (1999), *In Life of the Land v Land Use Comm*, 63 Hawaii 166; 623 P2d 431 (1981), and *Sears v Hull*, 192 Ariz 65; 961 P2d 1013 (1998).

Of course, this is not to say that, before *Lee*, Michigan was without standing requirements. Simply, they were more encompassing than the federal requirements. To have standing in Michigan courts, a person had to show the existence of a dispute over a legal right. *Daniels v*

People, 6 Mich 381, 388 (1859). See Sunstein at 170. The necessary showing did not need to rise to the level of a "case" or "controversy."[14]

Our state has relied on other requirements which also serve to ensure that standing is not too broadly applied. For example, the ripeness requirement ensures that a claim has actually arisen and that it has not been negated. *Obenauer v Solomon*, 151 Mich 570; 115 NW 696 (1908). The requirement that the case not be moot ensures that it does not present a purely abstract question and that only actual disputes are litigated. *East Grand Rapids School Dist v Kent Co Tax Allocation Bd*, 415 Mich 381, 390; 330 NW2d 7 (1982). See p 687 of this opinion.

I believe that our state's standing provisions before *Lee* sufficiently ensured that judicial power was properly constrained while allowing vigorously pursued suits to proceed. The decision in *Lee* wrongly blocked access to our state's courts.

Hence, contrary to the majority's assertion, *Lee*'s standing requirements are not essential to prevent the judicial branch from overpowering the legislative branch and the executive branch.

THE SEPARATION OF POWERS DOCTRINE AND MEPA

Turning to the interplay between the Michigan environmental protection act and the separation of powers clause, I cannot conclude that the act offends the clause.

Separation of powers principles ensure that courts do not move beyond the area of judicial expertise and that

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[14] When the majority characterizes "cases" and "controversies" as synonymous with "disputes," *ante* at 614, it is mistaken. See *Lujan* at 560. Notably, the majority produces no authority for this proposition. Clearly, "case" and "controversy" have specific meanings. *Id.*

political questions are not answered by a branch of government unaccountable to the people. *House Speaker v Governor*, 443 Mich 560, 574; 506 NW2d 190 (1993). I am unable to discern how MEPA's private attorneys general standing provision will offend these principles. The Legislature made the public's interest in the environment a legal right.[15] It is authorized to determine who may enforce such rights and in what manner. *Davis v Passman,* 442 US 228, 241; 99 S Ct 2264; 60 L Ed 2d 846 (1979).

MEPA is an expression of public concern for protecting the state's natural resources that was passed into law through the normal political process. It reflects the determination that the resources of the executive branch should be supplemented with those of the people. The majority today threatens to diminish the victory signified by its passage.

MEPA does not enable the judiciary to exercise legislative power at the instigation of a disinterested plaintiff. The structure of MEPA ensures that the plaintiffs are not mere interlopers. The act requires a plaintiff to make a prima facie showing of environmental damage. MCL 324.1703. Hence, there will always be alleged actual or imminent harm that will ensure that cases like this one will be ripe and that they will not be moot. See p 686 of this opinion.

This case presents one such actual, live controversy. The defendants' mine expansion is imminent. Plaintiffs' membership includes people who live and recreate in the area of the mine and claim to be adversely affected by its expansion.

Environmental and other collective concerns often

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[15] An inherent legislative power is to create legal rights enforceable through the judiciary and define chains of legal causation. See *Lujan* at 578, 580 (Kennedy, J., concurring).

have strong personal manifestations, called "passive use" or "standby value" interests. See, e.g., *General Electric Co v United States Dep't of Commerce,* 327 US App DC 33, 38; 128 F3d 767 (1997). These interests ensure that environmental suits are vigorously pursued by people with a strong personal belief in their claim.

I cannot perceive that the judiciary would be enabled to make policy by this Court's affirmance of the constitutionality of MEPA's standing provision without the need for particularized injury. *Sutherland v Governor,* 29 Mich 320, 324 (1874).

Neither does MEPA offend executive authority. The Constitution states that "The executive power is vested in the governor." Const 1964, art V, § 1. However, it is not vested solely in the Governor. Obviously, the Governor may delegate some of her power. As stated, the Legislature may vest some of its power in an agency. Similarly, the Legislature may return it to the people. The people know how to vest power exclusively in a single branch of government. For example, our Constitution says, "The judicial power is vested *exclusively* in one court of justice." Const 1963, art VI, § 1 (emphasis added).

The Legislature's decision to allow the people to directly enforce MEPA would offend the executive branch if it interfered with the executive branch's ability to accomplish its functions. *Nixon v Administrator of Gen Services*, 433 US 425, 443; 97 S Ct 2777; 53 L Ed 2d 867 (1977), citing *United States v Nixon,* 418 US 683, 711-712; 94 S Ct 3090; 41 L Ed 2d 1039 (1974). MEPA does not do this.

MEPA includes a mechanism to ensure that executive branch decisions are respected. It allows the judiciary to refer environmental protection act cases to state agencies for resolution. MCL 324.1704(2). MEPA is explicitly

"supplementary to existing administrative and regulatory procedures as provided by law." MCL 324.1706. Nothing in it encourages or authorizes the judiciary to itself exercise executive power or hinders the discretion of the executive branch. MEPA poses no danger of "aggrandizement or encroachment" of power that would trigger separation of powers concerns. *Mistretta v United States*, 488 US 361, 382; 109 S Ct 647; 102 L Ed 2d 714 (1989).

THE NEW JUDGE-MADE STANDING LIMITATION

Obviously, this Court is entitled to constrain its own power and limit standing as it has done in this case. But in doing so, it creates a self-inflicted wound. See *Warth v Seldin,* 422 US 490, 500; 95 S Ct 2197; 45 L Ed 2d 343 (1975). No constitution requires it. *People v Goldston*, 470 Mich 523, 532-535; 682 NW2d 479 (2004). It is an entirely judge-made limitation, a standing requirement fabricated by judges where none existed before. And, because it subverts the popular will, it injures more than the judicial branch. It injures the people.

The Court is ill-advised to curb its authority under the guise of respect for another branch of government. Its decision today is an unwarranted contraction of the right of the people to use the judicial and the legislative power to protect their interest in preserving the environment. It is not, as the majority asserts, a prudent check on an attempted expansion of legislative power. *Ante* at 616-618.

MEPA does not violate constitutional separation of powers principles despite the fact that it lacks a particularized injury requirement. These principles require that the judiciary respect the Legislature's decision and fulfill its role to adjudicate disputes as a co-equal branch of the state's government.

The majority advances a parade of horribles[16] that it fears would emerge if MEPA's standing provision were not supplemented by the *Lujan* standing requirements.[17] When examined closely, the horribles tend to shrink. Under MEPA, a plaintiff must establish prima facie environmental harm sufficient to support a claim. See MCL 324.1703(1) and *Nemeth v Abonmarche Dev, Inc*, 457 Mich 16; 576 NW2d 641 (1998); MCR 2.116(C)(8), (10). Moreover, existing court rules deter frivolous suits. See MCR 2.114 and MRPC 3.1 and 3.3.

It is improper to hold the plaintiffs in this case to the *Lujan* judicial test for standing. Given that the express will of the people is to the contrary, plaintiffs now and in the future should not have to shoulder the *Lujan* standing burden in MEPA cases.

CONCLUSION

I agree with the opinion of Justice WEAVER and with the result reached by the majority. Plaintiffs have standing. The authority of the Legislature to give the people a legal right to protect their interest in the environment through private attorneys general should not be abridged.

I would find that the Michigan Legislature did not violate the state Constitution by granting standing under MEPA to a party who does not satisfy the judicially crafted *Lee* test. The applicable test here, the MEPA test, was carefully devised by the Legislature. Because it

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[16] For a similar demonstration of this majority's proclivity for doomsday prophesy, see its conclusion in *Preserve the Dunes v Dep't of Environmental Quality*, 471 Mich 508; 684 NW2d 847 (2004). I note that there, I would have respected the will of the people to enjoin critical dune mining by ineligible entities. The majority should have done likewise. See *ante* at 638 n 25.

[17] See *ante* at 649-650.

gave standing to "any person," I believe that any person should be able to avail himself of that law. The Court of Appeals decision and analysis should be affirmed and the case remanded to the circuit court for trial.

CAVANAGH, J., concurred with KELLY, J.

STEWART v STATE OF MICHIGAN

Docket No. 124676. Decided October 26, 2004. On application by the state of Michigan for leave to appeal, the Supreme Court, in lieu of granting leave to appeal, in an opinion per curiam, reversed the part of the judgment of the Court of Appeals that held that the police cruiser was parked in such a way as to cause an unreasonable risk of bodily injury and reinstated the circuit court's order of summary disposition in favor of the state. Rehearing denied *post*, 1213.

Tammy Sue Stewart and Carla K. Amy, the surviving spouse of Douglas K. Amy, brought actions in the Saginaw Circuit Court against the state of Michigan and MIC General Insurance Corporation, seeking no-fault insurance benefits following an accident that occurred when a motorcycle operated by Douglas Amy, with Stewart as a passenger, struck the rear of a Michigan State Police cruiser that was stopped in a traffic lane with its emergency lights flashing while the officer sought to render assistance to the driver of a vehicle that had become disabled and remained in the traffic lane. The actions were consolidated in the circuit court. The circuit court, William A. Crane, J., determined, in part, that the police cruiser was a parked vehicle within the meaning of MCL 500.3106 and that the parked cruiser did not cause an unreasonable risk of bodily injury within the meaning of MCL 500.3106(1)(a). The plaintiffs appealed, in part, from the trial court's grant of summary disposition in favor of the state. The Court of Appeals, WHITBECK, C.J., and NEFF and DONOFRIO, JJ., affirmed in part, reversed in part, and remanded the case to the trial court. *Amy v MIC Gen Ins Corp*, 258 Mich App 94 (2003). The state of Michigan sought leave to appeal from that part of the Court of Appeals judgment that reversed the grant of summary disposition in favor of the state on the basis that, although the police cruiser was legally parked under MCL 257.603, it posed an unreasonable risk by virtue of the fact that it was parked on the traveled portion of the highway.

In a unanimous opinion per curiam, the Supreme Court *held*:

The police cruiser was not parked in such a way as to pose an unreasonable risk under the circumstances of this case. MCL 500.3106(1)(a) recognizes that there are degrees of risk posed by a parked vehicle and does not create a rule that whenever a vehicle

is parked entirely or in part on the traveled portion of the highway the vehicle always poses an unreasonable risk.

The portion of the Court of Appeals judgment pertaining to the state is reversed and the circuit court's order of summary disposition in favor the state is reinstated.

Harvey Kruse, P.C. (by *Michael J. Guss* and *Anne V. McArdle*), for Tammy Sue Stewart and MIC General Insurance Corporation.

Grimaldi, Pearson & Weyand, P.C. (by *William S. Pearson*), for Carla K. Amy.

Michael A. Cox, Attorney General, *Thomas L. Casey*, Solicitor General, and *James T. Farrell*, Assistant Attorney General, for the state of Michigan.

PER CURIAM. The issue presented in this appeal is whether, under the parked vehicle provisions of the no-fault act, MCL 500.3106(1), a police cruiser that is parked at least partially on a roadway, for the purpose of aiding a stalled vehicle and with its emergency lights flashing, presents an *unreasonable* risk of bodily injury, such that the state may be held liable under the no-fault act. The Court of Appeals concluded that a disabled vehicle that had come to rest in the right-hand lane of a highway and a state police cruiser that stopped behind it were both vehicles parked in such a way as to cause an unreasonable risk within the meaning of MCL 500.3106(1)(a). We reverse the portion of the Court of Appeals decision pertaining to the state police cruiser.[1]

I

The facts are not in dispute. On March 26, 1998, at about 8:20 P.M., Linda Jones was operating an automo-

[1] The only appeal before us is that filed by the state of Michigan on behalf of the state police. This opinion does not address liability issues related to the disabled vehicle.

bile in a northbound lane of Dixie Highway in Saginaw County. In the area where Jones was driving, Dixie Highway is a five-lane road (two southbound lines, two northbound lines, and a middle turn lane) with a speed limit of forty-five miles an hour. A state police trooper at the scene described the area as well lit. A curb runs along the edge of the highway; there is no shoulder.

After her vehicle stalled, Jones maneuvered it into the right lane. She activated the vehicle's flashers. Another driver saw her and stopped behind her to offer help. A state trooper came upon the scene, and he stopped his police cruiser behind the other two vehicles. The trooper activated his cruiser's emergency lights and the driver-side spotlight. The trooper placed his police cruiser in park, got out of his cruiser, and talked to Jones and the other driver. After the other driver left, the trooper decided that he would try to use his cruiser to push Jones's vehicle off the road.

As the trooper was returning to his cruiser, a motorcycle operated by Douglas Amy, and with Tammy Sue Stewart as a passenger, approached the scene from behind. The motorcycle struck the rear of the police cruiser with considerable force. Amy was killed, and Stewart was seriously injured. Stewart had no insurance of her own, and many of her medical bills were paid by Medicaid.

Numerous lawsuits were filed in the Saginaw Circuit Court and the Court of Claims seeking no-fault benefits from the insurer of the vehicle driven by Ms. Jones and from the state of Michigan, as the self-insurer of the state police cruiser. Carla Amy, the widow of Douglas Amy, sought to recover survivor's benefits. MCL 500.3108. Stewart sought to recover first-party personal protection insurance (PIP) benefits. MCL 500.3107; MCL 500.3114(5). The Michigan Department

of Community Health (MDCH), acting as the collection agent for Medicaid, sought to recover amounts paid for Stewart's medical care. This appeal concerns the potential liability of the state of Michigan arising from the involvement of the police cruiser.

The circuit court determined that the police cruiser was a parked vehicle, within the meaning of MCL 500.3106, at the time of the accident and that the parked cruiser did not cause an unreasonable risk of bodily injury within the meaning of MCL 500.3106(1)(a).[2] Accordingly, the circuit court granted the state's motion for summary disposition under MCR 2.116(C)(10).[3]

The Court of Appeals agreed that the police cruiser was a parked vehicle. However, the Court concluded that, although the cruiser was legally parked under MCL 257.603,[4] it posed an unreasonable risk by virtue

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[2] MCL 500.3106(1)(a) provides:

> Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.

[3] As for the disabled vehicle, the circuit court found that it was also a parked vehicle, but that it posed an unreasonable risk.

[4] MCL 257.603(3), part of the Michigan Vehicle Code, provides:

> The driver of an authorized emergency vehicle may do any of the following:
>
> (a) Park or stand, irrespective of this act.
>
> (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.
>
> (c) Exceed the prima facie speed limits so long as he or she does not endanger life or property.

of the fact that it was parked on the traveled portion of the highway. *Amy v MIC Gen Ins Corp*, 258 Mich App 94, 133-136; 670 NW2d 228 (2003). The Court therefore reversed the circuit court's summary disposition ruling in favor of the state.

II

This is an appeal from a decision on a motion for summary disposition, which we review de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The underlying question before this Court is whether under § 3106(1) the police cruiser, which was parked on the roadway for the purpose of aiding a stalled vehicle and with its emergency lights flashing, presented an *unreasonable* risk of bodily injury. When "the facts are undisputed, the determination of whether an automobile is parked in such a way as to create an unreasonable risk of bodily injury within the meaning of § 3106(1)(a) is an issue of statutory construction for the court." *Wills v State Farm Ins Cos*, 437 Mich 205, 208; 468 NW2d 511 (1991). We likewise review such statutory construction issues de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991).

III

A no-fault insurer is responsible for paying first-party PIP benefits "for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(1). For purposes of this appeal, the parties agree that the police cruiser was "parked" at the time of

(d) Disregard regulations governing direction of movement or turning in a specified direction.

the accident. Under the no-fault act, accidental bodily injury "does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle . . . ," MCL 500.3106(1), except in the three situations set forth in MCL 500.3106(1)(a), (b), and (c). Relevant to this case is the first of these exceptions:

> The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred. [MCL 500.3106(1)(a).]

IV

Contrary to the reasoning of the Court of Appeals, the statutory language in MCL 500.3106(1)(a) that is at issue (i.e., a vehicle may be parked in such a way "as to cause unreasonable risk . . .") recognizes that there are degrees of risk posed by a parked vehicle. The statutory language does not create a rule that whenever a motor vehicle is parked entirely or in part on a traveled portion of a road, the parked vehicle poses an unreasonable risk. In each case cited by the Court of Appeals it was determined that the vehicle involved posed an unreasonable risk (because it was parked partly or entirely on the traveled portion of a road). But that does not mean that the same result must necessarily obtain in a situation such as this, in which the parked vehicle was a police cruiser performing emergency services. Indeed, we find that the police cruiser in this case was not parked in such a fashion as to pose an *unreasonable* risk. We have no doubt that the cruiser posed a risk to other northbound vehicles and their occupants, and we have no doubt that, as the Court of Appeals said, the operator of the motorcycle had to perceive, react to, and navigate around the police cruiser. But none of this answers the question whether the parked police cruiser constituted an *unreasonable* risk.

The policy underlying the parked vehicle exclusion was explained in *Miller v Auto-Owners Ins Co*, 411 Mich 633, 639-641; 309 NW2d 544 (1981):

> Injuries involving parked vehicles do not normally involve the vehicle *as a motor vehicle*. Injuries involving parked vehicles typically involve the vehicle in much the same way as any other stationary object (such as a tree, sign post or boulder) would be involved. There is nothing about a parked vehicle *as a motor vehicle* that would bear on the accident.
>
> The stated exceptions to the parking exclusion clarify and reinforce this construction of the exclusion. Each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle—characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents.
>
> Section 3106(a), which excepts a vehicle parked so as to create an unreasonable risk of injury, concerns the act of parking a car, which can only be done in the course of using the vehicle as a motor vehicle, and recognizes that the act of parking can be done in a fashion which causes an unreasonable risk of injury, as when the vehicle is left in gear or with one end protruding into traffic.
>
> * * *
>
> Each of the exceptions to the parking exclusion thus describes an instance where, although the vehicle is parked, its involvement in an accident is nonetheless directly related to its character as a motor vehicle. The underlying policy of the parking exclusion is that, except in three general types of situations, a parked car is not involved in an accident *as a motor vehicle*. It is therefore inappropriate to compensate injuries arising from its nonvehicular involvement in an accident within a system designed to compensate injuries involving motor vehicles as motor vehicles. [Emphasis in original.]

As even the Court of Appeals recognized, factors such as the manner, location, and fashion in which a vehicle

is parked are material to determining whether the parked vehicle poses an unreasonable risk.[5] In this case, a police cruiser was parked in a travel lane, but it was parked in an area that was well lit, with its emergency lights flashing, with its spotlight on, and it was parked there for the purpose of providing necessary emergency services to a stalled vehicle that itself posed a risk of bodily injury. The stalled vehicle ahead of it also had its flashing lights on. The speed limit was forty-five miles an hour. Moreover, there was another northbound lane available, and the middle turn lane was potentially available for other vehicles to use. There is nothing in the record to suggest that an oncoming northbound driver would not have ample opportunity to observe, react to, and avoid the hazard posed by the police cruiser. In short, we find that the parked police cruiser in this case did not pose an *unreasonable* risk within the meaning of MCL 500.3106(1)(a).

V

The Court of Appeals decision is reversed to the extent it holds that the police cruiser was parked in such a way as to cause an unreasonable risk within the meaning of MCL 500.3106(1)(a). The circuit court's order of summary disposition in favor of the state of Michigan, as the self-insurer of the state police cruiser, is reinstated.

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

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[5] 258 Mich App 133-134.

HALIW v CITY OF STERLING HEIGHTS

Docket No. 125022. Argued October 6, 2004 (Calendar No. 5). Decided January 25, 2005.

Valeria and Ilko Haliw brought an action in the Macomb Circuit Court against the city of Sterling Heights after Valeria Haliw slipped and fell on an icy sidewalk. The city moved for summary disposition, arguing that the plaintiffs' claim was barred by the natural accumulation doctrine. The trial court denied the motion. The case was submitted to mediation, now case evaluation, and both parties rejected the award in the plaintiffs' favor. After granting the city leave to appeal the trial court's denial of summary disposition, the Court of Appeals, COLLINS, P.J., and SAWYER and CAVANAGH, JJ., in an unpublished opinion per curiam, issued October 5, 1999 (Docket No. 206886), affirmed. The Supreme Court granted the city leave to appeal, reversed the judgment of the Court of Appeals, concluding that the plaintiffs' claim was barred, and remanded the case to the trial court for entry of an order granting the city summary disposition. 464 Mich 297 (2001). On remand, the city moved for entry of an order granting summary disposition and requested case evaluation sanctions, which included the city's appellate attorney fees and costs. The trial court, Edward A. Servitto, Jr., J., granted summary disposition, but concluded that, although the city was entitled to an award of some of its trial court attorney fees and costs, the city was not entitled to its appellate attorney fees or costs under MCR 2.403(O). The city appealed the order granting sanctions, arguing that the trial court improperly excluded its appellate attorney fees and costs. The plaintiffs cross-appealed, arguing that the trial court should not have awarded any sanctions pursuant to the "interest of justice" exception in MCR 2.403(O)(11). The Court of Appeals, MARKEY, P.J., and ZAHRA, J. (WHITE, J., dissenting), reversed, holding that appellate fees and costs may be recovered under MCR 2.403(O). 257 Mich App 689 (2003). The Supreme Court granted leave to appeal. 470 Mich 869 (2004).

In a unanimous opinion by Justice CAVANAGH, the Supreme Court *held*:

"Actual costs" pursuant to MCR 2.403(O) do not include appellate attorney fees and costs. The decision of the Court of Appeals must be reversed, the trial court's award must be reinstated, and the matter must be remanded to the Court of Appeals for consideration of the plaintiffs' cross-appeal.

Specific court rules control over general ones. The rules governing case evaluation sanctions are in chapter two, which addresses civil procedure. Chapter seven addresses appellate fees and costs and controls appellate procedure. The Court of Appeals failure to appreciate this organization of the rules led it to incorrectly conclude that because MCL 2.403(O) did not specifically exclude appellate attorney fees and costs, the rule necessarily included them as case evaluation sanctions.

Michigan follows the "American rule," under which attorney fees are generally not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. The "American rule" is codified at MCL 600.2405(6). Appellate attorney fees and costs are not recoverable as case evaluation sanctions under MCR 2.403(O), which is a trial-oriented court rule. The failure of MCR 2.403(O) to expressly exclude appellate attorney fees and costs is not determinative of the issue whether the rule allows appellate attorney fees and costs as case evaluation sanctions. The Court of Appeals erred in holding to the contrary.

Nothing in the 1997 amendment of the court rule shows an intent to permit the recovery of appellate attorney fees and costs. The Court of Appeals analysis went beyond the intent of the 1997 amendment and the actual language used in the amendment.

The Court of Appeals also erred in determining that *Keiser v Allstate Ins Co*, 195 Mich App 369 (1992), and *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511 (1997), support the conclusion that appellate attorney fees and costs are recoverable under MCR 2.403(O).

Reversed and remanded to the Court of Appeals.

PRETRIAL PROCEDURE — CASE EVALUATION — SANCTIONS — APPELLATE ATTORNEY FEES — APPELLATE COSTS.

Appellate attorney fees and costs are not recoverable as case evaluation sanctions under MCR 2.403(O).

Haliw, Siciliano, Mychalowych, Van Dusen and Feul, PLC (by *Raymond L. Feul, Elaine Stypula*, and *Lindsay James*), for the plaintiffs.

O'Reilly Rancilio P.C. (by *Robert Charles Davis* and *William N. Listman*) for the defendant.

Amicus Curiae:

John P. Jacobs, P.C. (by *John P. Jacobs*), for Michigan Defense Trial Counsel, Inc.

CAVANAGH, J. At issue in this case is whether appellate attorney fees and costs are recoverable as case evaluation sanctions under MCR 2.403(O). We hold that "actual costs" pursuant to MCR 2.403(O) do not include appellate attorney fees and costs. Because the Court of Appeals held to the contrary, we reverse its decision, reinstate the trial court's award, and remand the case to the Court of Appeals for consideration of plaintiffs' cross-appeal.

I. FACTS AND PROCEEDINGS

Plaintiff Valeria Haliw was walking on a snow-covered sidewalk when she slipped and fell on a patch of ice that formed in a depressed area where two sections of the sidewalk met. Mrs. Haliw and her husband, plaintiff Ilko Haliw, brought suit under MCL 691.1402, alleging that defendant city of Sterling Heights breached its duty to maintain the sidewalk so that it was reasonably safe and convenient for public travel. Defendant moved for summary disposition under MCR 2.116(C)(7) and (10), asserting that plaintiffs' claim was barred by the natural accumulation doctrine. Before the trial court ruled on the motion, however, the matter was submitted to case evaluation pursuant to MCR 2.403.[1]

On September 8, 1997, the trial court denied defen-

[1] When this action commenced, MCR 2.403(O) used the term "mediation." In 2000, this Court amended the court rule and, among other things, changed the rule's terminology. The term "mediation" was

dant's motion for summary disposition. On October 13, 1997, both parties rejected the unanimous case evaluation award of $55,000 in plaintiffs' favor. Defendant then appealed by leave granted the trial court's denial of its motion for summary disposition, and the Court of Appeals affirmed.[2] This Court granted defendant's application for leave to appeal and reversed, determining that the natural accumulation doctrine precluded plaintiffs' claim.[3] Consequently, this Court remanded the case to the trial court for entry of summary disposition in favor of defendant.

In addition to moving on remand for entry of an order granting it summary disposition, defendant also requested case evaluation sanctions under MCR 2.403(O). Defendant sought $31,618 in sanctions; included in this amount were defendant's appellate costs and attorney fees. Consistent with this Court's decision, the trial court entered summary disposition in defendant's favor. The trial court, however, rejected defendant's request for appellate attorney fees and costs. Defendant subsequently moved to recover $5,335 in case evaluation sanctions for its trial court fees and costs. After considering defendant's supplemental motion, the trial court awarded defendant $1,500 in case evaluation sanctions.

Defendant appealed, asserting that the trial court impermissibly excluded its appellate attorney fees and

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replaced by the term "case evaluation." Thus, for simplicity, we will use the current terminology when discussing MCR 2.403(O).

[2] Unpublished opinion per curiam of the Court of Appeals, issued October 5, 1999 (Docket No. 206886).

[3] *Haliw v Sterling Hts*, 464 Mich 297; 627 NW2d 581 (2001) *(Haliw I)*. In *Haliw I*, I joined Justice KELLY's dissent and would have affirmed the trial court's ruling. I remain committed to the view that plaintiffs presented genuine issues of material fact sufficient to withstand defendant's summary disposition motion.

costs. Plaintiffs cross-appealed the trial court's award, arguing that the trial court abused its discretion by failing to apply the "interest of justice" exception, MCR 2.403(O)(11), to deny defendant any of its attorney fees and costs.

In a published two-to-one decision, the Court of Appeals reversed, holding that appellate attorney fees may be awarded under MCR 2.403(O) because (1) such fees are not expressly excluded, (2) a trial is not necessary to trigger sanctions, and (3) the applicable verdict for assessing sanctions is the verdict rendered after appellate review.[4] Because the Court of Appeals majority held that the trial court erred by refusing to consider defendant's appellate attorney fees and costs, the panel did not determine whether the trial court abused its discretion in failing to invoke the "interest of justice" exception under MCR 2.403(O)(11). We granted plaintiffs' application for leave to appeal, limited to the issue whether appellate attorney fees and costs are recoverable as case evaluation sanctions under MCR 2.403(O).[5]

II. STANDARD OF REVIEW

The proper interpretation and application of a court rule is a question of law, which this Court reviews de novo. *Bauroth v Hammoud*, 465 Mich 375, 378; 632 NW2d 496 (2001); *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

III. ANALYSIS

When called upon to interpret and apply a court rule, this Court applies the principles that govern statutory interpretation. *Grievance Administrator v Underwood*,

[4] 257 Mich App 689; 669 NW2d 563 (2003).

[5] 470 Mich 869 (2004).

462 Mich 188, 193; 612 NW2d 116 (2000). Accordingly, this Court begins with the language of the court rule. *Id.* at 194. At the time both parties rejected the case evaluation award, MCR 2.403(O) provided in pertinent part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.
>
> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.
>
> * * *
>
> (6) For the purpose of this rule, actual costs are
>
> (a) those costs taxable in any civil action, and
>
> (b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.
>
> For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.
>
> * * *
>
> (8) A request for costs under this subrule must be filed and served within 28 days after the entry of the judgment or entry of an order denying a timely motion for a new trial or to set aside the judgment.

* * *

> (11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole. When interpreting a court rule or statute, we must be mindful of "the surrounding body of law into which the provision must be integrated . . . ." *Green v Bock Laundry Machine Co*, 490 US 504, 528; 109 S Ct 1981; 104 L Ed 2d 557 (1989) (Scalia, J., concurring). Here, neither the language of MCR 2.403(O) nor the entire structure of our court rules supports the Court of Appeals construction. Accordingly, we conclude that appellate attorney fees and costs are not recoverable as case evaluation sanctions.

MCR 1.103 provides that specific court rules control over general court rules. The court rule governing case evaluation sanctions appears in chapter two, which addresses civil procedure. Appellate fees and costs are addressed under chapter seven, the chapter specifically controlling appellate procedure. Thus, the lack of any reference to appellate attorney fees and costs in MCR 2.403(O) is understandable because they are covered under an entirely separate section of the court rules.[6] The Court of Appeals failure to appreciate this organization of the court rules led it to incorrectly conclude that because MCR 2.403(O) did not specifically *exclude* appellate attorney fees and costs, the court rule necessarily *included* them as a case evaluation sanction.

We note that Michigan follows the "American rule" with respect to the payment of attorney fees and costs.

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[6] See, e.g., MCR 7.213(A)(6), MCR 7.216(C), and MCR 7.316(D).

Dessart v Burak, 470 Mich 37, 42; 678 NW2d 615 (2004). Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award. *Id*. The American rule is codified at MCL 600.2405(6), which provides that among the items that may be taxed and awarded as costs are "[a]ny attorney fees authorized by statute or by court rule." The American rule stands in stark contrast to what is commonly referred to as the "English rule," whereby the losing party pays the prevailing party's costs absent an express exception. MCR 2.403(O)(6) exemplifies the American rule by expressly authorizing the recovery of attorney fees and costs as case evaluation sanctions.

While MCR 2.403(O)(6) expressly authorizes recovery of "a reasonable attorney fee" and "costs," and the court rule does not distinguish between trial and appellate attorney fees and costs, the Court of Appeals erred in concluding that because MCR 2.403(O) does not expressly exclude appellate attorney fees and costs, such expenses are recoverable. That conclusion runs contrary to the American rule governing the payment of attorney fees. As noted, the American rule permits recovery of fees and costs where *expressly authorized*. As such, the fact that MCR 2.403(O) does not expressly *exclude* appellate fees and costs is not determinative. Therefore, we do not believe that the failure of MCR 2.403(O) to expressly exclude appellate attorney fees and costs is necessarily dispositive under these limited circumstances.

Our conclusion is supported by the fact that MCR 2.403(O) is trial-oriented. For example, at the time of this action, MCR 2.403(O)(1) provided, "If a party has rejected an evaluation and the action proceeds to ver-

dict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation." MCR 2.403(O)(2) then defines "verdict" as follows:

> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.

The most natural reading of MCR 2.403(O)(1) and (2) contemplates a trial-oriented court rule. Notably absent from the definition of "verdict," or any part of MCR 2.403(O) for that matter, is any mention of the appellate process.

In 1997, this Court amended MCR 2.403(O) and changed the phrase in MCR 2.403(O)(1) from "the action proceeds to trial" to "the action proceeds to verdict." In support of its conclusion that appellate fees and costs are recoverable, the Court of Appeals relied on this amendment. The Court of Appeals reasoned that because this Court "de-emphasiz[ed]" a trial as the "determinative proceeding," this Court somehow intended that appellate attorney fees and costs should now be recoverable as case evaluation sanctions. *Haliw, supra* at 698. However, the purpose of the 1997 amendment was narrower than that assumed by the Court of Appeals and, thus, the amendment does not support the Court of Appeals rationale.

Until this Court amended MCR 2.403(O) in 1997, it was sufficiently unclear whether a judgment that entered as a result of a dispositive motion instead of a trial would engender sanctions. By amending the court rule, this Court clarified that case evaluation sanctions may indeed be available when a case is resolved after case evaluation by a dispositive motion. As such, the Court

of Appeals analysis went beyond the intent of the 1997 amendment and the actual language used in the amendment.

Moreover, we believe that the Court of Appeals mistakenly relied on *Keiser v Allstate Ins Co*, 195 Mich App 369; 491 NW2d 581 (1992), and *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511; 575 NW2d 36 (1997), to support its ultimate conclusion that appellate attorney fees and costs are recoverable. In *Keiser*, the plaintiff brought an action for no-fault benefits against the defendant. The case evaluation resulted in an award of $12,000 in the plaintiff's favor. The plaintiff rejected the award, and the defendant accepted. As such, the case proceeded to trial, the defendant unsuccessfully moved for a directed verdict, and the jury awarded the plaintiff an amount in excess of the case evaluation award. The defendant appealed, and the Court of Appeals held that the trial court erred by denying the defendant's directed verdict motion. *Keiser v Allstate Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 1989 (Docket No. 101312).

The *Keiser* defendant then moved for case evaluation sanctions under MCR 2.403(O). The trial court ordered the plaintiff to pay the defendant's trial costs and fees. Notably, "[n]o costs or fees were awarded for any appellate or posttrial activity." *Keiser*, *supra* at 371. The plaintiff challenged the imposition of sanctions for the defendant's trial costs and fees, and the Court of Appeals affirmed. The *Keiser* Court noted:

> The only issue on appeal is whether, after a party rejects a [case] evaluation [award] and, following a trial, a verdict more favorable to the rejecting party is returned, MCR 2.403(O) allows the imposition of sanctions on the rejecting party following appellate reversal of the verdict where the final result is no longer favorable to that party. [*Id*.]

Accordingly, the Court of Appeals in *Keiser* concluded "that it is the ultimate verdict that the parties are left with after appellate review is complete that should be measured against the [case] evaluation [award] to determine whether sanctions should be imposed on a rejecting party pursuant to MCR 2.403(O)." *Id*. at 374-375. The *Keiser* panel, however, clearly did not see itself deciding the question presented in this case—i.e., whether appellate attorney fees and costs are recoverable under the court rule. In fact, *Keiser* deliberately noted the decisions in *American Cas Co v Costello*, 174 Mich App 1; 435 NW2d 760 (1989), and *Giannetti Bros Constr Co v City of Pontiac*, 175 Mich App 442; 438 NW2d 313 (1989), which held that appellate fees and costs are not recoverable under MCR 2.403(O). Further, the *Keiser* panel observed that "sanctions for appellate expenses are expressly set forth in MCR 7.216(C), which does not provide for [case evaluation] sanctions." *Keiser, supra* at 374.

As such, *Keiser* and its progeny merely stand for the proposition that the instant defendant may seek case evaluation sanctions for its trial attorney fees and costs because the result following appeal governs for purposes of MCR 2.403(O). However, *Keiser* cannot be interpreted as concluding that appellate attorney fees and costs are recoverable under the court rule. Thus, we believe that the Court of Appeals misread the *Keiser* decision to support its ultimate holding.[7]

In sum, we disagree with the Court of Appeals rationale because none of the bases that the panel relied

[7] In *Marketos v American Employers Ins Co*, 465 Mich 407, 414 n 9; 633 NW2d 371 (2001), this Court expressed no opinion regarding the validity of *Keiser*, *supra*, because the issue raised in *Keiser* was not then before us. In this case, however, the issue is squarely before this Court. Accordingly, we take this opportunity to approve of *Keiser*'s narrow application of MCR 2.403(O) under the facts presented in that case.

on necessitates the conclusion that appellate attorney fees and costs are recoverable under MCR 2.403(O). Rather, our reading of MCR 2.403(O) compels us to conclude that the court rule is trial-oriented.[8]

IV. CONCLUSION

We hold that appellate attorney fees and costs are not recoverable as case evaluation sanctions under MCR 2.403(O). Accordingly, we reverse the decision of the Court of Appeals and reinstate the trial court's award. Because the Court of Appeals did not determine whether the trial court abused its discretion in failing to invoke the "interest of justice" exception under MCR 2.403(O)(11), we remand to the Court of Appeals for consideration of plaintiffs' cross-appeal.

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

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[8] Moreover, in support of our conclusion that MCR 2.403(O) is trial-oriented, we note that a request for case evaluation sanctions must be made within twenty-eight days after entry of the judgment, MCR 2.403(O)(8), generally a time before the bulk of appellate fees and costs have been incurred. In addition, MCR 2.403(O)(6)(b) allows recovery of attorney fees "necessitated by" the rejection of the case evaluation. While a causal nexus plainly exists between rejection and trial fees and costs, the same cannot be said with respect to rejection and the decision to bring an appeal. Rather, appellate attorney fees and costs are arguably "necessitated by" a perceived erroneous trial court ruling.

We are cognizant of prior decisions of the Court of Appeals that have construed the phrase "necessitated by the rejection" as a mere temporal demarcation. See, e.g., *Michigan Basic Prop Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 235; 486 NW2d 68 (1992). On the basis of the language of MCR 2.403(O), however, we believe the better-reasoned approach goes beyond a temporal demarcation and requires a causal nexus between rejection and incurred expenses.

NASTAL v HENDERSON & ASSOCIATES INVESTIGATIONS, INC

Docket No. 125069. Argued October 5, 2004 (Calendar No. 3). Decided January 25, 2005.

Ronald M. and Irene Nastal brought an action in the Wayne Circuit Court, Cynthia D. Stephens, J., against Henderson & Associates Investigations, Inc., and others, alleging, among other things, a claim of civil stalking. The defendants moved for summary disposition, alleging, in part, that their surveillance of Ronald Nastal fit within an exception in the stalking statute that exempts conduct that serves a legitimate purpose. MCL 750.411h(1)(c). The circuit court denied the motion on the basis that there was a genuine issue of material fact regarding whether the defendants' actions continued to serve a legitimate purpose after Ronald Nastal discovered the surveillance. The Court of Appeals, CAVANAGH, P.J., and WHITE and TALBOT, JJ., affirmed with respect to the stalking claim in an unpublished opinion per curiam, concluding that a genuine issue of material fact existed regarding the legitimacy of the surveillance after it was discovered (Docket No. 241200). The Supreme Court granted the defendants leave to appeal. 470 Mich 869 (2004).

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

Surveillance by licensed private investigators is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by MCL 338.822(b). The plaintiffs failed to establish a genuine issue of material fact that the conduct here complained of ever ceased serving such purpose. 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 defendants.

1. Surveillance by a licensed private investigator is conduct that serves a legitimate purpose, and is therefore not harassment under MCL 750.411h(1)(c), where the surveillance serves or contributes to the purpose of obtaining information, as permitted by MCL 338.822(b).

2. To constitute harassment, there must be two or more acts of unconsented contact that actually cause the victim emotional

distress and that would also cause a reasonable person such distress. Conduct that is constitutionally protected or serves a legitimate purpose cannot constitute harassment or, derivatively, stalking. Conduct that serves a legitimate purpose means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute.

3. Surveillance, when it is conducted to obtain evidence concerning a party's claim in a lawsuit, is valid and well within the law.

Reversed and remanded.

Justice CAVANAGH, joined by Justice KELLY, dissenting, stated that a genuine issue of material fact exists regarding whether the conduct at issue in this matter served a legitimate purpose. It is not sufficient to examine the defendants' conduct in a vacuum and find that the conduct was appropriate because the defendants had a legitimate purpose in gathering information relating to the plaintiffs' underlying lawsuit. The appropriate analysis is whether the conduct engaged in by the defendants served a legitimate purpose. Certain tactics that an investigator may employ in conducting surveillance may not serve a legitimate purpose and may remove the investigator from the "legitimate purpose" shield. The judgment of the Court of Appeals should be affirmed.

CRIMINAL LAW — STALKING — LICENSED PRIVATE INVESTIGATORS — SURVEILLANCE.

Surveillance by a licensed private investigator that serves or contributes to the purpose of obtaining information, as permitted by MCL 338.822(b), is conduct that serves a legitimate purpose and therefore is not harassment or, derivatively, stalking; conduct that serves a legitimate purpose means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute (MCL 750.411h[1][c]).

Barbara H. Goldman and *Sheldon L. Miller* for the plaintiffs.

Kaufman, Payton & Chapa (by *Donald L. Payton* and *Frank A. Misuraca*) for the defendants.

Amici Curiae:

Martin L. Critchell for Michigan Self-Insurers Association.

Willingham & Coté, P.C. (by *Curtis R. Hadley* and *Matthew K. Payok*), for Michigan Council of Private Investigators, Michigan Professional Bail Agents Association, and Court Officers and Deputy Sheriffs, Process Servers of Michigan.

Michelle L. Pinter for McMurray, Baio and Associates.

TAYLOR, C.J. In this case, where plaintiff Ronald M. Nastal[1] alleges stalking by private investigators conducting surveillance, we granted leave to consider if, and when, such surveillance falls within the safe harbor in the stalking statute that exempts "conduct that serves a legitimate purpose." MCL 750.411h(1)(c). The circuit court concluded that surveillance could serve a legitimate purpose but that, here, there was a genuine issue of material fact regarding whether the defendants' surveillance continued to serve a legitimate purpose after it had been discovered. It thus determined that the viability of plaintiff's stalking claim depended upon a factual determination by the jury. The Court of Appeals affirmed the circuit court's ruling on that issue.[2] We conclude that surveillance by licensed private investigators that contributes to the goal of obtaining information, as permitted by the Private Detective License Act, MCL 338.822(b)(i)-(v), is conduct that serves a legitimate purpose. In the present case, plaintiff failed to establish a genuine issue of material fact that the conduct here complained of ever ceased serving such purpose, notwithstanding the fact that plaintiff

[1] Plaintiff Irene Nastal's claim is for loss of consortium, which is derivative. Therefore, we refer to Ronald Nastal as "plaintiff."

[2] *Nastal v Henderson & Assoc Investigations,* unpublished opinion per curiam of the Court of Appeals, decided October 30, 2003 (Docket No. 241200).

observed the investigators following him. We therefore reverse the judgment of the Court of Appeals and remand this case to the circuit court for entry of summary disposition in defendants' favor.

I. FACTS AND PROCEDURAL HISTORY BELOW

Following a 1997 accident in which a tractor-trailer collided with plaintiff Ronald Nastal's car, Nastal sued the tractor-trailer's operator and owner, asserting negligence by the driver and seeking damages for a closed head injury. Defense of the action was undertaken by the owner's insurance carrier, Citizens Insurance Company of America (Citizens).

In the course of discovery, neuropsychological and neurosurgery evaluations were undertaken. The neuropsychological expert concluded that Nastal was not suffering any residual deficits as a result of a brain injury and that he instead possessed a personality disorder known as "somatoform pain disorder" that caused him to perceive symptoms as being worse than can be objectively determined. The neurosurgery evaluation, undertaken at the behest of Nastal's employer, concluded that, although he had previously been diagnosed with a remote mild head injury, the injury had been totally resolved and Nastal was able to return to work. Moreover, the physician who conducted that evaluation opined that Nastal appeared to be suffering from depression and recommended a psychiatric examination.

The action was referred to case evaluation pursuant to MCR 2.403,[3] and the panel returned an award of $450,000 for plaintiff. Citizens rejected the award,

[3] Case evaluation was referred to as mediation at the time it was conducted in the action. MCR 2.403, 2000 Staff Comment.

deeming it excessive. Citizens also decided to again have plaintiff's medical records reviewed, refer plaintiff to Dr. Leon Quinn for a psychiatric examination, and have an investigation and surveillance of Nastal performed to monitor his activities.

On June 8, 1999, Citizens' adjuster, Penny Judd, sent a fax to Henderson & Associates Investigations, Inc. (Henderson), a licensed private investigation firm, requesting a background check, activities check, and surveillance of plaintiff. The particulars of how the surveillance was to be conducted were left to Henderson.

Conducting the first surveillance on Wednesday, June 30, 1999, Andrew Conley, one of Henderson's investigators, followed Nastal as he drove from his home. After surveilling him for forty-five minutes, Conley, because of the way Nastal began to drive, thought Nastal may have been attempting to determine if he was being followed by Conley's vehicle. Following that, Nastal parked his car and entered a medical facility. Conley, unsure if Nastal was aware of the surveillance, waited outside in his car in a parking lot across the street. When Nastal did come out, he came over to Conley's car and asked Conley if he was following him. Conley denied that he was, and Nastal replied by shouting profanities at him. Shortly thereafter, evidently alerted by the personnel of the medical facility, the local police appeared and spoke to Conley and Nastal. Nastal, agitated and cursing, repeated his concerns that he was being followed and that Conley had untruthfully denied following him. The officer told Nastal to calm down and shortly thereafter Conley left to call his supervisor, Gregory Henderson. Gregory Henderson instructed Conley to terminate the surveillance for that day because, as both Gregory Henderson and Conley testified,

when the subject of surveillance has discovered the surveillance, there is little purpose in continuing it at that time because the subject will not act unaffectedly or naturally.

A week later, on July 6, 1999, Conley and another investigator, Nathaniel Stovall, followed Nastal in separate cars as he drove to a number of locations. After Nastal returned home later in the day, Conley and Stovall parked their cars in separate places near his house to observe his activities. Nastal apparently noticed Conley and Stovall and called the police. Conley testified that he not only did not speak to the police officers that day, but also was unaware of their presence, and further had no indication that Nastal had called them or was aware of the reactivated surveillance. Stovall testified that he spoke to the police officers and was told, not that Nastal had called, but that someone in the neighborhood had called to report a suspicious vehicle. Stovall indicated that a police inquiry of this sort is a frequent occurrence when doing surveillance and, accordingly, it did not cause him to necessarily think that Nastal was aware of the surveillance.

On July 7, 1999, Henderson informed Judd that their surveillance had revealed that Nastal had been active, and that Nastal had confronted Conley on the first day of surveillance. Although Judd was concerned that Nastal might alter his activities because he was aware of the surveillance, she authorized further surveillance.

On July 8, 1999, an uneventful surveillance was conducted because plaintiff stayed at home all day. When informed of this, Judd stated that, because Nastal had confronted Conley at the beginning of the week and might suspect that he was being followed, surveillance should be discontinued for a few weeks. Gregory

Henderson described this period of nonsurveillance as a "cooling off" period, and indicated that it is usually employed by private investigators when they are concerned that the subject of their surveillance has detected their presence.

Twenty-two days later, on July 31, 1999, Conley and Stovall, again in separate cars, followed Nastal to a mall. While so engaged, both Conley and Stovall indicated that Nastal got behind Conley's car and appeared to be trying to write down Conley's license plate number. Further, once in the parking lot of the mall, plaintiff also turned in tight circles and appeared to by trying to get behind Stovall's car. Gregory Henderson, when made aware of this by a call from Conley, told both investigators to not terminate the surveillance because neither man could confirm that Nastal was actually aware that a surveillance was being conducted. Yet later, when Nastal began to attempt to evade Conley and Stovall, Henderson told Conley and Stovall to terminate the surveillance for that day because he believed it was no longer productive.

Dr. Quinn's report was received in Citizens' mailroom on Friday, July 30, 1999, but read by Judd early the next week. In the report, Dr. Quinn concluded that Nastal was primarily suffering from a depressive disorder and that there were undoubtedly more factors than just the 1997 accident causing his depression. He further recommended that plaintiff be referred to a psychiatrist or mental health clinic for treatment and that any surveillance being conducted be discontinued. He later explained that the recommendation to discontinue surveillance was based on his concern that the continued surveillance could make Nastal angry.

On August 4, 1999, Gregory Henderson called Judd and informed her that Nastal had again detected Conley

and Stovall's presence during the fourth surveillance on July 31, 1999. Judd told Gregory Henderson to stop conducting surveillance on the basis of Quinn's recommendation and her belief that the surveillance was not proving to be productive.

Over a year later on September 19, 2000, plaintiff filed a civil action alleging, among others, a claim of civil stalking pursuant to MCL 600.2954 against Henderson, Conley, and Stovall. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that surveillance serves a legitimate purpose pursuant to MCL 750.411h(1)(c) and, thus, that one engaged in it cannot be guilty of stalking. They asserted that plaintiff's stalking claim was barred because of immunity granted by law. They also asserted that Nastal had failed to state a claim on which relief could be granted, MCR 2.116(C)(8), and that, in any event, even assuming surveillance could in some circumstances be transformed into stalking, Nastal had produced no genuine issue of material fact on that point, MCR 2.116(C)(10). In the alternative, defendants asserted that even if Nastal were emotionally distressed by the actions of defendants, which constitutes a requirement of the statute, MCL 750.411h(1)(c), the requirement that the actions also would have emotionally distressed a reasonable person could not be shown because no reasonable litigant could claim that pretrial discovery is emotionally distressing.

The circuit court denied defendants' motion on the basis of its determination that defendants' surveillance initially served a legitimate purpose but that a genuine issue of material fact existed regarding whether the surveillance continued to serve that purpose after plaintiff discovered it. The court did not address defendants' alternative argument.

On appeal, the Court of Appeals affirmed the trial court's ruling on that issue, concluding that a genuine issue of material fact existed regarding the legitimacy of the surveillance after plaintiff confronted Conley during the first surveillance because, as the Court of Appeals interpreted the record, it had been conceded by defendants that surveillance can serve no purpose after the subject discovers it. The panel also rejected defendants' alternative argument on the basis that the issue whether a reasonable person would have suffered emotional distress as a result of defendants' surveillance was a question for the trier of fact.

We granted defendants leave to appeal. 470 Mich 869 (2004).

II. STANDARD OF REVIEW

We review de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer,* 471 Mich 109, 129; 683 NW2d 611 (2004). Questions of statutory interpretation are also reviewed de novo. *Id*.

When interpreting statutes, our primary goal is to give effect to the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). In doing so, our first step is to review the language of the statute itself. *Id*. The words used by the Legislature are given their common and ordinary meaning. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002); MCL 8.3a. If the statutory language is unambiguous, we must presume that the Legislature intended the meaning it clearly expressed and further construction is neither required nor permitted. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), but the circuit court

relied on MCR 2.116(C)(10) in denying defendants' motion. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. *Maiden, supra* at 120. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co,* 451 Mich 358; 547 NW2d 314 (1996).

III. ANALYSIS

In the early 1990s, the Legislature sought to address the inadequacy of existing criminal law, common-law causes of action, and court-ordered personal protection orders in protecting those who are maliciously followed, harassed, or intimidated by stalkers. Therefore, in 1992, it followed the lead of approximately two dozen other states that had enacted legislation specifically aimed at stalking and the special problems and circumstances surrounding it by criminalizing the offenses of stalking, MCL 750.411h, and aggravated stalking, MCL 750.411i. The Legislature also simultaneously amended the Revised Judicature Act to give a victim of stalking a civil action against the stalker, MCL 600.2954, with the elements of civil stalking being the same as those in the criminal statutes, MCL 600.2954(1).

Stalking is defined in MCL 750.411h(1)(d), which states:

> "Stalking" means a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized,

> frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

Accordingly, under Michigan civil and criminal law, stalking constitutes a willful course of conduct whereby the victim of repeated or continuous harassment actually is, and a reasonable person would be, caused to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

In defining harassment, the Legislature stated:

> "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact[4] that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does

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[4] "Unconsented contact" is defined as:

> [A]ny contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:
>
> (i) Following or appearing within the sight of that individual.
>
> (ii) Approaching or confronting that individual in a public place or on private property.
>
> (iii) Appearing at that individual's workplace or residence.
>
> (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.
>
> (v) Contacting that individual by telephone.
>
> (vi) Sending mail or electronic communications to that individual.
>
> (vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual. [MCL 750.411h(1)(e).]

> not include constitutionally protected activity or conduct that serves a legitimate purpose. [MCL 750.411h(1)(c).]

Thus, there must be two or more acts[5] of unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress. In any event, however, conduct that is constitutionally protected or serves a legitimate purpose cannot constitute harassment or, derivatively, stalking.

It is that safe harbor of "conduct that serves a legitimate purpose" that is the linchpin of this case. MCL 750.411h does not itself define "conduct that serves a legitimate purpose." Accordingly, because these are terms of common usage, we give them their plain and ordinary meaning by consulting dictionary definitions. *Horace v City of Pontiac,* 456 Mich 744, 755-756; 575 NW2d 762 (1998).

The *Random House Webster's College Dictionary* (2001) defines "serve" as "to answer the purpose," "to be in the service of; work for," "to answer the requirements of," or "to contribute to; promote." It further defines "legitimate," in part, as "according to the law; lawful," "in accordance with established rules, principles, or standards," "in accordance with the laws or reasoning; valid," "justified, genuine." *Id*. Thus, given the plain and ordinary import of the terms used by the Legislature, we conclude that the phrase "conduct that serves a legitimate purpose" means conduct that contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute.

The defendants here, private investigators licensed pursuant to MCL 338.821 *et seq*., are authorized to "obtain[] information with reference to any of the following":

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[5] MCL 750.411h(1)(a).

> (i) Crimes or wrongs done or threatened against the United States or a state or territory of the United States.
>
> (ii) The identity, habits, conduct, business, occupation, honesty, integrity, credibility, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of a person.
>
> (iii) The location, disposition, or recovery of lost or stolen property.
>
> (iv) The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.
>
> (v) Securing evidence to be used before a court, board, officer, or investigating committee. [MCL 338.822(b).]

Accordingly, surveillance,[6] when it is conducted to obtain evidence concerning a party's claim in a lawsuit, is valid and well within the law. Indeed, once involved in litigation, such as here, it is even more reasonable, in fact predictable, in a state such as Michigan that has a "strong historical commitment to a far-reaching, open and effective discovery practice," *Daniels v Allen Industries, Inc,* 391 Mich 398, 403; 216 NW2d 762 (1974),[7] that surveillance to secure or even lead to evidence is permitted "in order to narrow the range of disputed

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[6] See *Random House Webster's College Dictionary* (2001), which defines "surveillance" as "a watch kept over someone or something, esp. over a suspect, prisoner, etc.," and Black's Law Dictionary (6th ed), which defines it as "Oversight, superintendence, supervision. Police investigative technique involving visual or electronic observation or listening directed at a person or place (e.g., stakeout, tailing of suspects, wiretapping). Its objective is to gather evidence of a crime or merely to accumulate intelligence about suspected criminal activity."

[7] See also *Dorris v Detroit Osteopathic Hosp,* 460 Mich 26, 36; 594 NW2d 455 (1999), and *Domako v Rowe,* 438 Mich 347, 359; 475 NW2d 30 (1991). Discovery was liberalized in the General Court Rules of 1963 and opened even more expansively in the Michigan Court Rules of 1985. *Domako, supra* at 359.

issues which might otherwise needlessly waste the parties' and judicial resources." *Id.* at 406, 412.

It is only when the surveillance ceases to serve or contribute to the purpose of securing the information permitted by MCL 338.822(b) that conduct would be outside the statutory safe harbor of MCL 750.411h(1)(c) and a civil action for stalking could be maintained.

Here, the circuit court and the Court of Appeals incorrectly concluded that there was a genuine issue of material fact concerning whether defendants' surveillance ceased to serve a legitimate purpose once Nastal discovered it. There is no testimony to this effect. Rather, Conley, Stovall, and Gregory Henderson stated that once the subject of surveillance discovers that he is being observed, and the person performing the surveillance knows that the subject has detected his presence, any further surveillance of the subject *at that particular time* may serve no further purpose because the subject may modify his activities. Yet, as the testimony of both Gregory Henderson and Judd shows, they believed that further surveillance conducted at later times, especially after a cooling off period, could produce information useful to the case. Nastal produced no evidence to rebut this testimony as required by MCR 2.116(G)(4) and, therefore, failed to satisfy his burden of establishing that a genuine issue of material fact existed regarding whether defendants' surveillance continued to serve a legitimate purpose. In such circumstances, summary disposition in favor of the moving party is required. *Maiden, supra* at 120.[8] Accordingly, the trial court

[8] The dissent would reverse the burden of proof requirement and call on the defendants to establish a legitimate purpose rather than requiring the plaintiff to create a genuine issue of material fact regarding the elements of his cause of action. In so holding, it is inconsistent with MCR 2.116(G)(4) and *Maiden, supra.*

improperly denied defendants' motion for summary disposition and the Court of Appeals improperly affirmed that denial.

IV. CONCLUSION

Surveillance by a licensed private investigator is conduct that serves a legitimate purpose as long as the surveillance serves or contributes to the purpose of obtaining information, as permitted by MCL 338.822(b). Thus, surveillance conducted for and contributing to such purposes is beyond the stalking statute. The conduct at issue in this case served a legitimate purpose even after plaintiff observed the private investigators following him. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the circuit court for the entry of summary disposition in defendants' favor.

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

CAVANAGH, J. (*dissenting*). The majority's analysis in this case is flawed for one basic reason—it simply misapplies the law to the facts. This misapplication results in the majority reaching a conclusion that is contrary to the words used by the Legislature in the stalking statute, MCL 750.411h(1)(c). The majority errs because it does not truly examine whether defendants' *conduct* served a legitimate purpose. Because I believe that a genuine issue of material fact exists regarding whether the conduct at issue served a legitimate purpose, I respectfully dissent.

The civil stalking statute, MCL 600.2954, creates a civil cause of action for victims of stalking as defined by the criminal stalking statute, MCL 750.411h. "Stalk-

ing" is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d). "Harassment" is defined as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." MCL 750.411h(1)(c). Notably, MCL 750.411h(1)(c) further states, "Harassment does not include constitutionally protected activity or *conduct that serves a legitimate purpose*." (Emphasis added.)

Because the statutory language at issue in this case is clear and unambiguous, we must enforce the statute as written and follow its plain meaning, giving effect to the words chosen by the Legislature. *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004). Thus, to give effect to the words of the stalking statute, once a legitimate purpose is established, the essential question must be how the defendant's *conduct* at issue serves that legitimate purpose. In this case, the legitimate purpose was for defendants to provide information that would assist the insurance company that hired them in defending against plaintiff's claim. The examination, therefore, entails looking at how defendants' conduct served that legitimate purpose.

After plaintiff filed his underlying lawsuit, Citizens Insurance Company of America hired defendant Henderson & Associates Investigations, Inc. (Henderson), to conduct an "activities check" on plaintiff. The purpose of the activities check was to determine what plaintiff's

activities entailed. During one instance of surveillance, defendant Andrew Conley, a private investigator working for Henderson, followed plaintiff from his house to a restaurant and then to plaintiff's appointment with his therapist. Plaintiff noticed that he was being followed, and he spoke to his therapist about the incident. Plaintiff and his therapist went outside where plaintiff asked Conley if he was following plaintiff. Conley said he was not. Plaintiff did not believe this and became upset; he also wrote down the license plate number of the car Conley was driving. Conley then drove off and parked about one hundred to three hundred yards away before ultimately terminating the surveillance. The critical question in this incident is how the private investigator's actions served the legitimate purpose of gathering information about plaintiff to be used to defend against plaintiff's lawsuit. For example, how does following plaintiff and then lying to plaintiff about being followed serve the legitimate purpose of gathering information?

In some cases, following a person and lying about it to the person being followed may indeed be conduct that serves a legitimate purpose. For example, if an undercover police officer is conducting surveillance of a suspect and is then confronted by the suspect, the police officer may lie so that the undercover operation is not disclosed. However, in this case, defendants contend that plaintiff should not have been frightened by being followed because plaintiff was a party to a lawsuit. Defendants have repeatedly argued that "[a] reasonable person would understand that he's going to be under surveillance if that person files a lawsuit."[1] Therefore, I question what legitimate purpose was served by follow-

[1] Again, during oral argument, defendants argued "that a reasonable person who would be a plaintiff in a personal injury lawsuit, he or she has

ing plaintiff and then lying to plaintiff and telling him that he was *not* being followed. If plaintiff should already know that he may be followed because he is a party to a lawsuit, I fail to see how admitting to plaintiff that he is being followed because of the pending lawsuit would hamper the investigation. I understand the importance of wanting to be as secretive as possible about the actual surveillance, but once plaintiff realized that someone was following him, I do not see how, in this case, the legitimate purpose was served by lying.

Defendants cannot have it both ways. Defendants cannot argue that lying to plaintiff is critical in this case to keep the surveillance a secret so they can ascertain needed information. Defendants have already argued that plaintiff—by virtue of filing a lawsuit—should have known that he was likely to be followed and, therefore, should not have been afraid to see someone following him. Therefore, defendants must explain how, in this case, following plaintiff and then lying to him about it served a legitimate purpose.

In another instance, plaintiff was aware of being followed, and he detailed defendants' conduct in following him in and out of traffic. Another time, plaintiff realized he was being followed when he came out of his doctor's office. He telephoned his wife and she did not believe him when he told her, "half crying," that he was being followed. Because plaintiff was so afraid, plaintiff's wife was forced to come home. When she arrived, there were two cars parked near their home. After dressing like the plaintiff and leaving her home, plaintiff's wife realized that the two cars were following her, apparently because the drivers thought they were following her husband.

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an opportunity to know in fact that at some point during the litigation it may become an issue where he or she is placed under surveillance."

During the final incident of surveillance, private investigators followed plaintiff as he drove around in circles in a parking lot attempting to write down the license plate numbers of the cars the investigators were driving. They continued to follow plaintiff as he drove through traffic trying to "lose" the men who were following him. They drove through yellow lights and made an illegal right turn to follow plaintiff. One of the private investigators stated that it was clear plaintiff was trying to get away from them, but they continued to follow him anyway. It is important to note that at no time did defendants ever admit to plaintiff that they were indeed following him or tell him *why* he was being followed.

As stated, the issue is whether the conduct engaged in by defendants served a legitimate purpose. It is important to not merely examine the conduct at issue in a vacuum. Therefore, it is not enough to merely argue that defendants' conduct was appropriate because they had a legitimate purpose to provide information related to plaintiff's underlying lawsuit. Applying the statute in this manner disregards the words chosen by the Legislature and results in the majority essentially providing a generalized exemption for private investigators. The appropriate analysis requires more than the oversimplification adopted by the majority. In following, "tailing," sleuthing, or surveilling, is there no limit on an investigator's tactics? I think not. A private investigator's conduct—no matter how outrageous—is not excused merely because he is gathering information for a client. There must be some professional standards that, when violated, remove the investigator from the "legitimate purpose" shield.

A proper application of the law indicates that whether defendants' conduct served a legitimate purpose pre-

sents a genuine issue of material fact. Accordingly, because a reasonable juror could find that the conduct did not serve a legitimate purpose, I must respectfully dissent.

KELLY, J., concurred with CAVANAGH, J.

REPUBLIC BANK v GENESEE COUNTY TREASURER

Docket No. 126247. Decided on January 26, 2005. On application by the defendant for leave to appeal, the Supreme Court, in lieu of granting leave, reversed and remanded to the Court of Claims for further proceedings.

Republic Bank, as successor of D & N Bank, brought an action in the Court of Claims against the Genesee County Treasurer, alleging that the defendant failed to provide adequate notice of a tax foreclosure on property on which the plaintiff was the mortgagee. The Court of Claims, Beverley Nettles-Nickerson, J., granted summary disposition in favor of the plaintiff on the basis that the defendant had violated the notice provisions of MCL 211.78f and 211.78i. The Court of Appeals, GRIFFIN, P.J., and WHITE and DONOFRIO, JJ., granted leave to appeal and affirmed in an unpublished opinion per curiam, issued April 27, 2004 (Docket No. 251072). The defendant 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 General Property Tax Act, MCL 211.1 *et seq*., requires that notice of tax foreclosure proceedings be sent to an address reasonably calculated to apprise the object of the notice of the pending proceedings, and this requirement must be evaluated in the context of affording the object of the notice minimal due process.

1. Under the facts of this case, where the defendant relied on the address provided in the recorded mortgage, the plaintiff still operated a branch office at that address, and an employee of the plaintiff signed a certified mail receipt card for a notice sent to that address, the defendant not only complied with the minimum requirements of due process, but provided the plaintiff with actual notice of the hearings. The defendant clearly sent the notice to the address reasonably calculated to apprise the plaintiff of the hearings under MCL 211.78i.

2. The defendant failed to provide any notice under MCL 211.78f. That failure, standing alone, does not give rise to a due process claim. Here, where the plaintiff received constitutionally adequate notice, the minimal requirements of due process were

satisfied. Due process does not require the advance notice of MCL 211.78f when a person is given adequate notice and a meaningful opportunity to be heard pursuant to MCL 211.78i. The judgment of the Court of Appeals must be reversed and the matter must be remanded to the Court of Claims for further proceedings.

Justice KELLY, joined by Justice CAVANAGH, concurring, stated that a significant question exists about the constitutionality of the notice provisions of the General Property Tax Act. However, although the plaintiff was not given notice as required by MCL 211.78f, it did receive actual notice of the show cause and forfeiture hearings as required by MCL 211.78i. Thus, the actual notice plaintiff received satisfied the General Property Tax Act, MCL 211.1 *et seq*., and survives due process scrutiny.

Reversed and remanded.

1. TAXATION — TAX FORECLOSURES — NOTICE — DUE PROCESS.

The General Property Tax Act requires that notice of tax foreclosure proceedings be sent to an address reasonably calculated to apprise the object of the notice of the pending proceedings; the notice requirement of the act must be evaluated in the context of affording the object of the notice minimal due process (MCL 211.1 *et seq.*)

2. TAXATION — TAX FORECLOSURES — NOTICE — DUE PROCESS.

Due process does not require the advance notice of MCL 211.78f when a person entitled to notice of tax foreclosure proceedings under the General Property Tax Act is given adequate notice and a meaningful opportunity to be heard under MCL 211.78i.

Simon, Galasso & Frantz, PLC (by *Kenneth G. Frantz*), for the plaintiff.

Peter Goodstein for the defendant.

PER CURIAM. This case concerns the application of two notice provisions in the General Property Tax Act, MCL 211.1 *et seq*. We must determine whether plaintiff may maintain a claim under the act on the basis of defendant county treasurer's alleged failure to adequately notify plaintiff of a tax foreclosure on a piece of property on which plaintiff was the mortgagee. The Court of Claims granted summary disposition to plaintiff on a

finding that the notice given was insufficient under the act, and the Court of Appeals affirmed that decision. We reverse the judgment of the Court of Appeals and remand the case to the Court of Claims.

I

On August 5, 1999, D & N Bank gave a $490,000 loan to Karmo Flint Investment, Inc. This loan was secured by a mortgage on a gas station located in Grand Blanc Township in Genesee County, Michigan. The mortgage was recorded with the Genesee County Register of Deeds, and it listed D & N Bank's headquarters address in Hancock, Michigan, as the proper location for provision of any notice. The summer taxes on the secured property were due on the day the loan was closed. D & N Bank did not deduct the amount required to pay the then-delinquent property taxes from the funds disbursed to the mortgagor, and those 1999 summer taxes were mistakenly never paid. All subsequent tax assessments were paid by D & N Bank or by plaintiff Republic Bank as its successor.

The dispute between the parties in this case was engendered by the mailing of a hearing notice to what plaintiff alleges was the wrong address. This question of the proper address for the notice was a consequence of a bank merger that occurred before the mailing. In May 1999, D & N Financial Corporation, the holding company of D & N Bank, had merged with Republic Bancorp, Inc., the holding company of plaintiff Republic Bank. D & N Bank itself was subsequently merged into Republic Bank in December 2000. D & N Bank had its headquarters in Hancock. Republic Bank has its headquarters in Lansing, Michigan. After the bank merger, Republic Bank continued to maintain an office at the Hancock address. In fact, the former president and

chief executive officer of D & N Financial, who became vice-chairman of the board of directors and one of the largest shareholders of the merged corporation, maintained his office at the Hancock location, as did other corporate officers.

Karmo Flint Investment ultimately defaulted on its loan from D & N Bank. On November 1, 2001, a stipulated order was entered in a civil action filed by Republic Bank (as D & N Bank's successor) in Oakland Circuit Court. The order appointed a receiver for the secured property and authorized the receiver to take immediate possession and to borrow from Republic Bank the funds necessary to pay any delinquent and future property taxes.

Neither D & N Bank nor Republic Bank availed itself of the right granted by MCL 211.78a(4) to receive delinquent tax notices, and the 1999 summer tax delinquency did not come to Republic Bank's attention. Because those taxes were never paid, defendant Genesee County Treasurer commenced foreclosure proceedings on the Grand Blanc Township property. Defendant did not notify either D & N Bank or Republic Bank of the pending forfeiture of the property. Defendant did send out a notice of show cause and judicial foreclosure hearings in January 2002. The notice was sent by certified mail, return receipt requested, to the D & N Bank address in Hancock listed on the mortgage. On January 8, 2002, an employee at the Hancock office signed the return receipt. According to plaintiff, the notice never made it to the appropriate personnel at Republic Bank's Lansing headquarters.

Republic Bank did not send a representative to appear at the foreclosure hearing on February 19, 2002. At the hearing, the Genesee Circuit Court ordered a judgment of foreclosure to be entered on March 1, 2002.

Pursuant to that judgment, title in the property was to be vested in defendant if all delinquent taxes were not paid within twenty-one days of entry. Neither Republic Bank nor the receiver of the property paid the delinquent taxes. Consequently, defendant obtained title to the property on March 23, 2002.

Upon discovery of the loss of the property, Republic Bank filed this action seeking monetary relief in the Court of Claims, alleging that defendant had not provided proper notice of the foreclosure proceedings. At the close of discovery, both parties filed motions for summary disposition. The Court of Claims denied defendant's motion, and granted plaintiff's motion, finding that defendant had violated two notice provisions in the General Property Tax Act, MCL 211.78f and MCL 211.78i. The order granting plaintiff's motion was not a final judgment, because a hearing to determine plaintiff's damages was still required.

Defendant filed an application for leave to appeal with the Court of Appeals, which was granted. The Court of Appeals affirmed the decision of the Court of Claims.[1] It examined what it deemed the unique facts of this case and concluded that defendant had given plaintiff insufficient notice of the foreclosure proceedings. The Court of Appeals relied primarily on defendant's failure to mail the notice of show cause and foreclosure proceedings to Republic Bank at its Lansing headquarters. The Court concluded that mailing the notice to the Hancock address listed on the mortgage was not reasonably calculated to apprise plaintiff of the pendency of the proceedings, as required by the General Property Tax Act, MCL 211.78i. The Court added that, although defendant's failure to give notice of the threatened

[1] Unpublished opinion per curiam, issued April 27, 2004 (Docket No. 251072).

forfeiture, as required by MCL 211.78f, would not, standing alone, give rise to a due process claim, it was an important factual consideration in the Court's conclusion that the foreclosure notice failed to satisfy the requirements of due process.

II

The General Property Tax Act authorizes county treasurers to seize tax-delinquent property and sell it at auction in order to recover the delinquent taxes. It also imposes procedural safeguards in order to afford persons with an interest in such property an opportunity to be heard. Among those safeguards are various notice requirements. In this case, three provisions of the act are particularly relevant.

As an overall principle, MCL 211.78(2) provides that the adequacy of notice under the act is governed by state and federal due process standards, rather than by the specific provisions of the act. The subsection states as follows:

> It is the intent of the legislature that the provisions of this act relating to the return, forfeiture, and foreclosure of property for delinquent taxes satisfy the minimum requirements of due process required under the constitution of this state and the constitution of the United States but that those provisions do not create new rights beyond those required under the state constitution of 1963 or the constitution of the United States. The failure of this state or a political subdivision of this state to follow a requirement of this act relating to the return, forfeiture, or foreclosure of property for delinquent taxes shall not be construed to create a claim or cause of action against this state or a political subdivision of this state unless the minimum requirements of due process accorded under the state constitution of 1963 or the constitution of the United States are violated. [MCL 211.78(2).]

MCL 211.78f(1) requires a county treasurer to send certain parties notice of the date on which property will be forfeited to the county treasurer for unpaid delinquent taxes. The subsection states in part as follows:

> Except as otherwise provided in section 79 for certified abandoned property, not later than the February 1 immediately succeeding the date that unpaid taxes were returned to the county treasurer for forfeiture, foreclosure, and sale under section 60a(1) or (2) or returned to the county treasurer as delinquent under section 78a, the county treasurer shall send a notice by certified mail, return receipt requested, to the person to whom a tax bill for property returned for delinquent taxes was last sent and, if different, to the person identified as the owner of property returned for delinquent taxes as shown on the current records of the county treasurer and to those persons identified under section 78e(2). [MCL 211.78f(1).]

Plaintiff, as a holder of an undischarged mortgage, is an entity identified under section 78e(2).[2] Therefore, plaintiff was entitled to notice under section 78f(1). It is undisputed that defendant did not provide such notice.

The lower courts focused on the notice provision of MCL 211.78i. In January 2002, when defendant sent out its notice of show cause and foreclosure hearings, the section provided in relevant part as follows:[3]

> (1) Not later than May 1 immediately succeeding the forfeiture of property to the county treasurer under section 78g, the foreclosing governmental unit shall initiate a title search to identify the owners of a property interest in the property who are entitled to notice under this section of the

[2] MCL 211.78e(2)(b) lists (i) the owners, (ii) the holder of any undischarged mortgage, tax certificate issued under section 71, or other legal interest, (iii) a subsequent purchaser under any land contract, and (iv) a person entitled to notice of the return of delinquent taxes under section 78a(5).

[3] The section was substantially amended by 2003 PA 263.

> show cause hearing under section 78j and the foreclosure hearing under section 78k. . . .
>
> (2) The foreclosing governmental unit or its authorized representative shall determine the address reasonably calculated to apprise those owners of a property interest of the pendency of the show cause hearing under section 78j and the foreclosure hearing under section 78k and shall send notice of the show cause hearing under section 78j and the foreclosure hearing under section 78k to those owners, to a person entitled to notice of the return of delinquent taxes under section 78a(4), and to a person to whom a tax deed for property returned for delinquent taxes was issued pursuant to section 72 as determined by the records of the state treasurer, by certified mail, return receipt requested, not less than 30 days before the show cause hearing. The failure of the foreclosing governmental unit to comply with any provision of this section shall not invalidate any proceeding under this act if the owner of a property interest or a person to whom a tax deed was issued is accorded the minimum due process required under the state constitution of 1963 and the constitution of the United States. [MCL 211.78i.]

In short, notice must be sent to an address reasonably calculated to apprise the object of notice of the pending proceedings, and this requirement must be evaluated in the context of affording the object of notice minimal due process.

III

We will first examine whether defendant failed to provide adequate notice under MCL 211.78i. As earlier noted, the Court of Appeals concluded that defendant failed to determine the address reasonably calculated to apprise Republic Bank of the show cause and foreclosure hearings. In reaching this conclusion, the Court noted that defendant could have found an updated address in the local tax records, because plaintiff had

paid the property taxes for the winter of 1999, the year 2000, and the summer of 2001, all before the foreclosure action. A search of the tax records, said the Court, would have given defendant an easily attainable updated address. We disagree with this analysis.

In *Dow v Michigan,* 396 Mich 192; 240 NW2d 450 (1976), this Court examined the requirements of due process in the context of giving notice of a tax sale. In *Dow* the question was whether notice by publication was sufficient. This Court found that such notice did not meet constitutional standards, and then went on to describe the kind of notice that would satisfy due process requirements:

> Personal service is not required. Notice by mail is adequate. Mailed notice must be directed to an address reasonably calculated to reach the person entitled to notice. Mailing should be by registered or certified mail, return receipt requested, both because of the greater care in delivery and because of the record of mailing and receipt or non-receipt provided. Such would be the efforts one desirous of actually informing another might reasonably employ. If the state exerts reasonable efforts, then failure to effectuate actual notice would not preclude foreclosure of the statutory lien and indefeasible vesting of title on expiration of the redemption period. [396 Mich 211.]

This analysis was acknowledged by this Court in *Smith v Cliffs on the Bay Condo Ass'n,* 463 Mich 420; 617 NW2d 536 (2000), which considered a constitutional challenge to the procedures by which tax-sale title to a piece of property was obtained. The notice provision at issue was MCL 211.131e. In *Smith,* tax notices were sent to the address of a corporation as indicated on a quitclaim deed. The mailing to this last known address was returned by the post office as not deliverable. The owner contended that under this circumstance, the notice was inadequate, and that addi-

tional efforts should have been undertaken to ascertain the owner's current address. This Court disagreed, stating:

> In this case there is nothing to indicate that the township, county, or state had been informed of a new address for the association. Thus, it was appropriate for notices to be sent to the Birmingham address stated in the deed conveying the disputed parcel to the association. The fact that one of the mailings was returned by the post office as undeliverable does not impose on the state the obligation to undertake an investigation to see if a new address for the association could be located. [463 Mich 429.]

This Court held in *Smith* that the mailing of tax delinquency and redemption notices to a corporation at its tax address of record in the manner required by the General Property Tax Act was sufficient to provide constitutionally adequate notice.

The Court of Appeals in this case distinguished *Smith* by noting that, here, the municipality had been informed of a new address through the fact that plaintiff paid taxes on the property under the new name and address. We do not find this distinction significant. First, the record shows that plaintiff paid at least some of the post-summer 1999 property taxes using checks with the Hancock address on them. More importantly, this Court indicated in *Smith* that due process does not impose an obligation to undertake additional investigations, when an address has been provided on the relevant document and that document address has not been changed. We agree with defendant's argument that to require municipalities to keep copies of checks that are sent to pay taxes and then compare the addresses thereon to those already provided for all property subject to foreclosure would place unwarranted burdens on those municipalities.

Here, where defendant relied on the address provided in the mortgage recorded with the Genesee County Register of Deeds, Republic Bank still operated a branch office at that address, and an employee of the bank signed the certified mail receipt card at that address, defendant not only complied with the minimum requirements of due process, but provided plaintiff with actual notice of the hearings. Defendant clearly sent notice to "the address reasonably calculated to apprise" plaintiff of the hearings.

Having found that defendant complied with the requirements of MCL 211.78i, we must also examine the implications of defendant's failure to provide any notice under MCL 211.78f. As the Court of Appeals held, such failure to give notice would not, standing alone, give rise to a due process claim. We agree. As this Court explained in *Mudge v Macomb Co,* 458 Mich 87, 102; 580 NW2d 845 (1998), the critical question for purposes of due process is whether an individual has been given a " 'meaningful opportunity to be heard . . . .' " (Quoting *Boddie v Connecticut,* 401 US 371, 379; 91 S Ct 780; 28 L Ed 2d 113 [1971].) We noted that deprivation of property by adjudication must be preceded by notice and opportunity appropriate to the nature of the case, and within the limits of practicability.

Here, the minimal requirements of due process were satisfied where Republic Bank received constitutionally adequate notice of the show cause and forfeiture hearings. Due process does not require the advance notice of MCL 211.78f when a person is given adequate notice and a meaningful opportunity to be heard pursuant to MCL 211.78i. Such a conclusion is mandated by the above-quoted language in MCL 211.78(2). Consequently, the Court of Appeals erred in affirming the grant of summary disposition in favor of plaintiff in this

case. We thus reverse the judgment of the Court of Appeals. This matter is remanded to the Court of Claims for further proceedings consistent with this opinion.

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

KELLY, J. (*concurring*). I agree with the disposition of this case. I continue to believe that a significant question exists about the constitutionality of the notice provisions of Michigan's General Property Tax Act. MCL 211.1 *et seq*. However, in this case, the notice that defendant provided not only satisfied the act, it survives constitutional scrutiny.

A property owner facing foreclosure must be given notice that foreclosure proceedings are underway. *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 315; 70 S Ct 652; 94 L Ed 865 (1950); MCL 211.78i(2). The property owners may not have been given adequate notice in the case of *Smith v Cliffs on the Bay Condo Ass'n,* 463 Mich 420; 617 NW2d 536 (2000) (KELLY, J., dissenting). There, notice was mailed to the owners but returned as undeliverable. I believed that the owners may have been denied due process of law and I wrote:

> When the [Department of Treasury] receives notice that its tax bills directed to a corporation are undeliverable at a certain address, reasonableness may require one more step: an inquiry to the Corporations and Securities Bureau to check for a current address. [*Id.* at 433.]

By contrast, in the present case, defendant Genesee County Treasurer researched the title records for plaintiff's correct address and sent the notice to plaintiff at that address by certified mail. Defendant received verification that plaintiff had accepted delivery. These ac-

tions reasonably warned plaintiff that foreclosure of the property was about to occur.

Moreover, plaintiff Republic Bank received actual notice of the foreclosure hearing. It is the successor to D & N Bank's interest, and it continued to maintain an office at the address listed in the title records. Its employee accepted the notice.[1]

It is true that the bank was not given notice as required by § 78f of the act, MCL 211.78f. However, the notice it received of the show cause hearing and judicial forfeiture met the minimum requirements of due process.

Therefore, I agree that the decision of the Court of Appeals should be reversed.

CAVANAGH, J., concurred with KELLY, J.

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[1] That the notice was misplaced after plaintiff's employee accepted it is irrelevant to the question whether the bank received minimal due process.

BURTON v REED CITY HOSPITAL CORPORATION

Docket No. 124928. Decided January 26, 2005. On application by the defendants for leave to appeal, the Supreme Court, in lieu of granting leave, reversed the judgment of the Court of Appeals and reinstated the judgment of the circuit court.

Dale Burton brought a medical malpractice action in the Osceola Circuit Court against Reed City Hospital Corporation and others. The defendants moved for summary disposition on the basis that the plaintiff filed his complaint and affidavit of merit before the expiration of the notice period provided in MCL 600.2912b and that the prematurely filed complaint did not toll the statutory period of limitations, which had expired. The court, Lawrence C. Root, J., granted the motion. The plaintiff died following the proceedings and Jack Burton, the personal representative of the plaintiff's estate, was substituted as the plaintiff. The Court of Appeals, SMOLENSKI, P.J., and COOPER and FORT HOOD, JJ., reversed, holding that a prematurely filed complaint invokes the tolling provisions of MCL 600.5856(a). 259 Mich App 74 (2003). The defendants 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*:

A complaint filed before the expiration of the notice period provided by MCL 600.2912b violates the statute and is ineffective to toll the period of limitations. The prematurely filed complaint did not toll the limitations period. The Court of Appeals correctly held that dismissal is an appropriate remedy for noncompliance with the notice provisions of § 2912b and that when a case is dismissed the plaintiff must still comply with the applicable statute of limitations. The Court of Appeals erred, however, in concluding that the alleged lack of prejudice to the defendants justified the tolling of the limitations period. The filing of a complaint before the expiration of the statutorily mandated notice period is ineffective to commence the lawsuit regardless of prejudice to the defendants. In addition, where the defendants had timely pleaded the statute of limitations as an affirmative defense, the fact that the defendants did not move for summary disposition

until the period of limitations had run does not constitute a waiver of the statute of limitations defense. The defendants' pleadings were sufficient to assert and preserve the defense. The evidence does not show that the defendants implicitly waived their statute of limitations defense.

Reversed; circuit court judgment reinstated.

Justice KELLY, joined by Justice CAVANAGH, dissenting, stated that the Court of Appeals properly reversed the trial court's grant of summary disposition. The plaintiff's claim should be reinstated and the matter should be remanded to the trial court for a trial on the merits.

A party who requests a late answer and expresses no objection to the pleadings cannot challenge an early complaint. The defendants implicitly waived the statute of limitations defense predicated on the timing of the plaintiff's complaint by expressing satisfaction with the pleadings, failing to object to the timing of the plaintiff's complaint, and requesting two extensions of the time to file their answer.

The defendants also forfeited the defense of the statute of limitations. The defendants did not timely file their answer under MCL 600.2912e(1) or MCR 2.108(A)(1). They did not timely file the requisite affidavit of meritorious defense. MCL 600.2912e(1). The defendants' failure to conform to the mandatory pleading requirements governing their answer and affidavit of meritorious defense should have rendered their answer a nullity.

The trial court's dismissal with prejudice was an unjust remedy in light of the defendants' conduct. The dismissal of the complaint was contrary to the goals of the relevant court rules and the Legislature's intent of promoting the resolution of meritorious claims and discouraging frivolous claims and gamesmanship.

ACTIONS — MEDICAL MALPRACTICE — LIMITATION OF ACTIONS.

A plaintiff may not commence a medical malpractice action unless written notice of intent to file suit is provided to the defendant; after providing the notice, the plaintiff must wait for the applicable notice period to pass before filing suit; an action filed before the expiration of the notice period does not toll the period of limitations applicable to the action (MCL 600.2912b, 600.5856[a]).

Charfoos & Christensen, P.C. (by *David R. Parker*) [Detroit], and *Richard A. Lenter, P.C.* (by *Richard A. Lenter*), for the plaintiff.

Aardema, Whitelaw & Sears-Ewald PLLC (by *Brian W. Whitelaw*) for the defendants.

PER CURIAM. This case presents the question whether a complaint alleging medical malpractice that is filed before the expiration of the notice period provided by MCL 600.2912b tolls the period of limitations. The Court of Appeals held that a prematurely filed complaint invokes the tolling provisions of MCL 600.5856(a). We disagree. MCL 600.2912b(1) unambiguously states that a person "shall not" commence an action alleging medical malpractice until the expiration of the statutory notice period. A complaint filed before the expiration of the notice period violates MCL 600.2912b and is ineffective to toll the limitations period. We reverse the judgment of the Court of Appeals and reinstate the Osceola Circuit Court's grant of summary disposition for the defendants.

I. FACTS AND PROCEDURAL HISTORY

On January 17, 1998, plaintiff[1] went to the emergency room of defendant Reed City Hospital complaining of abdominal pain, nausea, and vomiting. Tests revealed the presence of an ulcer. Plaintiff was hospitalized and treated with medications until January 23, 1998. On January 26, 1998, the individually named defendants performed stomach and gall bladder surgery on plaintiff.

On February 10, 2000, plaintiff filed a medical malpractice complaint, alleging that his common bile duct and pancreatic duct were negligently transected during

[1] Plaintiff, Dale Burton, died following the proceedings in the trial court. The personal representative of his estate, Jack Burton, was substituted as plaintiff. For ease of reference, the term "plaintiff" refers to the decedent.

the surgery and that corrective surgery had to be performed in November 1998. Plaintiff alleges that he suffered residual, permanent damage as a result of the individual defendants' negligence.

The alleged malpractice occurred on January 26, 1998. The period of limitations for a medical malpractice action is two years. MCL 600.5805(6). Absent tolling, the statutory period of limitations would therefore have expired on January 26, 2000.

Plaintiff's counsel sent defendants a notice of intent to file a claim on October 18, 1999. Under MCL 600.5856(d), if the period of limitations would expire during the notice period, the period of limitations is tolled for 182 days and then resumes running after the 182-day period. In this case, the limitations period was tolled until April 17, 2000, and then resumed running, expiring on July 26, 2000.

Plaintiff filed a complaint and an affidavit of merit under MCL 600.2912d on February 10, 2000, 115 days after he provided his notice of intent. After receiving from plaintiff's counsel two extensions of time in which to answer, defendants filed an answer to the complaint on May 8, 2000. Defendants' affirmative defenses included the following:

> 5. That plaintiff's claim is barred by the applicable Statute of Limitations.
>
> * * *
>
> 12. That plaintiff has failed to comply with the provisions of MCLA 600.2912b and MCLA 600.2912d, *et seq*[.], and plaintiff's complaint must, therefore, be dismissed.

A pretrial status conference was held on June 29, 2000. The summary of that conference provides that

"Counsel stated that the status of the pleadings is satisfactory, pending discovery."

On August 24, 2000, defendants moved for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10), alleging that plaintiff failed to comply with the notice provisions of MCL 600.2912 *et seq*.[2] Defendants' motion pointed out that plaintiff's complaint was filed only 115 days after the date the notice of intent was sent. Defendants' motion alleged that the prematurely filed complaint did not toll the limitations period, which expired on July 26, 2000.

Plaintiff acknowledged that the complaint was filed before the expiration of the notice period, but argued that the filing of the complaint nevertheless tolled the period of limitations, such that the proper remedy was dismissal without prejudice. Plaintiff also asserted that defense counsel had engaged in misconduct by expressing satisfaction with the state of the pleadings at the pretrial conference and by waiting until after the limitations period had run to bring the motion for summary disposition. Plaintiff argued that defense counsel's misconduct resulted in a waiver, or that defendants were estopped from challenging the premature filing of the complaint.

The trial court initially denied the motion for summary disposition. Although the trial court rejected the plaintiff's argument that defendants' expression of satisfaction with the state of the pleadings at the pretrial conference waived the premature filing defense, it held that defendants' failure to bring their motion for summary disposition before the expiration of the limitations

[2] Defendants also challenged the sufficiency of the affidavit of merit filed with the complaint. The trial court held that the affidavit met the statutory requirements. Defendants have not appealed that ruling.

period resulted in a waiver. The court therefore denied defendants' motion for summary disposition.

Defendants filed a motion for reconsideration. On reconsideration, the trial court reversed its prior decision and granted summary disposition to defendants. The trial court concluded that the affirmative defenses were sufficiently pleaded to place plaintiff on notice of a problem before the expiration of the limitations period.

Plaintiff appealed the trial court's order to the Court of Appeals, which reversed in a published opinion. 259 Mich App 74; 673 NW2d 135 (2003). While acknowledging that dismissal is an appropriate remedy for noncompliance with the provisions of MCL 600.2912b and that when a case is dismissed the plaintiff must still comply with the applicable statute of limitations, the Court of Appeals nevertheless concluded that MCL 600.5856(a) operated to toll the period of limitations. *Burton*, *supra* at 85.

The Court of Appeals distinguished the present case from *Scarsella v Pollak*, 461 Mich 547; 607 NW2d 711 (2000), in which the plaintiff filed the complaint without also filing the affidavit of merit. The Court of Appeals determined that because the affidavit of merit was filed with the complaint in this case, the filing tolled the period of limitations. *Burton*, *supra* at 85–86. Finally, the Court of Appeals concluded that tolling is permissible where a complaint is filed prematurely because it does not result in unfair prejudice to the defendant. *Id*. at 87–89. It thus reversed the trial court's order granting defendants' motion for summary disposition.

Defendants filed an application for leave to appeal to this Court.

II. STANDARD OF REVIEW

We review the trial court's grant of summary disposition de novo. *Roberts v Mecosta Co Gen Hosp*, 466

Mich 57, 62; 642 NW2d 663 (2002) (*Roberts I*). This case involves questions of statutory interpretation, which are also reviewed de novo. *Id*. The cardinal principle of statutory construction is that courts must give effect to legislative intent. *Morales v Auto-Owners Ins Co (After Remand)*, 469 Mich 487, 490; 672 NW2d 849 (2003). When reviewing a statute, courts necessarily must first examine the text of the statute. *Dressel v Ameribank,* 468 Mich 557, 562; 664 NW2d 151 (2003). If the Legislature's intent is clearly expressed by the language of the statute, no further construction is permitted. *Helder v Sruba*, 462 Mich 92, 99; 611 NW2d 309 (2000).

III. ANALYSIS

A. RELEVANT STATUTES

MCL 600.2912b(1) precludes a medical malpractice claimant from commencing suit against a health professional or health facility unless written notice is provided to that professional or facility before the action is commenced. Section 2912b(1) provides:

> Except as otherwise provided in this section, a person *shall not commence* an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced. [Emphasis supplied.]

After providing the written notice, the claimant is required to wait for the applicable notice period to pass before filing suit. The claimant generally must wait 182 days after providing the notice of intent before commencing an action alleging medical malpractice. MCL 600.2912b(1). A claimant may file an action after 154 days if no response to the notice is received as contemplated by MCL 600.2912b(7).

MCL 600.5856(d) provides that the two-year period of limitations for medical malpractice actions is tolled during the notice period if notice is given in compliance with MCL 600.2912b. Defendants do not dispute that the notice given in this case tolled the period of limitations during the statutory notice period, so that the limitations period was extended through July 26, 2000.

The Court of Appeals concluded that the period of limitations was further tolled by plaintiff's prematurely filed complaint. It relied on MCL 600.5856(a), which states that the period of limitations is also tolled "[a]t the time the complaint is filed and a copy of the summons and complaint are served on the defendant."

B. PLAINTIFF'S PREMATURELY FILED COMPLAINT DID NOT TOLL THE PERIOD OF LIMITATIONS

Section 2912b(1) unequivocally provides that a person "shall not" commence an action alleging medical malpractice against a health professional or health facility until the expiration of the statutory notice period. This Court has previously construed other such imperative language in the statutes governing medical malpractice actions. For example, in *Scarsella*, we held that a complaint alleging medical malpractice that is not accompanied by the statutorily required affidavit of merit is not effective to toll the limitations period because the Legislature clearly intended that an affidavit of merit "shall" be filed with the complaint. *Id*. at 549 (citing MCL 600.2912d[1]). In adopting the Court of Appeals opinion in *Scarsella*, we noted that the Legislature's use of the word "shall" indicates a mandatory and imperative directive (citing *Oakland Co v Michigan*, 456 Mich 144, 154; 566 NW2d 616 [1997]). *Scarsella*, *supra* at 549. We concluded that the filing of a complaint without the required affidavit of merit was insufficient to commence the lawsuit. *Id*.

In *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000), a case involving tolling during the notice period, we held that a plaintiff cannot file suit without first giving the notice required by MCL 600.2912b. *Omelenchuk*, *supra* at 572. We further held that the limitations period cannot be tolled unless a plaintiff complies with the provisions of MCL 600.2912b. *Omelenchuk*, *supra* at 576.

In *Roberts I*,[3] another case involving tolling during the notice period, we again emphasized that a plaintiff's compliance with MCL 600.2912b is mandatory before tolling under MCL 600.5856(d) may occur. *Roberts I, supra* at 65, 67. We also held that MCL 600.2912b clearly places the burden of complying with the notice of intent requirements on the plaintiff and that this clear, unambiguous statute requires full compliance with its provisions as written. *Roberts I, supra* at 66.

In the instant case, the Court of Appeals correctly determined that dismissal is an appropriate remedy for noncompliance with the notice provisions of MCL 600.2912b and that when a case is dismissed, the plaintiff must still comply with the applicable statute of limitations. See *Gregory v Heritage Hosp*, 460 Mich 26, 47-48; 594 NW2d 455 (1999); *Scarsella, supra* at 552. The Court of Appeals erred, however, by basing its decision to reverse the decision of the trial court on the alleged lack of prejudice to the defendants, a factor that is not contained in the relevant statutes.

The directive in § 2912b(1) that a person "shall not" commence a medical malpractice action until the expiration of the notice period is similar to the directive in § 2912d(1) that a plaintiff's attorney "shall file with the

[3] The case was remanded for consideration of other issues. *Roberts v Mecosta Co Gen Hosp (On Remand)*, 252 Mich App 664; 653 NW2d 441 (2002); *(After Remand)* 470 Mich 679; 684 NW2d 711(2004).

complaint an affidavit of merit . . . ." Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit. In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action.

The fact that defendants did not bring their motion for summary disposition until the period of limitations had run does not constitute a waiver of the defense.[4] MCL 600.2912b places the burden of complying with the notice provisions on the plaintiff. *Roberts I, supra* at 66. As we explained in *Roberts I*, the purpose of a tolling

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[4] The assertion by the dissent that defendants implicitly waived their statute of limitations defense is not supported by the evidence. We agree that a waiver sometimes " 'may be shown by a course of acts and conduct, and in some cases will be implied therefrom.' " *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918) (citation omitted). However, neither of the acts cited by the dissent implies an "intentional abandonment" of defendants' right to assert a statute of limitations defense. See *Roberts I*, *supra* at 64 n 4.

First, the request for additional time to answer plaintiff's prematurely filed complaint was not, in fact, "inconsistent with" their statute of limitations defense. Defendants did not, as a result of the extension granted them, file their answer after the limitations period had expired. Had they done so, the dissent's theory would be more compelling. Rather, defendants filed their answer more than two months before the expiration of the limitations period. In addition, defendants' express incorporation of such a defense in their answer makes clear that they were not intentionally abandoning that defense when they sought the extension.

Second, defendants' expression during a pretrial conference that "the status of the pleadings is satisfactory" was also not "inconsistent with" their statute of limitations defense. This statement was offered only after defendants had filed their answer, which included the statute of limitations defense. There is nothing in the record to support an implication that defendants were willing to waive this defense on the basis of their "satisfaction" with the status of the pleadings.

provision is to protect a plaintiff from a statute of limitations defense. Here, defendants specifically raised the statute of limitations and plaintiff's compliance with MCL 600.2912b in their answer and affirmative defenses.[5] Such a direct assertion of these defenses by defendants can by no means be considered a waiver. *Roberts I, supra* at 68-70. To the contrary, it was a clear affirmation and invocation of such defenses. Defendants' pleadings were more than sufficient to comply with the requirements of MCR 2.116(D)(2) (requiring the statute of limitations to be raised in the first responsive pleading or in a motion filed before the responsive pleading).

The dissent contends that defendants' failure to comply with the pleading requirements of MCL 600.2912e(1) and MCR 2.108(A)(1) acts as a forfeiture of the statute of limitations defense. In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002), we stated that "a forfeiture necessarily requires that there be a specific point at which the right must be asserted or be considered forfeited." *Id*. (emphasis omitted). In this case, that specific point must have either occurred at defendants' first responsive pleading or at a motion filed before that pleading. MCR 2.116(D)(2). Here, defendants asserted the statute of limitations argument in their May 8, 2000, answer to plaintiff's complaint.

The dissent concludes, however, that defendants' failure to either answer or provide an affidavit of meritorious defense within the statutory time frame requires forfeiture. While the medical malpractice statute is silent on the remedy for a violation of the pleading requirements, generally, the remedy against a

[5] As noted earlier, the answer and affirmative defenses were filed on May 8, 2000, more than two months before the period of limitations expired.

party who "fail[s] to plead or otherwise defend" in an action is default. MCR 2.603(A)(1). But this remedy was unavailable to plaintiff, because he afforded defendants two extensions of time in which to answer and also agreed to extend the time for service of the affidavit of meritorious defense through May 28, 2000. In sum, a party that stipulates an extension of the time permitted for a filing may not be heard to complain that the filing, when submitted within that extended period, is untimely.

IV. CONCLUSION

Plaintiff did not fulfill his obligation under § 2912b. Accordingly, the limitations period was not tolled by the prematurely filed complaint. We therefore reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court granting summary disposition to defendants.

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

KELLY, J. (*dissenting*). I would affirm the decision of the Court of Appeals. Defendants negotiated with plaintiff for extensions of the time in which to file their answer. They failed to obtain approval of any extension from the trial court. Moreover, they failed to file their affidavit of meritorious defense in conformance with the mandatory requirements for medical malpractice actions.

I would hold that a party who requests a late answer and expresses no objection to the pleadings cannot challenge an early complaint. Defendants implicitly waived their statute of limitations defense predicated on the timing of plaintiff's complaint.

Moreover, under the Court's interpretation of the statutes governing medical malpractice actions, defendants' failure to conform to the mandatory pleading requirements should have rendered their answer a nullity. Accordingly, the statute of limitations defense should be deemed forfeited.

Plaintiff's complaint, which was filed before the end of the statutory waiting period for medical malpractice claims, was timely in all other respects. I agree with the Court of Appeals that the trial court's dismissal with prejudice was an unjust remedy in light of defendants' conduct.

I. STANDARD OF REVIEW

When presented with a motion for summary disposition under MCR 2.116(C)(7), the court considers the pleadings, affidavits, and other documentary evidence. MCR 2.116(G). In this case, the facts needed to review defendants' motion for summary disposition are not in dispute.

This case involves 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). 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 provisions of a statute must be read in the context of the entire statute in the interest of producing an harmonious whole. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).

II. BACKGROUND

On January 25, 1998, the defendant doctors at the defendant hospital performed exploratory surgery on

plaintiff.[1] Plaintiff has alleged that, during the surgery, they committed malpractice by negligently cutting his common bile and pancreatic ducts.

In order to file a complaint for this malpractice, a Michigan statute required plaintiff to serve defendants with a notice of intent to sue. MCL 600.2912b. Plaintiff served this notice on October 18, 1999, well within the two-year statutory period of limitations for medical malpractice actions.[2] MCL 600.5805(6). Defendants did not respond. Plaintiff's counsel filed the complaint and affidavit of merit on February 10, 2000. Plaintiff's counsel asserted that 154 days had elapsed since he filed the notice and that, since defendants had not responded, he believed that he was entitled to file the complaint early. MCL 600.2912b(8). In fact, defendants' failure to respond did not entitle plaintiff to file his complaint until March 20, 2000.

Rather than comment on the premature filing, defendants told plaintiff that they intended to file an answer and received two extensions from him. On March 7, 2000, defendants obtained from plaintiff an extension of the time in which to answer. On the date that extension expired, defendants obtained another extension through May 4, 2000. They told plaintiff that they "looked forward to working with" him and "appreciate[d plaintiff's] continued cooperation."

When ultimately defendants filed their answer on May 8, 2000, it was not timely under either the statutory pleading rules for medical malpractice claims or

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[1] Plaintiff, Dale Burton, died following the proceedings in the trial court. The personal representative of his estate, Jack Burton, was substituted as plaintiff. For ease of reference, the term "plaintiff" refers to the decedent.

[2] This tolled the running of the limitations period. MCL 600.5856(d).

the court rules.[3] See MCL 600.2912e(1) and MCR 2.108(A)(1). It lacked supporting facts, as required by the Michigan court rules. MCR 2.111(F). Moreover, it lacked the requisite affidavit of meritorious defense, as required by statute. MCL 600.2912e. This affidavit was not filed until May 15, 2000, four days after the mandatory ninety-one-day deadline expired. MCL 600.2912e(1).

Defendants' answer included a statute of limitations defense. However, it did not indicate the basis for defendants' assertion of the defense. On the date the answer was filed, the limitations period had not yet run. The defense was not yet viable and appeared to have been included in the answer as boilerplate. Plaintiff denied that the defense was applicable.

At a pretrial conference on June 29, 2000, defendants expressed satisfaction with the pleadings. Then, on August 24, 2000, defendants brought a motion to dismiss the claim under MCR 2.116(C)(8) or (C)(10), asserting that plaintiff had not complied with the timing provisions of MCL 600.2912b and MCL 600.2912d. Plaintiff challenged defendants' motion on several grounds. Among the reasons was that defendants' conduct had waived the statute of limitations defense.

The trial court granted the motion. It held that the statute of limitations defense in defendants' answer had placed plaintiff on notice of a problem with his pleadings before the expiration of the period of limitations.

The Court of Appeals reversed the grant of summary disposition. It opined that the statutory period of limi-

[3] It was also after the expiration of the second extension granted by plaintiff.

tations had not elapsed, because plaintiff's prematurely filed complaint and affidavit had tolled the period of limitations. *Burton v Reed City Hosp Corp*, 259 Mich App 74; 673 NW2d 135 (2003). Tolling should be found to have occurred, it reasoned, because defendants had not been prejudiced and because summary disposition with prejudice was an unnecessarily harsh remedy.

III. ANALYSIS

A. DEFENDANTS WAIVED THE STATUTE OF LIMITATIONS DEFENSE

In the trial court, plaintiff argued that the affirmative defense of the statute of limitations had been waived. I agree. " '[W]aiver is the "intentional relinquishment or abandonment of a known right." ' " *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). It is an equitable doctrine applied judicially to avoid injustice. *Roberts v Mecosta Co Gen Hosp,* 466 Mich 57, 76 n 9; 642 NW2d 663 (2002) (KELLY, J., dissenting).

Waiver may be implied by conduct inconsistent with the intent to assert the right. 28 Am Jur 2d, Estoppel and Waiver, § 209, pp 612-613. The party waiving the right must have actual or constructive knowledge of facts that would create the right. *Id.,* § 202, pp 607-608.

Here, defendants did not respond to plaintiff's notice of intent to sue. Defendants contacted plaintiff only after receiving his complaint. Defendants requested two extensions of the time in which to file their answer. They reserved no rights or defenses.

Defendants' answer raised the affirmative defense of the statute of limitations at a time when it was not viable. Plaintiff denied that the defense was applicable.

At a pretrial conference, defendants expressed satisfaction with the pleadings.

Defendants knew that the notice period had not elapsed. They also knew that plaintiff's complaint was subject to a statute of limitations. Yet they made no mention that the complaint had been filed prematurely. They did not then assert, and have not yet asserted, any prejudice from receiving plaintiff's complaint before the full notice period had elapsed.

Defendants induced plaintiff to believe that they had no objection to the timing of his complaint. Defendants, who asked twice to file a late answer, cannot equitably harbor a challenge to plaintiff's early complaint.[4] Plaintiff's claim should not be subject to dismissal, with prejudice or otherwise. I would hold that defendants' actions implied a knowing waiver of any affirmative defense that is based on the premature filing of plaintiff's complaint.

B. UNDER THE MAJORITY'S JURISPRUDENCE, DEFENDANTS FORFEITED THE STATUTE OF LIMITATIONS DEFENSE

This Court has held that, in medical malpractice cases, pleading requirements must be strictly followed. For instance, an affidavit of merit "shall" accompany the complaint,[5] unless the plaintiff obtains an extension from the trial court pursuant to MCL 600.2912d(2).

In *Scarsella v Pollak*,[6] this Court considered MCL 600.2912d(1). There, the plaintiff failed to include an affidavit of merit with his complaint and neglected to

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[4] The majority contends that plaintiff is not entitled to pursue his claim because "a party that stipulates [to] an extension of the time permitted for a filing may not be heard to complain that the filing, when submitted within that extended period, is untimely." *Ante* at 756. However, plaintiff is not claiming that defendants' answer was untimely.

[5] MCL 600.2912d(1).

[6] 461 Mich 547, 553; 607 NW2d 711 (2000).

obtain an extension. The statutory period of limitations had expired before the plaintiff filed the affidavit. The Court held that, because the plaintiff failed to comply with the mandatory requirement, he failed to commence the action. Thus, the filing of the complaint " 'was a nullity' " and did not toll the period of limitations. *Scarsella, supra* at 549 (citation omitted). This interpretation, it concluded, was necessary to effectuate "the Legislature's clear statement that an affidavit of merit 'shall' be filed with the complaint. MCL 600.2912d(1)." *Id.* at 552.

Similarly, this Court has held that "a plaintiff cannot file suit without giving the notice required by [MCL 600.2912b(1)]." *Omelenchuk v City of Warren*, 461 Mich 567, 572; 609 NW2d 177 (2000), overruled in part on other grounds *Waltz v Wyse,* 469 Mich 642, 655; 677 NW2d 813 (2004). The failure to file a notice precludes the filing of a valid complaint. By contrast, defendants "must file an affidavit as provided in . . . [MCL] 600.2912e . . . ." MCR 2.112(L). The Legislature has mandated that medical malpractice defendants promptly respond to complaints with an affidavit of meritorious defense. Unlike plaintiffs, defendants may not obtain "an additional 28 days in which to file the affidavit required . . . ." See MCL 600.2912d(2) and MCL 600.2912e. The fact that, in this case, the parties had agreed to extend the time in which to answer is of no moment. The parties may not rewrite statutes by extrajudicial agreement. See *Harvey v Harvey,* 470 Mich 186, 193-194; 680 NW2d 835 (2004).

Defendants' answer and affidavit of meritorious defense failed to conform to the pleading requirements. Therefore, the trial court could have concluded, following the reasoning in *Scarsella* and *Omelenchuk*, that the answer was deficient. On motion by plaintiff or at the court's own initiative, defendants' nonconforming

answer could then have been stricken. MCR 2.115(B). If this had occurred, plaintiff would have been entitled to judgment by default. MCR 2.603(A)(1). See *Kowalski v Fiutowski,* 247 Mich App 156; 635 NW2d 502 (2001).

However, plaintiff did not move to strike defendants' answer or for a default judgment. Nevertheless, the court rules require that a statute of limitations defense be asserted in the first responsive pleading, or it is forfeited. MCR 2.116(D)(2). Forfeiture is the failure to timely assert a known right. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 379; 666 NW2d 251 (2003).

If the reasoning of *Scarsella* were consistently applied to MCL 600.2912e(1) as it was to MCL 600.2912d(2), defendants' answer would be deemed a nullity because defendants failed to satisfy the mandatory statutory requirements. Thus, even assuming that the statute of limitations defense was a viable affirmative defense at the time it was raised, the defense would be deemed forfeited.

This holding would effectuate "the Legislature's clear statement"[7] that without exception, after the plaintiff has filed a complaint and the requisite affidavit of merit, an answer shall be filed "within 21 days." In addition, an affidavit of meritorious defense shall be filed within "91 days." MCL 600.2912e(1). Here, defendants did neither. Their statute of limitations defense should be deemed forfeited.

C. DISMISSING PLAINTIFF'S CLAIM WITH PREJUDICE UNDERMINES THE INTENT OF THE LEGISLATURE

The notice provision for medical malpractice suits requires a plaintiff to provide a sound basis for his

[7] *Scarsella, supra* at 552.

claim. MCL 600.2912b(4).[8] The Legislature enacted these requirements to discourage frivolous lawsuits and allow only meritorious claims to proceed.

The Legislature also imposed a presuit requirement on defendants accused of medical malpractice. Defendants must provide the basis for their defense to the alleged malpractice. MCL 600.2912b(7).[9]

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[8] The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

(a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

[9] Within 154 days after receipt of notice under this section, the health professional or health facility against whom the claim is made shall furnish to the claimant or his or her authorized representative a written response that contains a statement of each of the following:

(a) The factual basis for the defense to the claim.

(b) The standard of practice or care that the health professional or health facility claims to be applicable to the action and that the health professional or health facility complied with that standard.

(c) The manner in which it is claimed by the health professional or health facility that there was compliance with the applicable standard of practice or care.

When these subsections of § 2912b are read together it is apparent that the notice requirements were imposed also to facilitate settlement. They provide the parties with a mandatory period in which to investigate a pending claim and negotiate a settlement before suit is filed. See *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 707; 684 NW2d 711 (2004) (KELLY, J., dissenting). If the defendant fails to respond to the notice of intent, indicating he does not wish to settle the case, the plaintiff is excused from the 182-day requirement. The plaintiff may file suit after 154 days. MCL 600.2912b(8).

In this case, defendants did not take advantage of the statutory notice period. They did not attempt to negotiate a settlement. In fact, they did not respond to plaintiff's notice at all. Plaintiff was thus entitled to file his complaint after 154 days. However, he erroneously filed his complaint and affidavit of merit after 115 days.

Defendants continued to violate the procedural rules. They did not timely file their answer. MCR 2.108(A)(1). Rather, they obtained two extensions from plaintiff. They asserted that they had difficulty obtaining the relevant records from each other and needed more time to prepare their answer. They did not seek an extension from the trial court as the court rules allow. MCR 2.108(E). Defendants also failed to timely file their mandatory affidavit of meritorious defense. MCL 600.2912e. When defendants ultimately answered, they included a statute of limitations defense.

(d) The manner in which the health professional or health facility contends that the alleged negligence of the health professional or health facility was not the proximate cause of the claimant's alleged injury or alleged damage.

As the Court of Appeals noted:

> "Statutes of limitation are procedural devices intended to promote judicial economy and the rights of defendants. For instance, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence. They also prevent plaintiffs from sleeping on their rights; a plaintiff who delays bringing an action profits over an unsuspecting defendant who must prepare a defense long after the event from which the action arose." [*Burton, supra* at 83, quoting *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995).]

Defendants asserted the statute of limitations defense after inducing plaintiff to believe that they had no quarrel with the timing of his complaint. Defendants themselves failed to comply with procedural requirements. Allowing defendants to prevail here frustrates the purposes of the requirements, does nothing to deter stale claims, and does not discourage frivolous litigation. Rather, it precludes valid suits from proceeding on their merits, encourages trial by ambush, and discourages cooperation between the parties.[10] It unjustly penalizes the innocent injured and allows negligent tortfeasors to avoid responsibility for their actions through gamesmanship.[11]

Although, pursuant to MCL 600.2912b(1), plaintiff should not have been allowed to commence his suit,

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[10] Under the reasoning of today's decision, any deviation from a mandatory statutory deadline risks summary disposition. Parties may now be required to object to any requested accommodation. This is likely to diminish the frequency of settlement. In the future, cooperation like that by plaintiff's counsel may even constitute legal malpractice if it voids an otherwise valid claim or defense.

[11] Indeed, defendants could not, after two extensions, timely file an affidavit of meritorious defense. Despite the misfeasance of defendants, the majority has chosen to selectively apply the statute in lieu of invoking equitable doctrines that ensure justice and fair play.

defendants are not entitled to summary disposition. Given that defendants' conduct constitutes waiver of the statute of limitations defense, dismissal of the complaint is contrary to the Legislature's intent and the goals of the relevant court rules.

IV. CONCLUSION

I disagree that defendants who have slept on their rights as in this case are entitled to raise the affirmative defense of the statute of limitations. I would hold that the defendants here waived and then forfeited the defense.

To hold that plaintiff's complaint does not toll the period of limitations undermines the intent of the Legislature. It does not promote resolution of meritorious claims. It does not discourage frivolous claims. It encourages gamesmanship.

The Court of Appeals properly reversed the trial court's grant of summary disposition for defendants. I would reinstate plaintiff's claim and remand the case for trial on the merits.

CAVANAGH, J., concurred with KELLY, J.

Actions on Applications

ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

Leave to Appeal Denied July 23, 2004:

SANCHEZ v EAGLE ALLOY, INC and VASQUEZ v EAGLE ALLOY, INC, Nos. 123114, 123115, 6/April 2004. The cause having been briefed and orally argued, the order of November 7, 2003, 469 Mich 955, granting leave to appeal is vacated, and leave to appeal and cross-appeal are denied because the Supreme Court is no longer persuaded that the questions presented should be reviewed. Reported below: 254 Mich App 651.

WEAVER, J. (*concurring).* I concur in the order dismissing the case; I believe the Court of Appeals opinion is correct and would adopt its opinion.

By dismissing this case, we leave the published Court of Appeals opinion as binding precedent, which gives the bench, the bar, and interested parties guidance on these issues.

KELLY, J. (*dissenting*). After full briefing and oral argument, a majority of the Court has decided that leave was improvidently granted. I respectfully disagree. I would not avoid the issues presented. They are jurisprudentially significant. The parties, the people of Michigan, and those who come into the state to work have a pressing interest in having these issues resolved by the state's highest court.

MARKMAN, J. (*dissenting*). I disagree with the majority that leave has been improvidently granted in this case and, therefore, I respectfully dissent. Instead, I believe that issues pertaining to the legal consequences of illegal alien status in Michigan—in this case, the eligibility of such persons for worker's compensation benefits—are important ones and deserve full consideration by this Court.[1] These issues are important not only for their impact upon illegal aliens, but equally for their impact upon the rule of law and the meaning of citizenship. I would have embarked in this case upon the process of addressing these issues.

There are two principal legal issues involved here, in my judgment. The first is whether there can be a valid contract of hire under the circumstances of illegality in this case. The second is whether the burden is upon the Legislature to affirmatively *include* illegal aliens within the coverage of a statute, if this is their intention, or to affirmatively *exclude* illegal aliens from coverage, if this is their intention. By failing to address

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[1] Commissioner Witte of the Worker's Compensation Appellate Commission observed at the outset of her opinion below: "In our collective memory, no case has engendered more passionate debate at the [WCAC] than the following matter . . . whether an injured illegal alien is entitled to worker's compensation benefits."

these issues, this Court leaves the legislative and executive branches without guidance concerning whether coverage under countless state statutes is identical between illegal aliens and persons who are citizens or otherwise lawfully within the United States.

There is no dispute that illegality permeates the relationship between the parties in this case. Plaintiffs obtained forged Social Security and alien identification cards and lied on their employment applications with defendant with regard to their immigration and Social Security status.

The Immigration Reform and Control Act (IRCA), 8 USC 1101 *et seq.*, clearly shows Congress's intent to proscribe the employment of illegal aliens, such as plaintiffs. Pursuant to 8 USC 1324a(a), which is captioned "Making employment of unauthorized aliens unlawful," it is unlawful to knowingly hire illegal aliens for employment in the United States. In addition, 8 USC 1324a(b)(1) requires a prospective employee to submit to an examination of documentation, and 8 USC 1324a(b)(2) requires such an employee to attest, under penalty of perjury, that he is not an illegal alien. 18 USC 1001 and 42 USC 408(a)(7) punish as crimes the fraudulent procurement or use of social security numbers and similar documentation. Moreover, 8 USC 1324c(a) specifically prohibits the use of fraudulent documents to seek employment and 8 USC 1325(a) provides criminal punishment for one who has entered the United States by false or misleading representations or by the concealment of material facts.

The clear import of these federal laws is that an illegal alien is not lawfully employable in the United States.[2] Further, the clear import of these laws—which constitute the "supreme Law of the Land" under US Const, art VI—is that an illegal alien is not lawfully employable in Michigan.[3] Indeed, at all times while in this country, the illegal alien is in violation of the law, and subject to immediate arrest and incarceration or

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[2] The purposes of the federal laws governing employment of aliens include removing financial incentives for illegal immigration and the promotion of jobs for legal workers by reducing the jobs available to illegal workers. See anno: *Validity, construction, and application of § 274A of immigration and nationality act (8 USCS § 1324A), involving unlawful employment of aliens*, 130 ALR Fed 381, § 2[a], p 396. As noted recently by the United States Supreme Court in *Hoffman Plastic Compounds, Inc v Nat'l Labor Relations Bd*, 535 US 137, 147 (2002), quoting *Immigration & Naturalization Service v National Center for Immigrants' Rights, Inc*, 502 US 183, 194 n 8 (1991), the IRCA " 'forcefully' made combating the employment of illegal aliens central to 'the policy of immigration law.' "

[3] Moreover, with regard to what specifically is at issue in the instant case—worker's compensation benefits—MCL 418.361(1) provides that an employer shall not be liable for economic benefits "for such periods of time that the employee is unable to obtain or perform work because of imprisonment or commission of a crime." *Sweatt v Dep't of Corrections*, 468 Mich 172 (2003). See also MCL 418.301(4); *Sington v Chrysler Corp*, 467 Mich 144 (2002).

deportation. As the United States Supreme Court observed in *Hoffman Plastic Compounds, Inc v Nat'l Labor Relations Bd*, 535 US 137, 148 (2002):

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.

What are the implications of illegal behavior in other contractual circumstances under Michigan law? It is well-established that a promise or agreement requiring the performance of a criminal or tortious act is illegal, unenforceable, and void. See 5 Williston on Contracts (4th ed), § 12:1, p 570. As this Court stated in *Cashin v Pliter*, 168 Mich 386, 390 (1912), quoting *In re Reidy's Estate*, 164 Mich 167, 173 (1910): " 'It is a well-settled principle of law that all contracts which are founded on an act prohibited by a statute under a penalty are void, although not expressly declared to be so.' " See also *Kukla v Perry*, 361 Mich 311, 324 (1960) (noting that a contract that is violative of a statute is void even if the applicable statute does not so provide); *Stokes v Millen Roofing Co*, 466 Mich 660, 672 (2002), quoting *Bilt-More Homes, Inc v French*, 373 Mich 693, 699 (1964) (contracts by a residential builder not duly licensed as required by statute are " 'not only voidable but void' ").

Similarly, contracts that offend public policy may be declared illegal and void. See Williston, *supra,* pp 546, 559; see also *Cook v Wolverine Stockyards Co*, 344 Mich 207, 209 (1955). " 'If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise . . . .' " *Kukla, supra* at 325, quoting *McNamara v Gargett,* 68 Mich 454, 462 (1888). Indeed, as this Court noted in *Sands Appliance Services Inc v Wilson*, 463 Mich 231, 239 (2000), it is the *duty* of the courts to "refuse to enforce a contract that is contrary to public policy."

See also *Terrien v Zwit*, 467 Mich 56, 66-67 (2002), in which this Court addressed the judiciary's obligation to enforce "public policy" as a means of nullifying a contractual relation. "In identifying the boundaries of public policy . . . the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." In *Muschany v United States*, 324 US 49, 66 (1945), the United States Supreme Court stated similarly, "[T]here must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy."

Finally, the "wrongful conduct rule" of *Orzel v Scott Drug Co,* 449 Mich 550 (1995), provides that when "a plaintiff's action is based in whole or in part, on his own illegal conduct," his claim is generally

barred. *Id.* at 558. This rule rests on the premise that courts should not, directly or indirectly, encourage or tolerate illegal activities.

> The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct. If courts chose to regularly give their aid under such circumstances, several unacceptable consequences would result. First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct. Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, and related to the two previously mentioned results, the public would view the legal system as a mockery of justice. Fourth, and finally, wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties. [*Id.* at 559-560 (citations omitted).]

More specifically, as this Court observed in *Crane v Reeder*, 21 Mich 24, 67-68 (1870):

> The laws of congress manifest a disposition to open the door as wide as possible to induce aliens to become citizens. But they show as plain an intent not to give any special privileges to aliens who do not comply with the statutes. . . . The disability of alienage . . . always rested on the broader principle that states are organized for the benefit of their own people, and that those who are not within the allegiance can have no claim beyond what the law sees fit to give them.

In addition to addressing the consequences of illegal behavior for contracts of hire in Michigan, this Court should address whether it is to be presumed that the countless references in Michigan statutes (as well as in the Michigan Constitution, art 10, § 6) to "persons" or "aliens" necessarily encompass illegal aliens. Is the burden upon the Legislature to affirmatively *include* illegal aliens within these terms and within these statutes, or is the burden upon the Legislature to affirmatively *exclude* illegal aliens from within these terms and from within these statutes? Is the presumption that Michigan law is neutral as between illegal aliens and persons who are citizens or otherwise lawfully within the United States, or is the presumption that illegal aliens do not constitute a part of the civil community in the same way as do citizens and legal aliens? The overarching issue here pertains to the cognizance that the legal system will take of the uniquely unlawful behavior of illegal aliens, an unlawful behavior that is ongoing and omnipresent.

While the decision below of the Court of Appeals may reflect to some a reasonable compromise, allowing illegal aliens to receive partial, but not full, worker's compensation benefits, each of the underpinnings of this compromise is open to legal question. Moreover, in my judgment, a

serious policy on the standing of illegal aliens within the legal system cannot rest ultimately, as it does in the Court's decision, upon how successful an illegal alien has been in avoiding detection of his conduct.

The issues in this case are substantial ones and of considerable importance to our state. They affect large numbers of Michigan statutes, they implicate legal principles of the highest order, and they are likely to become increasingly significant in the years ahead. These issues are exactly the sort concerning which the people of Michigan and their Legislature are entitled to guidance from the highest court of their state.[4]

PEOPLE v EMMANUEL LEWIS, No. 126418; Court of Appeals No. 251464.

Case to Be Reargued and Resubmitted July 28, 2004:

GERLING KONZERN ALLGEMEINE VERSICHERUNGS AG v LAWSON, No. 122938. On the Court's own motion, the clerk is to set this case for reargument and resubmission. The parties are to file supplemental briefs not later than 42 days after the date of this order. The parties are to include among the questions briefed: (1) Did the abolition of joint liability in most tort actions, MCL 600.2956, eliminate the right of contribution among settling tortfeasors under MCL 600.2925a? (2) Under what circumstances does a "common liability" among settling tortfeasors and non-settling alleged tortfeasors exist? See MCL 600.2925a(2). Does "common liability" refer to joint liability only, or does it also include several liability? How should "common liability" be construed in light of the language of MCL 600.2925a(1) providing a right of contribution "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"? (3) Where a trier of fact must allocate liability in direct proportion to a person's percentage of fault, MCL 600.2957(1), when, if ever, might a tortfeasor's settlement of a case include another alleged tortfeasor's percentage of fault? That is, is the settling tortfeasor, to the degree it settles over its own percentage of fault, a mere volunteer? (4) Does the injured party's actual amount of damages play a role in determining whether a settling tortfeasor has paid more than its pro rata share? If so, how is this amount proved? Are amounts paid by the settling tortfeasor for non-fault reasons (such as a desire for quick resolution or for anonymity) separated out and, if so, how? (5) What is the pleading burden on the contribution

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[4] See, e.g., the decisions of the Supreme Courts in Virginia, *Granados v Windson Development Corp,* 257 Va 103 (1999), and Connecticut, *Dowling v Slotnik*, 244 Conn 781 (1998), which reach very different results in addressing these issues. These cases also make clear that broader legal issues concerning the effect of illegal alien status cannot be decided free from consideration of the specific facts of particular cases. IRCA, for example, makes clear that *both* the illegal alien and the employer of the illegal alien possess legal obligations under the act. Possibly relevant to this case is that defendant employed significant numbers of illegal aliens and received economic value from plaintiffs before their injuries.

plaintiff who alleges that defendant is a tortfeasor, that plaintiff has paid more than its pro rata share of common liability, and that defendant has not paid its pro rata share of liability? (6) What is the effect in this case, if any, of (a) the fact that plaintiff has already paid defendant to settle defendant's claims against plaintiff, and (b) the fact that plaintiff did not attempt to join defendant in the underlying suit against plaintiff? Persons or groups interested in the resolution of the questions presented are invited to move for leave to file briefs amicus curiae. Reported below: 254 Mich App 241.

WEAVER, J. I dissent from the order because I am prepared to decide this case and do not believe that reargument is necessary to enable the Court to decide this case.

CAVANAGH, J. I join the statement of Justice WEAVER.

KELLY, J. (*dissenting*). In my opinion, the parties are entitled to a decision from this Court without further waiting. The following would be my decision. Because additional briefing and oral argument has been requested, I will be willing, of course, to revise my thinking to the extent I am shown to be incorrect.

Plaintiff seeks contribution from defendants for a portion of settlement monies paid to two third parties in a three-way automobile accident. We are asked to decide whether such a contribution action is possible under the facts of this case and in light of tort reform legislation enacted in 1995. I would find that it is not.

Under MCL 600.2956, part of the 1995 tort reform legislation, tortfeasors' potential liability in a personal injury lawsuit is several and not joint. Plaintiff's insured was not liable for defendants' negligence and thus could not have been held legally responsible to pay damages to third parties for injuries arising from defendants' negligence. When plaintiff settled with third parties, the amount it agreed to pay cannot be held to have included anything other than plaintiff's insured's own percentage of fault for the accident. Any additional amount is deemed a voluntary payment.

Accordingly, plaintiff cannot now seek contribution from the defendants for monies it paid in settlement of the third parties' claim. Therefore, we should affirm the decision of the Court of Appeals.

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 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 on behalf of Maus and the regents, paying approximately $2.2 million to Ash and Nicastri and $85,000 to Lawson.

In November 1999, plaintiff filed a separate complaint seeking statutory contribution from Lawson and American Beauty Turf under MCL 600.2925a 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 (2002). We granted leave to appeal on plaintiff's application.

STATUTORY LANGUAGE

We review de novo a decision on a motion for summary disposition. Questions of the interpretation and construction of statutes are questions of law that we also review de novo. *Northville Charter Twp v Northville Pub Schools,* 469 Mich 285, 289 (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 (1995). The best measure of intent is the words used by the Legislature. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 398 (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 sections of MCL 600.2925a provide:

> (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.

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[1] 1995 PA 161 and 1995 PA 249.

> (2) Conditions. 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 liability and commenced his action for contribution. [MCL 600.2925c(4) (emphasis added).]

MCL 600.2925b provides its own treatment of the expression "pro rata share," which 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 backdrop that we 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 of *Kokx v Bylenga*, 241 Mich App 655 (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 damages 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." Also, an employer can seek contribution from a union in a sex discrimination claim against it brought by an employee. *Donajkowski v Alpena Power Co*, 460 Mich 243, 264 (1999).

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 (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 (1984) (citations omitted). See also *Caldwell*, *supra* at 420 n 5.

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 (2001).

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, 3d, Apportionment of Liability, § B19, comment K.

Plaintiff argues 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 this provision in conjunction with the limitation in § 2925a(2). That section 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, 3d, Apportionment of Liability, § 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 find comment c of the same provision also persuasive to my analysis:

> *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*. at 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 not an "indivisible injury" under MCL 600.2925a.

Similarly, plaintiff cannot rely on the language of MCL 600.2925b simply because it sets out guidelines for determining the "pro rata share" of common liability. The statute does not expose 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.

It is clear that this pro rata division can be made only when the tortfeasors actually share a common tort burden or liability. But 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. Hence, plaintiff's insured was responsible only for its own separate liability to Ash and Nicastri.

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

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[2] 138 Mich App 334, 340 (1984).

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. [Dobbs, The Law of Torts (2001) § 390, p 1088.]

In addition, while settlements are generally favored, neither the language of MCL 600.2925a nor MCL 600.6304 clearly reflects the goal of promoting voluntary settlement.[3] Instead, their provisions are designed to achieve similar ends. They are intended to place the risk of, and burden for, payment upon a party only to the extent it is actually responsible for the injury. This applies even if the injury is indivisible.

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 and it cannot now recover contribution from defendants on the theory that it paid more than its pro rata share of such liability.

Therefore, the decision of the Court of Appeals should be affirmed.

Reconsideration Granted July 28, 2004:

PEOPLE v YOUNG, No. 124811. On reconsideration, the order of June 3, 2004, 470 Mich 869, is modified. The appeal is limited to the following

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

issues: (1) whether Michael Martin or Eugene Lawrence were accomplices, (2) whether the facts of the case establish a "closely drawn" issue of credibility, and (3) whether the "closely drawn" rule announced by this Court in *People v McCoy*, 392 Mich 231, 240 (1974), is inconsistent with MCL 768.29 and MCR 2.516(C). Court of Appeals No. 240832.

Reconsideration Denied July 29, 2004:

PEOPLE v HAROLD WILLIAMS, No. 124228. Leave to appeal denied at 470 Mich 852. Court of Appeals No. 230566.

PEOPLE v HOSS, No. 124749. Leave to appeal denied at 470 Mich 853. Court of Appeals No. 247374.

PEOPLE v CHATMAN, No. 124822. Leave to appeal denied at 470 Mich 854. Court of Appeals No. 247378.

PEOPLE v ANTHONY ALEXANDER, No. 124851. Leave to appeal denied at 470 Mich 854. Court of Appeals No. 234744.

PEOPLE v DIANGELO STEWART, No. 124906. Leave to appeal denied at 470 Mich 855. Court of Appeals No. 246120.

PEOPLE v CAULTON, No. 124917. Leave to appeal denied at 470 Mich 855. Court of Appeals No. 245797.

PEOPLE v SCOTT BALDWIN, No. 124931. Leave to appeal denied at 470 Mich 856. Court of Appeals No. 236855.

PEOPLE v WINGEART, No. 125009. Leave to appeal denied at 470 Mich 856. Court of Appeals No. 240697.

PEOPLE v DAVID SAMEL, No. 125225. Leave to appeal denied at 470 Mich 860. Court of Appeals No. 251920.

Summary Dispositions July 29, 2004:

PEOPLE v WILSON JONES, No. 125184. In lieu of granting leave to appeal, the case is remanded to the Wayne Circuit Court for vacation of the judgment of sentence in Wayne Circuit Court Docket No. 93-012808, because there was no valid conviction in that case. MCR 7.302(G)(1). In all other respects, leave to appeal is denied because defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D) on the remaining issue. Jurisdiction is not retained. Court of Appeals No. 249125.

PEOPLE v ENDRES, No. 125823. 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. 252738.

PEOPLE v BENJAMEN LYONS, No. 126348. In lieu of granting leave to appeal, the Court of Appeals order is vacated and the case is remanded to that Court for plenary consideration. MCR 7.302(G)(1). Proceedings in the circuit court are stayed until further order of the Court of Appeals. Jurisdiction is not retained. Court of Appeals No. 254644.

Chief Justice CORRIGAN concurs, and Justices WEAVER and MARKMAN dissent, in statements set forth below:

CORRIGAN, C.J. I concur in the decision to vacate the Court of Appeals judgment and remand this case to the Court of Appeals for plenary consideration, and to stay the circuit court proceedings.

After defendant pleaded no contest, the trial court departed downward from the sentencing guidelines. The prosecutor filed an appeal, and the Court of Appeals remanded to the trial court to articulate substantial and compelling reasons for the downward departure under *People v Babcock*, 469 Mich 247 (2003). On remand, the trial court decided sua sponte that there was an insufficient factual basis for the plea. The court therefore set the plea aside.

The prosecutor again appealed, arguing that the trial court had exceeded its authority on remand by vacating the plea rather than addressing the sentencing issue. In a two-to-one peremptory order, the Court of Appeals remanded the case to the trial court for an evidentiary hearing. The Court of Appeals stated that the prosecutor must be given an opportunity to present evidence of defendant's guilt, but that defendant must then have an opportunity to present contrary evidence. The Court of Appeals further said that "[i]f contrary evidence is produced, the defendant shall be given an opportunity to elect to allow the plea to stand or to withdraw the plea." The prosecutor then appealed to this Court.

On plenary review on remand, the Court of Appeals should consider whether the trial court lacked authority to set the plea aside. The Court of Appeals earlier order had remanded the case solely for sentencing purposes, i.e., for the court to articulate substantial and compelling reasons for its downward departure. Given the limited scope of the remand, a question may exist regarding whether the trial court exceeded its authority by vacating the plea.

I also urge the Court of Appeals to consider whether any legal authority supports the relief granted by the Court of Appeals most recent peremptory order. That order seemed to suggest that defendant could set aside his plea even if there were a sufficient factual basis, so long as defendant could present evidence to rebut the prosecutor's proofs. It appears that defendant never requested such relief and never identified a defect in the plea-taking procedure.

In addressing these questions, the Court of Appeals should consider the nature of a no contest plea. It is axiomatic that a defendant who pleads no contest waives the right to contest his guilt. Thus, it would seem to follow that once a defendant has pleaded no contest, he cannot set aside the plea merely by presenting exculpatory evidence, because that is the very right that he has waived.

WEAVER, J. I dissent from the order remanding this case to the Court of Appeals for plenary consideration. Rather than remand to the Court of Appeals, I would vacate the June 3, 2004, Court of Appeals order and reverse the trial court's order to sua sponte set aside defendant's second-degree home invasion conviction. Defendant's conviction should be reinstated and the case remanded to the trial court for the trial court to articulate a substantial and compelling reason for its downward departure, as was required by the Court of Appeals in its February 17, 2004, order.

The trial court's decision on remand to sua sponte set aside the second-degree home invasion conviction that resulted from defendant's no contest plea was beyond the scope of the Court of Appeals remand order. Further, it appears from the record that there was a sufficient factual basis for defendant's no contest plea.

MARKMAN, J. I join in the statement of Justice WEAVER.

Leave to Appeal Denied July 29, 2004:

SMITH v BEUKER, No. 125380; Court of Appeals No. 241169.

VAN REKEN v DARDEN, NEEF & HEITSCH, No. 125457; reported below: 259 Mich App 454.

HORNE v STRAWBERRY HILLS CORPORATION, No. 125460; Court of Appeals No. 240247.

PEOPLE v CLEE JACKSON, No. 125475; Court of Appeals No. 241597.

BURLINGAME COMPANY v CHENARD, No. 125515; Court of Appeals No. 241533.

PEOPLE v CATLETT, No. 125528; Court of Appeals No. 242787.

PEOPLE v KLEIN, No. 125541; Court of Appeals No. 241219.

COMERICA BANK v HARBOR NORTHWESTERN-30800, LLC, No. 125565; Court of Appeals No. 241744.

PEOPLE v HAROLD SHAW, No. 125569; Court of Appeals No. 234923 (after remand).

PEOPLE v ANTHONY LEE, No. 125570; Court of Appeals No. 243098.

GILMORE ESTATE v NATIONWIDE INSURANCE COMPANY, No. 125575; Court of Appeals No. 244825.

PEOPLE v STEVEN BAILEY, No. 125585; Court of Appeals No. 242417.

PEOPLE v ERIC POWELL, No. 125591; Court of Appeals No. 239310.

PEOPLE v LOVE, No. 125595; Court of Appeals No. 242791.

PEOPLE v MYRON JACKSON, No. 125596; Court of Appeals No. 241751.

BEAGLE v GENERAL MOTORS CORPORATION, No. 125611; Court of Appeals No. 251495.

HARRIS v DETROIT POLICE OFFICER, No. 125626; Court of Appeals No. 249979.

In re VON MYHR TRUST (VON MYHR v GUNNING), No. 125627; Court of Appeals No. 241926.

PEOPLE v DJOUMESSI, No. 125645; Court of Appeals No. 238631.

SIMMONS v TRI-COUNTY ELECTRIC COMPANY, No. 125651; Court of Appeals No. 245930.

REESE v MCCREARY, No. 125655; Court of Appeals No. 251487.

PEOPLE v ROBERT KINNEY, No. 125657; Court of Appeals No. 244280.

BLUEMLEIN v DELPHI AUTOMOTIVE SYSTEMS, No. 125661; Court of Appeals No. 250598.

PEOPLE v ROHM, No. 125663; Court of Appeals No. 241755.

PEOPLE v THOMPKINS, No. 125667; Court of Appeals No. 242478.

PEOPLE v WOLF, No. 125679; Court of Appeals No. 251093.

PEOPLE v ZALECKI, No. 125680; Court of Appeals No. 251094.

PIGORS v GENERAL FORMULATIONS, INC, No. 125682; Court of Appeals No. 252841.

ALLIET v BERENHOLZ, No. 125684; Court of Appeals No. 242469.

CITY OF LAKE ANGELUS v AERONAUTICS COMMISSION, No. 125687. Leave to file briefs amicus curiae is granted. Reported below: 260 Mich App 371.

PEOPLE v VERDELL PHILLIPS, No. 125689; Court of Appeals No. 243043.

PEOPLE v DWAYNE JONES, No. 125693; Court of Appeals No. 243481.

PEOPLE v SOUSA, No. 125697; Court of Appeals No. 244554.

SQUIRES v CITY OF DETROIT, No. 125703; Court of Appeals No. 240762.

PEOPLE v SAVINO, Nos. 125713, 125714; Court of Appeals Nos. 251681, 251682.

PEOPLE v EDWARD, No. 125715; Court of Appeals No. 243842.

PEOPLE v PHILIP CLARK, No. 125716; Court of Appeals No. 242156.

UNIONVILLE-SEBEWAING AREA SCHOOLS v MASB-SEG PROPERTY/CASUALTY POOL, INC, No. 125719; Court of Appeals No. 242084.

PEOPLE v PELL, No. 125720; Court of Appeals No. 242272.

BENZ v PITTSFIELD CHARTER TOWNSHIP, No. 125721; Court of Appeals No. 243133.

EVARIAN v MICHALSKI, No. 125726; Court of Appeals No. 244487.

PEOPLE v ESQUIVEL, No. 125729; Court of Appeals No. 243044.

PEOPLE v ROACH, No. 125730; Court of Appeals No. 243845.

PEOPLE v BINGHAM, No. 125735; Court of Appeals No. 243619.

PEOPLE v ROBERT HALL, No. 125742; Court of Appeals No. 240341.

WILLIAMS v DEPARTMENT OF CORRECTIONS, No. 125743; Court of Appeals No. 252150.

PEOPLE v SAMUEL DEJESUS, No. 125745; Court of Appeals No. 241438.

PEOPLE v NEVERS, No. 125746; Court of Appeals No. 227401 (on remand).

MARKMAN, J., not participating.

PEOPLE v MOREY, No. 125753; Court of Appeals No. 251558.

PEOPLE v BARNES, No. 125754; Court of Appeals No. 244590.

PEOPLE v TIMOTHY JOHNSON, No. 125755; Court of Appeals No. 244057.

PEOPLE v HENDERSON, No. 125756; Court of Appeals No. 244217.

PEOPLE v BALLARD, No. 125769; Court of Appeals No. 241583.

PEOPLE v ECCLES, No. 125770; reported below: 260 Mich App 379.

PEOPLE v MARROW-BEY, No. 125772; Court of Appeals No. 250586.

PEOPLE v WILLIAM MOORE, No. 125775; Court of Appeals No. 242744.

PEOPLE v RONNIE JOHNSON, No. 125776; Court of Appeals No. 243484.

PEOPLE v HOLLAND, No. 125777; Court of Appeals No. 242170.

MEAD v MEAD, No. 125778; Court of Appeals No. 240872.

PEOPLE v CEDRIC HARRIS, No. 125779; Court of Appeals No. 243045.

PEOPLE v PINKNEY, No. 125781; Court of Appeals No. 243826.

DWYER v DWYER, No. 125783; Court of Appeals No. 252685.

PEOPLE v CHARLES SMITH, No. 125784; Court of Appeals No. 243633.

PEOPLE v DARIAN BROWN, No. 125785; Court of Appeals No. 240826.

PEOPLE v WIGFALL, No. 125786; Court of Appeals No. 244813.

PEOPLE v CHITTLE, No. 125787; Court of Appeals No. 244313.

PEOPLE v DEFRANCE, No. 125789; Court of Appeals No. 245011.

PEOPLE v LAY, No. 125794; Court of Appeals No. 252694.

PAMPREEN v PAMPREEN, No. 125797; Court of Appeals No. 251610.

PEOPLE v JUNIOUS HALL, No. 125798; Court of Appeals No. 244517.

PEOPLE v JEFFERY MOORE, No. 125800; Court of Appeals No. 243631.

PADGETT v GIOVANNI, No. 125802; Court of Appeals No. 242081.

PEOPLE v CALBERT, No. 125807; Court of Appeals No. 243875.

KEARNEY TOWNSHIP v WAGNER, No. 125809; Court of Appeals No. 251519.

PEOPLE v GREGORY WHITE, No. 125814; Court of Appeals No. 243960.

PEOPLE v CLEMENTS, No. 125815; Court of Appeals No. 252057.

PEOPLE v DAMON THOMAS, No. 125822; Court of Appeals No. 243413.

PEOPLE v VALASQUEZ, No. 125826; Court of Appeals No. 243083.

PEOPLE v HUMPHREY, No. 125828; Court of Appeals No. 243482.

PEOPLE v LONGGREAR NO 1, No. 125830; Court of Appeals No. 244237.

PEOPLE v CARL THOMAS, No. 125835; reported below: 260 Mich App 450.

PEOPLE v DANIEL WRIGHT, No. 125842. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252497.

PEOPLE v FULLER, No. 125843; Court of Appeals No. 244906.

PEOPLE v CREGO, No. 125844; Court of Appeals No. 252480.

PEOPLE v BENTLEY, No. 125870; Court of Appeals No. 250788.

PEOPLE v RANDY HOLLOWAY, No. 125871; Court of Appeals No. 243325.

PEOPLE v JOHN COOK, No. 125876; Court of Appeals No. 251752.

PEOPLE v CLARENCE SCOTT, No. 125883; Court of Appeals No. 245016.

PEOPLE v MICHAEL TAYLOR, No. 125884; Court of Appeals No. 240344.

PEOPLE v RIVERA, No. 125885; Court of Appeals No. 252986.

PEOPLE v TIMOTHY SMITH, No. 125886; Court of Appeals No. 251517.

PEOPLE v ELI PAYNE, No. 125913; Court of Appeals No. 244316.

PEOPLE v HOWARD SMITH, No. 125920; Court of Appeals No. 244238.

PEOPLE v ROMANDO SMITH, No. 125921; Court of Appeals No. 245098.

PEOPLE v KAWAN PAYNE, No. 125922. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252387.

PEOPLE v CAUVIN, No. 125923; Court of Appeals No. 253032.

PEOPLE v MONFORD, No. 126137; Court of Appeals No. 247159.

Interlocutory Appeal

Leave to Appeal Denied July 29, 2004:

HORNE v ABS PROPERTIES, INC, No. 125459; Court of Appeals No. 240247.

Reconsideration Denied July 30, 2004:

PEOPLE v COUCH, No. 125169. Leave to appeal denied at 470 Mich 889. Court of Appeals No. 241079.

KELLY, J. (*dissenting*). In his motion for reconsideration, defendant claims that the recent United States Supreme Court decision in *Blakely v Washington*[1] is applicable to Michigan's sentencing scheme. I would request full briefing and oral argument on the issue. It is jurisprudentially significant and affects this defendant as well as many others.

While a majority of this Court has already determined that *Blakely* is inapplicable, see *People v Claypool*,[2] it did so in a footnote in a case where the issue was neither raised nor briefed. Given the significance of the issue, it should have the benefit of full briefing and oral argument.

Therefore, I would grant leave and direct the parties to address *Blakely's* applicability to Michigan's sentencing scheme in general and to this defendant's sentence in particular.

Leave to Appeal Denied July 30, 2004:

In re GENTRIS-BROOKS (FAMILY INDEPENDENCE AGENCY v BROOKS), No. 126513; Court of Appeals No. 252078.

In re MANDILEGO (FAMILY INDEPENDENCE AGENCY v LOUDENSLAGER), No. 126526; Court of Appeals No. 252944.

Summary Dispositions August 31, 2004:

SANDUSKY v ROCKWELL AUTOMATION, INC, No. 126388. 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). Court of Appeals No. 255694.

MILLER v KEZLARIAN, No. 126499. In lieu of granting leave to appeal, the Court of Appeals order is vacated in part. MCR 7.302(G)(1). Further proceedings in the Oakland Circuit Court are stayed pending 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. Court of Appeals No. 249641.

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[1] 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[2] 470 Mich 715 (2004).

Leave to Appeal Denied August 31, 2004:

KNECHT v QUICK-SAV FOOD STORES, LTD, No. 121622; Court of Appeals No. 239672.

PEOPLE v SCHUSTER, No. 123714; Court of Appeals No. 246968.

ZEVALLOS v GATZAROS, No. 125104; Court of Appeals No. 245659.

PEOPLE v MORGAN, No. 125223; Court of Appeals No. 242731.

HUNTINGTON NATIONAL BANK v HICKS, No. 125227; Court of Appeals No. 239612.

PEOPLE v BRENT SMITH, No. 125251; Court of Appeals No. 238005.

PEOPLE v BRIAN ALEXANDER, No. 125405; Court of Appeals No. 239241.

PEOPLE v COREY TURNER, No. 125420; Court of Appeals No. 245376.

CITY OF ROMULUS v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 125518; reported below: 260 Mich App 54.

PEOPLE v STREETS, No. 125607; Court of Appeals No. 251269.

PEOPLE v RICKY TAYLOR, No. 125609; Court of Appeals No. 252195.

PEOPLE v MCADOO, No. 125618; Court of Appeals No. 242214.

MICHIGAN ENVIRONMENTAL COUNCIL v PUBLIC SERVICE COMMISSION, Nos. 125619, 125620, 126264; Court of Appeals Nos. 240403, 240406, 244354.

LAWRENCE v BLOOMFIELD TOWNSHIP, No. 125683; Court of Appeals No. 243527.

PEOPLE v YOSHEYAH THOMAS, No. 125724; Court of Appeals No. 242377.

ROBINSON v CITY OF DETROIT, No. 125767; Court of Appeals No. 241748.

PEOPLE v JEFFREY KINNEY, No. 125771; Court of Appeals No. 252990.

PEOPLE v JAYSON PAYNE, No. 125773; Court of Appeals No. 243032.

PEOPLE v RAMIREZ, No. 125795; Court of Appeals No. 242381.

FAIRCHILD v BUENA VISTA CHARTER TOWNSHIP, No. 125801; Court of Appeals No. 241506.

PEOPLE v RONALD WEST, No. 125804; Court of Appeals No. 242860.

PEOPLE v HESTER, No. 125805; Court of Appeals No. 243636.

PEOPLE v LONNIE TAYLOR, No. 125806; Court of Appeals No. 244514.

PEOPLE v SARAMPOTE, No. 125813; Court of Appeals No. 250608.

NACY v DAIMLERCHRYSLER CORPORATION, No. 125825; Court of Appeals No. 251819.

PEOPLE v LAQUAN JOHNSON, No. 125833; Court of Appeals No. 237200.

PEOPLE v JASON DAVIS, No. 125846; Court of Appeals No. 253279.

REINHART v CENDROWSKI SELECKY, PC, Nos. 125847, 125849; Court of Appeals Nos. 239540, 239584.

LEE v MICHIGAN CONSOLIDATED GAS COMPANY, No. 125848; Court of Appeals No. 252074.

PEOPLE v ROXIE BURTON, No. 125851; Court of Appeals No. 243874.

PEOPLE v WALTER COLLINS, No. 125853; Court of Appeals No. 244658.

GREAT LAKES PLUMBING & HEATING OF NORTHERN MICHIGAN, INC v WDLS, INC, No. 125854; reported below: 260 Mich App 625.

PEOPLE v HELBLING, No. 125858; Court of Appeals No. 253318.

GANTT v SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION, Nos. 125860, 125861; Court of Appeals Nos. 241237, 243284.

PEOPLE v BLACKWOOD, No. 125863; Court of Appeals No. 243324.

SCHAEFER v INGHAM COUNTY DRAIN COMMISSIONER NO 1, No. 125881; Court of Appeals No. 250924.

RUMP v BAYPOINTE APARTMENTS, No. 125887; Court of Appeals No. 244082.

KINNEY v GEIL, No. 125888; Court of Appeals No. 245025.

PEOPLE v THORNSBURY, No. 125889; Court of Appeals No. 253199.

PEOPLE v WISE, No. 125890; Court of Appeals No. 252383.

PEOPLE v HILTS, No. 125891; Court of Appeals No. 253429.

PEOPLE v JOHN RICHARDSON, No. 125892; Court of Appeals No. 245325.

PEOPLE v LAQUAN JAMES, No. 125893; Court of Appeals No. 239993.

PEOPLE v SALERNO, No. 125894; Court of Appeals No. 244699.

PATTERSON v BALFOUR, No. 125896; Court of Appeals No. 244707.

FARM BUREAU MUTUAL INSURANCE COMPANY v BALFOUR, No. 125897; Court of Appeals No. 244785.

PEOPLE v DEWOLFE, No. 125899; Court of Appeals No. 253226.

TAGUE v DEPARTMENT OF CORRECTIONS, No. 125902; Court of Appeals No. 250542.

PEOPLE v MACK MCKINNEY, No. 125903; Court of Appeals No. 253133.

PEOPLE v BRYANT, No. 125904; Court of Appeals No. 245449.

PEOPLE v GEORGE, No. 125905; Court of Appeals No. 241382.

PEOPLE v MCNORIELL, No. 125906; Court of Appeals No. 240748.

PEOPLE v STEINKE, No. 125907; Court of Appeals No. 243420.

ESTON v PHILIP R SEAVER TITLE COMPANY, INC, No. 125909; Court of Appeals No. 247298.

PEOPLE v ANTHONY THOMPSON, No. 125912; Court of Appeals No. 244236.

PEOPLE v BRANNON, No. 125918; Court of Appeals No. 253532.

PEOPLE v EDDIE LEE, No. 125919; Court of Appeals No. 244233.

PEOPLE v RONNELL WILSON, No. 125927; Court of Appeals No. 253134.

SCHAEFER v INGHAM COUNTY DRAIN COMMISSIONER NO 2, No. 125928; Court of Appeals No. 252439.

PEOPLE v LEROY SCOTT, No. 125930; Court of Appeals No. 242250.

MONTGOMERY v CITIBANK, NA, No. 125931; Court of Appeals No. 252629.

OASIS PROPERTIES, INC v VANGUARD RECORDING STUDIO, INC, No. 125933; Court of Appeals No. 251919.

PEOPLE v GRAYSE, No. 125934; Court of Appeals No. 244069.

PEOPLE v NEFF, No. 125937; Court of Appeals No. 253194.

PEOPLE v CASTILLO, No. 125938; Court of Appeals No. 243330.

PEOPLE v FLEMING, No. 125939; Court of Appeals No. 252258.

PEOPLE v MCCLURE, No. 125940; Court of Appeals No. 242323.

PEOPLE v HUNTER, No. 125941; Court of Appeals No. 244409.

PEOPLE v JAMES BAILEY, No. 125945; Court of Appeals No. 253278.

In re BENJAMIN JOHN AZZAR LIVING TRUST (ELLIS v AZZAR), Nos. 125951-125953; Court of Appeals Nos. 238476, 241119, 243766.

PEOPLE v DESAI, No. 125957; Court of Appeals No. 238210.

PEOPLE v RAMONE MCKINNEY, No. 125958; Court of Appeals No. 253871.

PEOPLE v HAMILTON, No. 125963; Court of Appeals No. 244184.

PEOPLE v COOPER, No. 125966; Court of Appeals No. 253492.

PEOPLE v ABERNATHY, No. 125968; Court of Appeals No. 243745.

HACKERT v PERE MARQUETTE CHARTER TOWNSHIP, No. 125979; Court of Appeals No. 244781.

PEOPLE v HAUGHTON, No. 125982; Court of Appeals No. 243962.

PEOPLE v TONY BROWN, No. 125985; Court of Appeals No. 243961.

PEOPLE v KEITH CUMMINGS, No. 125986; Court of Appeals No. 244035.

PEOPLE v BOURNE, No. 125992; Court of Appeals No. 244724.

WINDSOR CHARTER TOWNSHIP v AZZAWI, No. 126003; Court of Appeals No. 249876.

PEOPLE v BERG, No. 126004; Court of Appeals No. 253462.

PEOPLE v ANTHONY BALDWIN, Nos. 126007, 126009; Court of Appeals Nos. 252259, 252260.

PEOPLE v LONEY, No. 126016; Court of Appeals No. 243416.

PEOPLE v JAMES GREEN, No. 126018; reported below: 260 Mich App 392.

PEOPLE v DRAHEIM, No. 126026; Court of Appeals No. 244218.

HERWIG-TUCKER v DETROIT ENTERTAINMENT, LLC, No. 126028; Court of Appeals No. 244834.
CAVANAGH, J., not participating

PEOPLE v BOLTON, No. 126032; Court of Appeals No. 253983.

CHRISTENSEN v CHRISTENSEN, No. 126042; Court of Appeals No. 244995.

ALANIZ v NAN-TAY APARTMENTS OF SUNBURY, No. 126043; Court of Appeals No. 245205.

PEOPLE v ROWE, No. 126046; Court of Appeals No. 240820.

PEOPLE v SOLMONSON, No. 126059; reported below: 261 Mich App 657.

PEOPLE v SANDS and PEOPLE v DESHAWN JENKINS, Nos. 126061, 126063; reported below: 261 Mich App 158.

PEOPLE v DENNIS ROBINSON, No. 126092; Court of Appeals No. 246033.

PEOPLE v FRANK, No. 126095; Court of Appeals No. 253583.

PEOPLE v HYDE, No. 126110; Court of Appeals No. 238389 (on remand).

PEOPLE v STANLEY, No. 126112; Court of Appeals No. 243819.

KOJAIAN v HARRIS, No. 126748; Court of Appeals No. 254231.

PEOPLE v PHILIP MILLER, No. 126751; Court of Appeals No. 246607.

In re VANDERBAND (FAMILY INDEPENDENCE AGENCY v VANDERBAND), No. 126805; Court of Appeals No. 255572.

Interlocutory Appeals

Leave to Appeal Denied August 31, 2004:

BURNETT v WAR MEMORIAL HOSPITAL, No. 125949; Court of Appeals No. 253154.

PEOPLE v VENDEVILLE, No. 126006; Court of Appeals No. 248161.

Leave to Cross-Appeal Denied August 31, 2004:

PEOPLE v RICHARD KIMBLE, No. 122271. By order of March 26, 2003, the defendant's application for leave to appeal as cross-appellant was held in abeyance pending consideration of the prosecutor's application for leave to appeal. On order of the Court, the opinion having been issued on June 29, 2004, 470 Mich 305 (2004), the application for leave to appeal as cross-appellant is again considered, and it is denied because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 252 Mich App 269.

Reconsideration Denied August 31, 2004:

PEOPLE v DEAN, No. 121117. Leave to appeal denied at 470 Mich 863. Court of Appeals No. 235538.

PEOPLE v DONALD KIMBLE, No. 124718. Leave to appeal denied at 470 Mich 871. Court of Appeals No. 239273.

KELLY and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

BRENNAN v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 124985. Leave to appeal denied at 470 Mich 856. Court of Appeals No. 235196.

SOSINSKI v CYNTHIA M TROSIN, DO, PC, No. 125020. Leave to appeal denied at 470 Mich 856. Court of Appeals No. 239781.

PEOPLE v EDDIE PERKINS, No. 125130. Leave to appeal denied at 470 Mich 858. Court of Appeals No. 235922.

SAMUEL v FIEGER, FIEGER, SCHWARTZ & KENNEY, PC, No. 125194. Leave to appeal denied at 470 Mich 865. Court of Appeals No. 248385.

HENRY v DOW CHEMICAL COMPANY, No. 125205. Leave to appeal granted at 470 Mich 870. Court of Appeals No. 251234.

KELLY, J. I would grant the motion for reconsideration.

LUDWIG v DICK MARTIN SPORTS, INC, No. 125222. See 470 Mich 862. Court of Appeals No. 242758.

PEOPLE v NEWMAN, No. 125270. Leave to appeal denied at 470 Mich 860. Court of Appeals No. 249994.

PEOPLE v MARCELLE DORSEY, No. 125271. Leave to appeal denied at 470 Mich 860. Court of Appeals No. 240856.

AMERICAN AXLE & MANUFACTURING, INC v MURDOCK, No. 125605. Leave to appeal denied at 470 Mich 871. Court of Appeals No. 253054.

In re GATES (FAMILY INDEPENDENCE AGENCY v GATES), Nos. 126220, 126223. Leave to appeal denied at 470 Mich 883. Court of Appeals Nos. 251366, 251111.

Reconsideration Denied September 10, 2004:

In re GENTRIS-BROOKS (FAMILY INDEPENDENCE AGENCY v BROOKS), No. 126513. Leave to appeal denied *ante* at 869. Court of Appeals No. 252078.

Leave to Appeal Denied September 10, 2004:

EASTERN SAVINGS BANK v CITIZENS BANK, No. 125238. Leave to file a brief amicus curiae is granted. Court of Appeals No. 240779.

LAMAR CONSTRUCTION COMPANY v HILLTOP GOLF CENTER, LLC, No. 126012; Court of Appeals No. 250742.

HAZEL PARK RACING ASSOCIATION, INC v BOARD OF STATE CANVASSERS, No. 126910. The application for leave to appeal prior to decision by the Court of Appeals is denied as moot, the Court of Appeals having issued an order disposing of the case. Court of Appeals No. 257568.

Leave to Appeal Granted September 16, 2004:

STUDIER v MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD NO 1, No. 125765. The parties are directed to include among the issues to be briefed whether health benefits are "accrued financial benefits" within the meaning of Const 1963, art 9, § 24, and whether the challenged health care plan amendments impair existing contractual obligations in violation of Const 1963, art 1, § 10, and US Const, art I, § 10. The case is to be argued and submitted to the Court with *Studier v Michigan Public School Employees' Retirement Bd,* No. 125766. Reported below: 260 Mich App 460.

STUDIER v MICHIGAN PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD NO 2, No. 125766. The parties are directed to include among the issues to be briefed whether the health benefits described in MCL 38.1391(1) are a contractual obligation that cannot be diminished or impaired by the state. Const 1963, art 1, § 10, and US Const, art I, § 10. The case is to be argued and submitted to the Court with *Studier v Michigan Public School Employees' Retirement Bd,* No. 125765. Reported below: 260 Mich App 460.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 16, 2004:

PEOPLE v SHAWN JENKINS, No. 125141. 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)(l). The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 240947.

MAGEE v DAIMLERCHRYSLER CORPORATION, No. 126219. 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. The application for leave to appeal remains pending. Court of Appeals No. 243847.

Summary Dispositions September 16, 2004:

PEOPLE v MEAD, No. 126410. In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed. MCR 7.302(G)(1). In reversing defendant's convictions, the Court of Appeals expressly found that it was not clear whether, or to what degree, any alleged errors affected the trial court's decision. Given the Court's uncertainty on this issue, defendant did not meet his burden of establishing that it is more probable than not that any alleged error was outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496 (1999); MCL 769.26. This matter is remanded to the Court of Appeals for consideration of the remaining issue in defendant's appeal of right. Jurisdiction is not retained. Court of Appeals No. 238754.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PEOPLE v MARKS, No. 126482. 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). Court of Appeals No. 256029.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

Leave to Appeal Denied September 16, 2004:

ALEXANDER v VETTRAINO, No. 123695; Court of Appeals No. 245369.

SCHENK, BONCHER & PRASHER v VANDERLAAN, No. 125181; Court of Appeals No. 237690.

CAVANAGH, WEAVER, and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on rehearing granted.

PEOPLE v FREDERICK FIELDS, No. 125325; Court of Appeals No. 237176.

PEOPLE v SKUTT, No. 125387; Court of Appeals No. 251540.

CAVANAGH and KELLY, JJ. We would remand to the Court of Appeals as on leave granted.

PEOPLE v HARMON, No. 125439; Court of Appeals No. 251947.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for docketing and consideration of defendant's application. The criminal defendant demonstrated his inability to pay the partial filing fee required by MCL 600.321. Because the defendant showed that he is

unable because of indigency to pay the partial fee, we would order the Court of Appeals to "order those fees and costs either waived or suspended until the conclusion of the litigation." MCR 2.002(D).

PEOPLE v BENNETT, No. 125511; Court of Appeals No. 252691.

CAVANAGH, KELLY, and MARKMAN, JJ. We would remand this case to the Court of Appeals for consideration in light of *People v Babcock*, 469 Mich 247 (2003).

PEOPLE v DURANT, No. 125523; Court of Appeals No. 243023.

CAVANAGH and KELLY, JJ. We would remand this case for a new trial.

PEOPLE v POINDEXTER, No. 125525; Court of Appeals No. 233907.

PEOPLE v MCSWAIN, No. 125546. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Reported below: 259 Mich App 654.

GULLEY-REAVES v BACIEWICZ, No. 125808; reported below: 260 Mich App 478.

CAVANAGH, WEAVER, and KELLY, JJ. We would remand this case to the Court of Appeals for reconsideration in light of *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679 (2004).

BIRCHWOOD MANOR, INC v COMMISSIONER OF REVENUE, HEALTH CARE AND RETIREMENT CORPORATION v COMMISSIONER OF REVENUE, and KNOLLVIEW MANOR, INC v COMMISSIONER OF REVENUE, Nos. 125873-125875. Motion for leave to file sur-reply brief is granted. Reported below: 261 Mich App 248.

PEOPLE v JEFFERY JONES, No. 125970; Court of Appeals No. 252916.

Interlocutory Appeals

Leave to Appeal Denied September 16, 2004:

SHEPHERD MONTESSORI CENTER MILAN v ANN ARBOR CHARTER TOWNSHIP, No. 125267; reported below: 259 Mich App 315.

JOHNSON v ORAL AND MAXILLOFACIAL SURGERY RESIDENTS, No. 126375; Court of Appeals No. 255352.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 17, 2004:

ASSOCIATED BUILDERS AND CONTRACTORS-SAGINAW VALLEY AREA CHAPTER v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES DIRECTOR, No. 124835. 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 correctly ruled that there

was no "actual controversy" between the parties and that therefore a declaratory judgment action could not be maintained. The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 234037.

WEAVER, J. The issues in this case are of sufficient importance that I would grant leave to appeal rather than direct oral argument on the application.

KELLY, J. I join the statement of Justice WEAVER.

Summary Disposition September 17, 2004:

WILLIAMS v FARM BUREAU MUTUAL INSURANCE COMPANY, No. 126811. 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 Ingham Circuit Court is to stay the trial pending the completion of proceedings on appeal. Jurisdiction is not retained. Court of Appeals No. 255753.

Leave to Appeal Denied September 17, 2004:

FACE TRADING, INC v DEPARTMENT OF CONSUMER & INDUSTRY SERVICES, No. 126704; Court of Appeals No. 256639.

CAVANAGH, KELLY, and MARKMAN, JJ. We would continue the injunction issued by the trial court until completion of the appeal.

Interlocutory Appeal

Leave to Appeal Denied September 17, 2004:

COLIN COMMUNICATIONS, INC v SBC GLOBAL SERVICES, INC, No. 126971; Court of Appeals No. 257048.

YOUNG, J. I concur in the denial of interlocutory relief because the trial judge has not foreclosed the possibility of revisiting the propriety of admitting the disputed experts' testimony. Moreover, in July, this Court provided explicit guidance to the Michigan bench and bar on the significant gatekeeping obligation of our trial courts to ensure that only reliable expert testimony is admitted for a jury's consideration. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-791 (2004), and *Craig v Oakwood Hosp*, 471 Mich 67, 77-85 (2004). Any reconsideration given to defendant's motion will be governed by the important obligations laid out in *Gilbert* and *Craig* and the new provisions of MRE 702.

Reconsideration Denied September 17, 2004:

In re MANDILEGO (FAMILY INDEPENDENCE AGENCY v LOUDENSLAGER), No. 126526. Leave to appeal denied *ante* at 869. Court of Appeals No. 252944.

Summary Dispositions September 24, 2004:

TROUTEN v AUTOZONE, INC, No. 124380. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *Corley v Detroit Bd of Ed*, 470 Mich 274 (2004). MCR 7.302(G)(1). Court of Appeals No. 232690.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. I would deny leave to appeal and allow this case to proceed to trial on the claim of quid pro quo sexual harassment in relation to the acts allegedly committed by the defendant's store manager, William Hall. I do not find that the facts herein are related to the facts in *Corley v Detroit Bd of Ed*, 470 Mich 274 (2004). In *Corley, supra,* we dealt with the question of quid pro quo sexual harassment where the parties had been involved in a prior consensual, romantic relationship. The complainant in this case has not alleged that any mutual romantic relationship ever existed.

PEOPLE v MCCRAINE, No. 124958. In lieu of granting leave to appeal, the case is remanded to the Grand Traverse Circuit Court for resentencing in light of *People v Kimble*, 470 Mich 305 (2004), as the court erred in using the same sexual penetration in scoring OV 11 and OV 13. MCR 7.302(G)(1). Jurisdiction is not retained. Court of Appeals No. 251024.

Chief Justice CORRIGAN and Justices YOUNG and MARKMAN concur, and Justice WEAVER dissents, in statements below:

CORRIGAN, C.J. I concur in remanding for resentencing because the majority opinion in *People v Kimble*, 470 Mich 305 (2004), entitles defendant to this relief. Nonetheless, I write separately to emphasize my continued adherence to the views expressed by Justice WEAVER in her dissenting opinion in *Kimble*.

The second sentence of MCL 769.34(10) provides:

> A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

As Justice WEAVER's dissent in *Kimble* explained, this provision reflects that the Legislature intended that the Court of Appeals review only those scoring errors that were preserved " 'at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.' " *Id*. at 317, quoting MCL 769.34(10). Despite this plain language, the *Kimble* majority held that this provision did not apply where a sentence falls outside the appropriate guidelines range.

In light of the holding in *Kimble*, the Legislature may wish to consider another means of effectuating its intent to preclude the Court of Appeals from reviewing unpreserved scoring errors. For example, the Legislature could prescribe that the Court of Appeals lacks jurisdiction to review scoring errors that were not preserved in one of the required ways, regardless of whether the sentence falls within the appropriate guidelines

range.[1] Such a jurisdictional provision would seem to fall within the Legislature's authority. See Const 1963, art 6, § 10; *People v Bulger*, 462 Mich 495, 509 (2000) (" '[t]he Legislature, not this Court, has the power under the constitution to prescribe the jurisdiction of the Court of Appeals' ") (quoting *People v Cooke*, 419 Mich 420, 430 [1984]).[2]

YOUNG, J. I join the statement of Justice CORRIGAN.

MARKMAN, J. I concur in the decision to remand.

I join in this Court's decision to remand this case to the circuit court for resentencing in light of *People v Kimble*, 470 Mich 305 (2004). I write separately to respond to Chief Justice CORRIGAN's concurring statement, in which she restates her criticism of the majority's decision in *Kimble* and urges the Legislature to enact legislation that would preclude the Court of Appeals from reviewing unpreserved scoring errors.

First, I continue to believe that *Kimble* was decided correctly. MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

When § 34(10) is read in its entirety, it is clear that the Legislature intended unpreserved scoring errors to be reviewable on appeal if the error has resulted in a sentence that is outside the appropriate guidelines sentence range. *Kimble, supra* at 310-311.

Second, with regard to the chief justice's recommendation to the Legislature, I respectfully, but strongly, disagree. In my judgment, the Legislature should not enact legislation that would preclude the Court of Appeals from reviewing unpreserved scoring errors. Unpreserved sentencing errors should be reviewable for plain error just as unpreserved

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[1] I take no position regarding whether, as a policy matter, the Legislature *should* preclude the Court of Appeals from reviewing unpreserved scoring errors. I simply observe that, in light of *Kimble*, the Legislature would probably need to rely on its constitutional authority to prescribe the jurisdiction of the Court of Appeals if it wished to preclude such review.

[2] Justice MARKMAN questions the Legislature's authority to enact such a provision. But this Court has recognized the Legislature's constitutional prerogative to prescribe the jurisdiction of the Court of Appeals under Const 1963, art 6, § 10. See *Bulger*, *supra*; *Cooke*, *supra*.

nonsentencing errors are reviewable for plain error. An individual should not remain incarcerated for years beyond what the law allows—for years beyond what the Legislature itself in its guidelines has determined to constitute appropriate punishment for a crime—simply because he failed to properly preserve a scoring error.

Further, I am not as certain as Chief Justice CORRIGAN that, in light of MCR 6.429(C), such legislation would "fall within the Legislature's authority." See *People v McGuffey*, 251 Mich App 155, 165-166 (2002), which concluded that the preservation of scoring errors is a matter of "practice and procedure," and *McDougall v Schanz*, 461 Mich 15 (1999), which concluded that this Court has exclusive authority over matters of practice and procedure. Const 1963, art 6, § 5.

WEAVER, J. I would deny leave to appeal and not remand this case to the circuit court for resentencing because defendant did not preserve the scoring error at issue. I would hold that the plain language of MCL 769.34(10) requires that a defendant preserve a scoring error, as I previously explained in my dissent in *People v Kimble,* 470 Mich 305 (2004).

ZAK v ZAK, Nos. 126023, 126024. 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 the parties' settlement agreement placed on the record in open court on January 16, 2002. MCR 7.302(G)(1). The Court of Appeals erred in finding that defendant hid the existence of the severance payments from plaintiff. The record demonstrates that plaintiff was aware of the severance payments, and that the parties treated them as defendant's income for purposes of reaching a settlement. Moreover, neither the agreement placed on the record in open court, nor the consent judgment of divorce, can reasonably be interpreted to provide for the division of the severance payments upon defendant's re-employment. The parties' agreement only contemplates the reopening of the alimony provisions of the divorce judgment upon a showing by plaintiff that defendant committed fraud by representing that he was not employed, and did not have an offer of employment, at the time the settlement agreement was placed on the record. To date, no such finding has been made. Jurisdiction is not retained. Court of Appeals Nos. 243233, 243378.

Leave to Appeal Denied September 24, 2004:

PEOPLE v VANLANDINGHAM, No. 125501; Court of Appeals No. 241311.

BACHRAN v BACHRAN, No. 125502; Court of Appeals No. 226937 (after remand).

MARKMAN, J. (*dissenting*). I would vacate the decision of the Court of Appeals and remand to analyze this matter in accord with *Reeves v Reeves*, 226 Mich App 490 (1997), and MCL 552.18(1). A party to a divorce action retains all property he or she brings into the marriage unless one of two statutorily created exceptions is met. MCL 552.23 and 552.401. Although failing to apply any such exception, the trial court here nonetheless distributed property brought by defendant into the marriage.

PEOPLE v BATEY, No. 125582; Court of Appeals No. 227117 (on remand).

KELLY, J. (*dissenting*). This case involved a charge of criminal sexual conduct by an adult male against a teenaged boy. At trial, the prosecutor allegedly made numerous allusions to defendant's sexual orientation, including references to his consensual relationships with adult male partners.

Defense counsel failed to object. Normally, this failure precludes appellate review because the trial court is not provided with the opportunity to cure any error. *People v Buckey*, 424 Mich 1, 18 (1985). However, "[a]n exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice." *People v Stanaway*, 446 Mich 643, 687 (1994).

In my opinion, this case satisfies the exception. Defendant was accused of sexually assaulting his teenaged nephew. During the trial, the prosecutor allegedly questioned defendant about his failed relationships with women. He asked defense witnesses if they viewed gay pornography videos or magazines, and questioned them about their sexual orientation.

None of the questions bears any relevance to whether defendant sexually assaulted the victim. Instead, it appears that, in posing them, the prosecutor sought to secure a conviction by playing to societal stereotypes regarding gay men. Furthermore, the prosecutor's questions seem to suggest that the witnesses' sexual orientation affected their truthfulness. This Court long ago held that a witness's "sexual propensities or preferences do not bear on his character for truthfulness or untruthfulness." *People v Mitchell*, 402 Mich 506, 515 (1978). The references to the sexual orientation of defendant and witnesses for the defense were pervasive and extensive.

Even if defense counsel had objected, the damage had already been done. These are not the only improper statements that the prosecutor allegedly made, but they are the most disturbing. The Court of Appeals stated that "Batey has not demonstrated that the prosecutor's comments were likely to have had any negative effect on the jury." Unpublished opinion per curiam, issued August 27, 2002 (Docket No. 227117). Given the prevalent stereotypes surrounding homosexuality, defendant has clearly shown that the comments were likely to have a negative effect on the jury. The real question is whether the pervasive comments were outcome-determinative.

I would grant leave to appeal to consider these issues.

CAVANAGH, J. I concur in the statement of Justice KELLY.

MOSQUEDA v MUELLER-MCCLENNEN, No. 126908; Court of Appeals No. 256812.

BALDWIN v RYKULSKI, No. 126924; Court of Appeals No. 256512.

ILITCH-TREPECK v TREPECK, No. 126965; Court of Appeals No. 257128.

COGBURN v GARRITANO, No. 126998; Court of Appeals No. 257677.

Summary Disposition September 28, 2004:

PEOPLE v LUCERO, No. 122014. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals to consider whether the Macomb Circuit Court abused its discretion in concluding that defendant's custodial statements were involuntary, and whether defendant was required to testify in order to preserve his challenge to the trial court ruling that his custodial statements, although inadmissible as substantive evidence, could be used for impeachment purposes. *People v Boyd*, 470 Mich 363, 375 n 9 (2004). MCR 7.302(G)(1). Jurisdiction is retained. Court of Appeals No. 231977.

Leave to Appeal Denied September 28, 2004:

PEOPLE v CRAWFORD, No. 122976; Court of Appeals No. 232962 (on rehearing).

PEOPLE v JERRILS, No. 123100; Court of Appeals No. 231217.

PEOPLE v THOMAS COLLINS, Nos. 123167, 123168; Court of Appeals Nos. 235552, 239913.

PEOPLE v DEBACK, No. 123236; Court of Appeals No. 233794.

PEOPLE v BRUNER, No. 123793; Court of Appeals No. 236013.

PEOPLE v RUSS, No. 124107; Court of Appeals No. 247401.

ADVANTA NATIONAL BANK v MCCLARTY, No. 124137; reported below: 257 Mich App 113.

PEOPLE v SZAWARA, No. 124313; Court of Appeals No. 248416.

PEOPLE v LEAGUE, No. 124528; Court of Appeals No. 237168.

NELSON v GRAY, No. 124795; Court of Appeals No. 236369.

MASSENBERG v HENRY FORD HEALTH SYSTEM, No. 124951; Court of Appeals No. 236985.

SAMPIER v DETROIT EDISON COMPANY, No. 124972; Court of Appeals No. 250872.

CURRIE v NATIONAL METAL PROCESSING, INC, No. 125451; Court of Appeals No. 240450.

PEOPLE v RUFUS JOHNSON, No. 125563; Court of Appeals No. 243125.

PEOPLE v USHER, No. 125615; Court of Appeals No. 242233.

VOWELS v BRANDT, No. 125623; Court of Appeals No. 243167.

PEOPLE v CRON, No. 125673; Court of Appeals No. 242160.

PEOPLE v DEYONTA ROBINSON, No. 125677; Court of Appeals No. 243335.

BUENA VISTA CHARTER TOWNSHIP v ANKLAM CONSTRUCTION, INC, No. 125690; Court of Appeals No. 243974.

PEOPLE v ENGLEMAN, No. 125701; Court of Appeals No. 240363.

PEOPLE v KEITH WILLIAMS, No. 125727; Court of Appeals No. 232255 (on remand).

DETROIT MARINE TERMINALS, INC v EDWARD C LEVY COMPANY, Nos. 125741, 125749; Court of Appeals Nos. 250678, 250719.

PEOPLE v MONROE, No. 125760; Court of Appeals No. 251460.

PEOPLE v WILLIS, No. 125803; Court of Appeals No. 242382.

PEOPLE v CURTISS, No. 125857; Court of Appeals No. 252824.

ALCOA, INC v DEPARTMENT OF TREASURY, No. 125911; Court of Appeals No. 241170.

BERLIN CHARTER TOWNSHIP v PROUD, No. 125914; Court of Appeals No. 242947.

PEOPLE v BLACKMON, No. 125916; Court of Appeals No. 245100.

KNOLLWOOD COUNTRY CLUB v WEST BLOOMFIELD TOWNSHIP, No. 125944; Court of Appeals No. 241297.

PEOPLE v MCGOUGHY, No. 125972; Court of Appeals No. 245179.

PEOPLE v GREENE, No. 125976; Court of Appeals No. 244114.

PEOPLE v FRANK ADAMS, No. 125977; Court of Appeals No. 244314.

ST PAUL ALBANIAN CATHOLIC COMMUNITY v MAIDA, No. 125980; Court of Appeals No. 243608.

PEOPLE v HINDS, No. 125987; Court of Appeals No. 243040.

DAIMLERCHRYSLER CORPORATION v AJILON SERVICES, INC, No. 125988; Court of Appeals No. 241954.

MERKUR STEEL SUPPLY, INC v CITY OF DETROIT, No. 125993; reported below: 261 Mich App 116.

PEOPLE v BLACK, No. 125997; Court of Appeals No. 243744.

PEOPLE v COKER, No. 125999; Court of Appeals No. 238738.

MERRILL LYNCH BUSINESS FINANCIAL SERVICES, INC v TELGEN CORPORATION, No. 126010; Court of Appeals No. 244880.

ALEXANDER v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 126013; Court of Appeals No. 251208.

PEOPLE v WARFIELD, No. 126015; Court of Appeals No. 245261.

PEOPLE v BARRY, No. 126017; Court of Appeals No. 253867.

PEOPLE v TYRONE ROBINSON, No. 126022; Court of Appeals No. 242982.

PEOPLE v LIVINGSTON, Nos. 126027, 126030; Court of Appeals Nos. 244419, 244420.

CUPPLES v EVERGREEN ESTATES, INC, No. 126040; Court of Appeals No. 243689.

PEOPLE v LADOW, No. 126049; Court of Appeals No. 244286.

PEOPLE v AMADOR, No. 126050; Court of Appeals No. 242363.

PEOPLE v CHILDS, No. 126053; Court of Appeals No. 253031.

LAWSUIT FINANCIAL, LLC v CURRY, No. 126057; reported below: 261 Mich App 579.

ADAMS v BEAUDRY, No. 126062; Court of Appeals No. 244485.

PEOPLE v HUBBARD, No. 126066; Court of Appeals No. 244122.

FLYNN v OPPERMAN, No. 126071; Court of Appeals No. 242017.

PEOPLE v REDDIC, No. 126075; Court of Appeals No. 253700.

LICTAWA v FARM BUREAU INSURANCE COMPANY, No. 126082; Court of Appeals No. 245026.

PEOPLE v PANNELL, No. 126083; Court of Appeals No. 237024.

PEOPLE v ULLAH, No. 126096; Court of Appeals No. 251734.

ZDRAVKOVSKI v GAN GONY, INC, No. 126099; Court of Appeals No. 246392.

PEOPLE v MARK ADAMS, No. 126101; Court of Appeals No. 251781.

SHR LIMITED PARTNERSHIP v SHELL OIL COMPANY, No. 126114; Court of Appeals No. 251927.

PEOPLE v BAYLOR, No. 126115; Court of Appeals No. 244701.

HAMON v HAYES ALBION CORPORATION, No. 126116; Court of Appeals No. 252325.

SHIPP v DEPARTMENT OF CORRECTIONS, No. 126126; Court of Appeals No. 252066.

PEOPLE v MAKI, No. 126127; Court of Appeals No. 245983.

PEOPLE v MORRISON, No. 126128; Court of Appeals No. 253939.

PEOPLE v SWINTON, No. 126129; Court of Appeals No. 253906.

PEOPLE v MICHAEL LEWIS, No. 126130; Court of Appeals No. 240354.

COUSINO v KIEFER (COUSINO v NOWICKI), Nos. 126134, 126135; Court of Appeals Nos. 240764, 240794.

POINDEXTER v DEPARTMENT OF CORRECTIONS, No. 126138; Court of Appeals No. 253555.

SHELBY OAKS, LLC v SHELBY CHARTER TOWNSHIP, Nos. 126139, 126140; Court of Appeals Nos. 241135, 241253.

PROCARE HEALTH PLAN, INC v COMMUNITY HEALTH PLAN, INC, Nos. 126142, 126143; Court of Appeals Nos. 243227, 246370.

PEOPLE v FLIE, No. 126145; Court of Appeals No. 242864.

1ST RURAL HOUSING PARTNERSHIP, LLP v CITY OF HOWELL, No. 126147; Court of Appeals No. 241192.

PEOPLE v STEPHAN, No. 126153; Court of Appeals No. 241051.

PEOPLE v SYKES, No. 126154; Court of Appeals No. 242736.

PEOPLE v WESLEY, No. 126158; Court of Appeals No. 243626.

PEOPLE v FOMBY, No. 126161; Court of Appeals No. 244908.

PEOPLE v NASH, No. 126162; Court of Appeals No. 253585.

PEOPLE v HUGUELET, No. 126172; Court of Appeals No. 242790.

PEOPLE v DEANDRE EVANS, No. 126174; Court of Appeals No. 254165.

PEOPLE v LINDSAY, No. 126178; Court of Appeals No. 244422.

PEOPLE v HOLTROP, No. 126184; Court of Appeals No. 253582.

KLUNGLE v KLUNGLE, No. 126186; Court of Appeals No. 240404.

PEOPLE v ABNER, No. 126189; Court of Appeals No. 241569.

PEOPLE v CARAWAY, No. 126190; Court of Appeals No. 244206.

PEOPLE v PALMER, No. 126193. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254356.

PEOPLE v CALVIN WILEY, No. 126195; Court of Appeals No. 243627.

PEOPLE v MCBRIDE, No. 126198; Court of Appeals No. 253637.

PEOPLE v BETANCOURT, No. 126208; Court of Appeals No. 254242.

PEOPLE v HOBBS, No. 126213; Court of Appeals No. 238739.

PEOPLE v BATES, No. 126216; Court of Appeals No. 244414.

PEOPLE v SCALES, No. 126452. Application for leave to cross-appeal is also denied. Court of Appeals No. 246411.

PEOPLE v HANN, No. 126475; Court of Appeals No. 252386.

SOLOMON v MOORE, No. 126634; Court of Appeals No. 250846.

Reconsideration Denied September 28, 2004:

COATES v CONTINENTAL VINYL WINDOW COMPANY, INC and EVERETT v CONTINENTAL VINYL WINDOW COMPANY, INC, Nos. 124336, 124896. Leave to appeal denied at 470 Mich 871. Court of Appeals Nos. 235400, 235438.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

HUTCHINSON v PORTAGE TOWNSHIP, No. 124571. Leave to appeal denied at 470 Mich 876. Court of Appeals No. 240136.

CAVANAGH, KELLY, and MARKMAN, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

CHURCH MUTUAL INSURANCE COMPANY v CONSUMERS ENERGY COMPANY, No. 125228. Leave to appeal denied at 470 Mich 865. Court of Appeals No. 240571.

PEOPLE v DOZIER, No. 125329. Leave to appeal denied at 470 Mich 861. Court of Appeals No. 251174.

PEOPLE v HARDY, No. 125382. Leave to appeal denied at 470 Mich 866. Court of Appeals No. 242199.

PEOPLE v TYKEE ROSS, No. 125557. Leave to appeal denied at 470 Mich 874. Court of Appeals No. 240371.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal September 30, 2004:

COUNTY ROAD ASSOCIATION OF MICHIGAN v GOVERNOR, No. 125665. 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. Reported below: 260 Mich App 299.

Summary Dispositions September 30, 2004:

PEOPLE v JERMAINE JAMES, No. 125752. In lieu of granting leave to appeal, the case is remanded to the Wayne Circuit Court for recalculation of the amount of jail credit to which defendant may be entitled against his sentence. MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Court of Appeals No. 244151.

PEOPLE v ZOLLICOFFER, No. 125872. In lieu of granting leave, the case is remanded to the trial court for correction of the judgment of sentence. MCR 7.302(G)(1). Defendant was entitled to 239 days' credit toward his third-degree criminal sexual conduct sentences. The judgment of sentence mistakenly applied this sentencing credit only toward defendant's

sentences for fourth-degree criminal sexual conduct. On remand, the trial court is directed to correct the judgment of sentence. MCR 6.435(A). Court of Appeals No. 250260.

PICKERING v LAKELAND REGIONAL HEALTH SYSTEM, No. 125973. 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). Application for leave to cross-appeal is denied as moot. Jurisdiction is not retained. Court of Appeals No. 253047.

Leave to Appeal Denied September 30, 2004:

MALBURG v WAYNE J LENNARD & SONS, INC and MALBURG v NEUMANN, Nos. 124640, 124641; Court of Appeals Nos. 236980, 236981.

WEAVER and KELLY, JJ. We would grant leave to appeal.

TORPEY v SECREST, WARDLE, LYNCH, HAMPTON, TRUEX & MORLEY, PC, Nos. 124921, 125039; Court of Appeals No. 234956.

KELLY, J. I would grant leave to appeal.

SECREST, WARDLE, LYNCH, HAMPTON, TRUEX & MORLEY, PC v TORPEY, No. 124922; Court of Appeals No. 234973.

KELLY, J. I would grant leave to appeal.

JOHNSON v GRAND HAVEN STAMPED PRODUCTS, No. 125333; Court of Appeals No. 250236.

CAVANAGH and KELLY, JJ. We would grant leave to appeal to revisit *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691 (2000).

ELSWORTH ENTERPRISES, INC v GENESYS REGIONAL MEDICAL CENTER, No. 125423; Court of Appeals No. 248446.

DODD v MPG FINANCIAL, INC, No. 125514; Court of Appeals No. 250243.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

RITZEMA v MARTIN TOWNSHIP, No. 125564; Court of Appeals No. 241328.

KELLY, J. I would grant leave to appeal.

PEOPLE v WILLHITE, No. 125598; Court of Appeals No. 250091.

KELLY, J. I would grant leave to appeal.

PEOPLE v BOND, No. 125660; Court of Appeals No. 253030.

KELLY, J. I would remand to the Court of Appeals for consideration as on leave granted.

PEOPLE v WALTER NEAL, No. 125895; Court of Appeals No. 243552.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v KERR, No. 125924; Court of Appeals No. 252588.

KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v MARKEL, No. 125932; Court of Appeals No. 245141.

KELLY, J. I would remand this case for resentencing.

KOSMALSKI v ST JOHN'S LUTHERAN CHURCH, No. 125971. Application for leave to cross-appeal is also denied. Reported below: 261 Mich App 56.

AME, INC v STEELCON, INCORPORATED, No. 126909. Motion for stay is also denied. Court of Appeals No. 257427.

WEAVER and KELLY, JJ. We would further state that the denial is without prejudice to defendants seeking a stay with the posting of an appropriate bond under MCR 7.209.

Reconsideration Denied September 30, 2004:

PEOPLE v CARUS-WILSON, No. 125183. Leave to appeal denied at 470 Mich 865. Court of Appeals No. 240752.

CAVANAGH, J. I concur in denying reconsideration. I write to comment that the considerable documentation defendant presented in support of his claim of rehabilitation is compelling. While it cannot help him procedurally here, I note that the regulations of the Immigration and Naturalization Service, now the United States Citizenship and Immigration Services, do not mandate his deportation. Thus, in light of defendant's substantial efforts at rehabilitation and commitment to family, I would encourage the agency to consider exercising its broad discretion in his favor.

WEAVER and KELLY, JJ. We join in the statement of Justice CAVANAGH.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 1, 2004:

WARD v CONSOLIDATED RAIL CORPORATION, No. 124533. 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 address whether the trial court correctly determined that plaintiff was entitled to a presumption that the missing evidence was defective, whether the jury was properly instructed, and whether any error was harmless. Supplemental briefs may be filed within 28 days of the date of this order. Court of Appeals No. 234619.

Leave to Appeal Denied October 1, 2004:

In re BEARDEN (FAMILY INDEPENDENCE AGENCY v BEARDEN), No. 127017; Court of Appeals No. 253481.

Leave to Appeal Granted October 7, 2004:

CITY OF NOVI v ROBERT ADELL CHILDREN'S FUNDED TRUST, No. 122985; reported below: 253 Mich App 330.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 7, 2004:

WOODARD v CUSTER and WOODARD v UNIVERSITY OF MICHIGAN MEDICAL CENTER, Nos. 124994, 124995. Pursuant to MCR 7.302(G)(l), the clerk is to schedule oral argument on whether to grant the applications 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 Nos. 239868, 239869.

Leave to Appeal Denied October 7, 2004:

PEOPLE v HADLEY, No. 122822; Court of Appeals No. 231979.

ABT v MOORE, No. 123809; Court of Appeals No. 242047.

WEAVER, J. I would grant leave to appeal because of the significant issues presented in this case.

PEOPLE v CHARLES LEWIS, No. 125509; Court of Appeals No. 242231.

PEOPLE v ANTWAIN JOHNSON, No. 125517; Court of Appeals No. 242304.

PEOPLE v CLIFTON LEWIS, No. 126124; Court of Appeals No. 242232.

Leave to Appeal Granted October 8, 2004:

CASCO TOWNSHIP v SECRETARY OF STATE, No. 126120. The parties are to include among the issues briefed: (1) whether a single detachment petition and vote thereon, pursuant to the terms of the Home Rule City Act, MCL 117.1 *et seq*., may encompass territory to be detached from a city and attached to more than one township, and (2) whether a writ of mandamus should issue to compel the Secretary of State to issue a notice directing an election on the change of boundaries sought by plaintiffs. The motion for leave to file a brief amicus curiae is 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. The case is to be argued and submitted to the Court with *Fillmore Twp v Secretary of State,* No. 126369. Reported below: 261 Mich App 386.

FILLMORE TOWNSHIP v SECRETARY OF STATE, No. 126369. The parties are to include among the issues briefed: (1) whether a single detachment petition and vote thereon, pursuant to the terms of the Home Rule City Act, MCL 117.1 *et seq*., may encompass territory to be detached from a city and attached to more than one township, and (2) whether a writ of mandamus should issue to compel the Secretary of State to issue a notice directing an election on the change of boundaries sought by plaintiffs. 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. The case is to be argued and submitted to the Court with *Casco Twp v Secretary of State,* No. 126120. Court of Appeals No. 245640.

Summary Dispositions October 8, 2004:

PEOPLE v TYRONE DAVIS NO 1, No. 125925. In lieu of granting leave to appeal, the Court of Appeals order is vacated and the case is remanded to the Ingham Circuit Court for resentencing, as the court failed to articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range. MCR 7.302(G)(1). On remand, the court shall sentence defendant within the sentencing guidelines range, 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). Court of Appeals No. 253320.

YOUNG, J. I concur in the majority's decision to vacate the Court of Appeals order and remand this case to the Ingham Circuit Court for resentencing. The reasons proffered by the trial court to justify departure from the sentencing guidelines do not pass muster under *People v Babcock,* 469 Mich 247 (2003). However, the fact that the defendant sexually assaulted the complainant in a public school—a place where children are entitled to pursue their education without fear of personal harm—may be a substantial and compelling basis for departure on remand that is not factored into the guidelines.

CORRIGAN, C.J. I join in the statement of Justice YOUNG.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would deny leave to appeal for lack of merit in the grounds presented.

PEOPLE v TYRONE DAVIS NO 2, No. 126269. In lieu of granting leave to appeal, the Court of Appeals order is vacated and the case is remanded to the Ingham Circuit Court for resentencing, as the court failed to articulate on the record a substantial and compelling reason for departing from the sentencing guidelines range. MCR 7.302(G)(1). On remand, the court shall sentence defendant within the sentencing guidelines range, 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). Court of Appeals No. 253321.

YOUNG, J. I concur in the majority's decision to vacate the Court of Appeals order and remand this case to the Ingham Circuit Court for resentencing under *People v Babcock,* 469 Mich 247 (2003). The trial court did not articulate a basis for departure that satisfies the standards set forth in *Babcock*. But as is the case in *People v Davis,* Docket No. 125925, the record in this matter includes substantial and compelling reasons to depart from the sentencing guidelines upon remand. In particular, departure may be justified because the sentencing guidelines

give insufficient weight to the fact that defendant sexually assaulted his eleven-year-old cousin on multiple occasions.

CORRIGAN, C.J. I join in the statement of Justice YOUNG.

CAVANAGH, J. I would deny leave to appeal.

WEAVER, J. I would deny leave to appeal for lack of merit in the grounds presented.

Leave to Appeal Denied October 8, 2004:

PEOPLE v MAXON, No. 122895; Court of Appeals No. 235542.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

GRAND VALLEY HEALTH CENTER v AMERISURE INSURANCE COMPANY, SPECTRUM HEALTH v ANTHONY, ANTHONY v DEPARTMENT OF COMMUNITY HEALTH, and HOPE NETWORK REHABILITATION SERVICES v AMERISURE INSURANCE COMPANY (AMERISURE INSURANCE COMPANY v AUTO-OWNERS INSURANCE COMPANY), Nos. 125836-125839; reported below: 262 Mich App 10.

Interlocutory Appeal

Leave to Appeal Denied October 8, 2004:

BOWERS v CITY OF FLINT, No. 125105; Court of Appeals No. 251062.

Leave to Appeal Denied October 14, 2004:

STANISZ v FEDERAL EXPRESS CORPORATION, No. 124377; Court of Appeals No. 236371.

Leave to Appeal Denied October 15, 2004:

PEOPLE v CHRIS WALKER, No. 122425; Court of Appeals No. 230570.

Summary Dispositions October 21, 2004:

ARY v GRITTER, No. 125879. 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. 251266.

GOETHALS v FARM BUREAU INSURANCE, No. 126463. 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 clarification of its decision. MCR 7.302(G)(1). The Court of Appeals erred in remanding for a redetermination of damages after holding that plaintiff's claim was barred because she failed to provide sufficient notice of injury to extend the one-year limitations period provided in MCL 500.3145(1). If plaintiff failed to provide a sufficient notice of injury within one year from the date of the accident as required by MCL 500.3145(1), her claim is barred in its

entirety. On remand, the Court of Appeals shall clarify whether plaintiff provided a sufficient notice of injury under MCL 500.3145(1) to extend the one-year limitations period. Jurisdiction is not retained. Court of Appeals No. 242422.

Leave to Appeal Denied October 21, 2004:

PEOPLE v GRIMMETT, No. 122965; Court of Appeals No. 243387.

KELLY, J. I would remand this case to the Court of Appeals for consideration in light of *People v Babcock*, 469 Mich 247 (2003).

CONSUMERS ENERGY COMPANY v PUBLIC SERVICE COMMISSION NO 1 and DETROIT EDISON COMPANY v PUBLIC SERVICE COMMISSION NO 1, Nos. 125284, 125285, 125629; Court of Appeals Nos. 241990, 241991.

GIUSTI v MT CLEMENS GENERAL HOSPITAL, No. 125415; Court of Appeals No. 241714.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

MCLELLEN v MERIDIAN CHARTER TOWNSHIP, No. 125421; Court of Appeals No. 244353.

PEOPLE v LAWWILL, No. 125550; Court of Appeals No. 242789.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v MARSHALL, No. 125608; Court of Appeals No. 242774.

CELLEY v STEVENS, No. 125664; Court of Appeals No. 243114.

KELLY, J. I would grant leave to appeal.

PICA-KRAS v COSTCO WHOLESALE, INC, No. 125675; Court of Appeals No. 242920.

KELLY, J. I would grant leave to appeal.

SHULER v MICHIGAN PHYSICIANS MUTUAL LIABILITY COMPANY, No. 125810; reported below: 260 Mich App 492.

MARKMAN, J. I would grant leave to appeal.

PEOPLE v ISSAC WALKER, No. 125819; Court of Appeals No. 251180.

PEOPLE v MEADOWS, No. 126209; Court of Appeals No. 253933.

Interlocutory Appeal

Leave to Appeal Denied October 21, 2004:

LINKER v CITY OF FLINT, No. 125358; Court of Appeals No. 238342.

Interlocutory Appeal

Leave to Appeal Denied October 22, 2004:

HEISINGER v ROOT, No. 127145; Court of Appeals No. 257499.

Summary Dispositions October 25, 2004:

O'DELL ESTATE v UNIVERSITY OF MICHIGAN REGENTS, No. 123490. In lieu of granting leave to appeal, the case is remanded to the Court of Claims for reconsideration in light of J*enkins v Patel*, 471 Mich 158 (2004), and *Shinholster v Annapolis Hosp*, 471 Mich 540 (2004). MCR 7.302(G)(1). Court of Appeals No. 245706.

GREEN v KNAZIK, No. 124484. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration of the issue relating to the cap on noneconomic damages in light of J*enkins v Patel*, 471 Mich 158 (2004), and *Shinholster v Annapolis Hosp*, 471 Mich 540 (2004). MCR 7.302(G)(1). In all other respects leave to appeal is denied because the Supreme Court is not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 233482.

Leave to Appeal Denied October 25, 2004:

BROWN v BRECON COMMONS, LLC, No. 123600; Court of Appeals No. 233188.

SMITH v COMMUNITY EMERGENCY MEDICAL SERVICE, No. 123883; Court of Appeals No. 247770.

MIRANDA v SHELBY TOWNSHIP, No. 125016; Court of Appeals No. 240568.

PEOPLE v DENEAL SMITH, No. 125286. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250753.

PEOPLE v MOFFIT, No. 125322. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 252109.

PEOPLE v GARY FRANKLIN, Nos. 125337, 125355. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals Nos. 252026, 250625.

PEOPLE v FELTON, No. 125338. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249161.

PEOPLE v JERRY JONES, No. 125339. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249705.

PEOPLE v PETUSH, No. 125362. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249376.

PEOPLE v VARTINELLI, No. 125369. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250907.

PEOPLE v ROUSSEAU, No. 125416. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250225.

PEOPLE v SKINNER, No. 125418; Court of Appeals No. 251669.

PEOPLE v CIPRIANO, No. 125440. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 251290.

PEOPLE v EDDIE THOMPSON, No. 125452. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 252236.

PEOPLE v GEORGEES, No. 125470. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250890.

PEOPLE v DENNIS FRANKLIN, No. 125471. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249930.

PEOPLE v RHOADES, No. 125474. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250269.

PEOPLE v WARDLAW, No. 125487. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249928.

PEOPLE v WILLIAM SNYDER, No. 125498. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250457.

PEOPLE v DONNELL COLE, No. 125505. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249511.

PEOPLE v TERRELL, No. 125547. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250654.

PEOPLE v STIGER, No. 125551; Court of Appeals No. 251486.

PEOPLE v FOSTER, No. 125576. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 241644.

PEOPLE v BELL, No. 125580. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250543.

PEOPLE v ETOYI JOHNSON, No. 125589. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250615.

PEOPLE v MATTHEWS, No. 125599; Court of Appeals No. 252042.

PEOPLE v DANIELS, No. 125617. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 248350.

PEOPLE v NORWOOD, No. 125622. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250833.

PEOPLE v ROYCE, No. 125635. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 251584.

PEOPLE v CHESTER PATTERSON, No. 125642. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 251292.

PEOPLE v MICHAEL BROWN, No. 125650; Court of Appeals No. 252839.

PEOPLE v RUSIECKI, No. 125688. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253190.

PEOPLE v GARNER, No. 125707. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 248129.

PEOPLE v DWIGHT WILLIAMS, No. 125732. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251660.

PEOPLE v DALRON HARRIS, No. 125737. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 253536.

CONWAY GREEN COMPANY v STATE OF MICHIGAN, Nos. 125747, 125748; Court of Appeals Nos. 242177, 243695.

PEOPLE v FRANK ANDERSON, No. 125780. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 252091.

PEOPLE v LAGROU, No. 125782. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251212.

PEOPLE v FERENSIC, No. 125793. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252993.

PEOPLE v GARY JACKSON, No. 125816; Court of Appeals No. 252887.

PEOPLE v KOVACS, No. 125820. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 253195.

PEOPLE v KEEGAN, No. 125827. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252897.

PEOPLE v MCLOUTH, No. 125831. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252535.

PEOPLE v VINSON, No. 125834. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251748.

PEOPLE v DWAYNE JOHNSON, No. 125841. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 251204.

PEOPLE v DONALD JACKSON, No. 125845. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252285.

PEOPLE v CHARLES TAYLOR, No. 125856. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251289.

PEOPLE v LAFLEUR, No. 125859. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251733.

PEOPLE v THOMASON, No. 125868. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251210.

PEOPLE v DELL, No. 125882; Court of Appeals No. 250754.

PEOPLE v DAMIEN WHITE, No. 125908. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251966.

PEOPLE v SALISBURY, No. 125915. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 252834.

PEOPLE v KUNDRAT, No. 125917. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252600.

PEOPLE v HOLMAN, No. 125929. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251844.

PEOPLE v THEODORE LEE, No. 125946. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252380.

PEOPLE v HORTON, No. 125947. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251659.

PEOPLE v GOHAGEN, No. 125956; Court of Appeals No. 253140.

PEOPLE v BILLY WALLACE, No. 125959. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251668.

PEOPLE v ELLER, No. 125965. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252530.

PEOPLE v PATRICK, No. 125967. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253383.

PEOPLE v ERDIST MITCHELL, No. 125978. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250442.

PEOPLE v BETTIN, No. 125983. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250852.

PEOPLE v KEVIN BOYD, No. 125990. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252111.

PEOPLE v WILLIAMSON, No. 125991. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 254579.

PEOPLE v WASHINGTON, No. 125998. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250752.

PEOPLE v DAVID REYNOLDS, No. 126005; Court of Appeals No. 245140.

PEOPLE v PEREZ, No. 126008. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 245303.

PEOPLE v LADON MOORE, No. 126014. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for a hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), is denied. Court of Appeals No. 252007.

GILLETTE v COMSTOCK TOWNSHIP, No. 126020; Court of Appeals No. 240198.

GILLETTE v STUCKI, No. 126021; Court of Appeals No. 240199.

PEOPLE v STAMPER, No. 126029; Court of Appeals No. 253136.

PEOPLE v RAFAEL DEJESUS, No. 126031. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251085.

PEOPLE v MAGEE, No. 126033. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250893.

PEOPLE v CONIC, No. 126034. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250373.

PEOPLE v BADOUR, No. 126038. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252885.

PEOPLE v BYRD, No. 126044. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252024.

PEOPLE v TYLER, No. 126045. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251084.

FORSBERG FAMILY, LLC v MERIDIAN CHARTER TOWNSHIP, No. 126047; Court of Appeals No. 245413.

SAF CONSTRUCTION, INC v AKR & ASSOCIATES, No. 126048; Court of Appeals No. 241980.

PEOPLE v WARD, Nos. 126052, 126102. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals Nos. 252281, 252153.

INTERCONTINENTAL ELECTRONICS, SPA v AMERICAN KEYBOARD PRODUCTS, INC, No. 126058; Court of Appeals No. 242455.

PEOPLE v ASHE, No. 126064. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251684.

PEOPLE v RONALD LEE, No. 126065. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252232.

LINCOLN PARK HOUSING COMMISSION v ANDREW, No. 126091; Court of Appeals No. 244259.

T G DEVELOPMENT, LLC v MT MORRIS CHARTER TOWNSHIP, No. 126118. Leave to file a brief amicus curiae is granted. Court of Appeals No. 243019.

PEOPLE v LOUIS SCOTT, No. 126141; Court of Appeals No. 231516 (on remand).

BINT v DOE, No. 126144; Court of Appeals No. 242252.

PEOPLE v AGUIRRE, No. 126155; Court of Appeals No. 251721.

PEOPLE v GAINOUS, No. 126160; Court of Appeals No. 246024.

PEOPLE v ERIC DRAPER, No. 126163; Court of Appeals No. 243021.

PEOPLE v MAY, No. 126170; Court of Appeals No. 243615.

JAAKKOLA v KRIST OIL CO, No. 126173; Court of Appeals No. 250270.

PEOPLE v GRANGER, No. 126175; Court of Appeals No. 253693.

PEOPLE v WENDEL, No. 126179; Court of Appeals No. 254015.

PEOPLE v CHRISTIAN, No. 126180; Court of Appeals No. 253530.

PEOPLE v PIERCE, No. 126185; Court of Appeals No. 244276.

FLOYD v DEPARTMENT OF CORRECTIONS, No. 126187; Court of Appeals No. 254097.

PEOPLE v MARY LITTLE, No. 126194; Court of Appeals No. 253935.

PEOPLE v PERCY WHITE, No. 126196; Court of Appeals No. 246021.

PEOPLE v PETTY, No. 126203; Court of Appeals No. 253929.

PEOPLE v CHARLES JONES, No. 126204; Court of Appeals No. 245056.

PEOPLE OF THE CITY OF WESTLAND v ADLER, No. 126210; Court of Appeals No. 251914.

PEOPLE v MYERS, No. 126211; Court of Appeals No. 252881.

PEOPLE v FLETCHER, No. 126212; reported below: 260 Mich App 531.

FERGUSON v HAMBURG TOWNSHIP, No. 126215; Court of Appeals No. 243852.

PEOPLE v MELVIN JACKSON, No. 126222; Court of Appeals No. 243815.

PEOPLE v ENDERSEN, No. 126226; Court of Appeals No. 254135.

PEOPLE v CONWAY, No. 126235; Court of Appeals No. 246026.

PEOPLE v GREATHOUSE, No. 126238; Court of Appeals No. 246620.

PEOPLE v MACKALL, No. 126242; Court of Appeals No. 239724.

ARTRIP v PIONEER STATE MUTUAL INSURANCE COMPANY, No. 126246; Court of Appeals No. 252616.

HOLLOWAY v UNITED PARCEL SERVICE, No. 126252; Court of Appeals No. 251995.

LASALLE NATIONAL BANK v MASTER GUARD HOME SECURITY, INC, No. 126263; Court of Appeals No. 252571.

PEOPLE v MILLIGAN, No. 126265; Court of Appeals No. 244935.

PEOPLE v FREDDIE PATTERSON, No. 126267; Court of Appeals No. 253493.

PEOPLE v GARY ROBINSON, No. 126268. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252779.

PEOPLE v GRAYSON, No. 126270; Court of Appeals No. 244909.

PEOPLE v FRIEND, No. 126271; Court of Appeals No. 246443.

PEOPLE v GARRIS, No. 126272; Court of Appeals No. 245793.

PEOPLE v ANDREWS, No. 126277; Court of Appeals No. 245259.

PEOPLE v FERRELL, No. 126278; Court of Appeals No. 244147.

PEOPLE v WASHNOCK, No. 126279; Court of Appeals No. 253833.

PEOPLE v TREVINO, Nos. 126283, 126284; Court of Appeals Nos. 245324, 245451.

PEOPLE v NOLAN, No. 126288; Court of Appeals No. 244509.

PEOPLE v FULCHER, Nos. 126289, 126290; Court of Appeals Nos. 245446, 250072.

PEOPLE v FERGUSON, No. 126291; Court of Appeals No. 244902.

MISTRETTA v AUTO CLUB INSURANCE ASSOCIATION, No. 126292; Court of Appeals No. 242500.

PEOPLE v LONNIE WELCH, No. 126293; Court of Appeals No. 253633.

PEOPLE v DECHENEY, No. 126294; Court of Appeals No. 254583.

PEOPLE v UNCAPHER, No. 126299; Court of Appeals No. 246222.

PEOPLE v BEASLEY, No. 126308; Court of Appeals No. 252522.

PEOPLE v LARRY BAKER, No. 126325; Court of Appeals No. 253062.

PEOPLE v MCCULLOUGH, No. 126329People v Hudson5410355

PEOPLE v JEROME HUDSON, No. 126339; Court of Appeals No. 252904.

PEOPLE v DEWALD, No. 126957; Court of Appeals No. 251804.

Interlocutory Appeals

Leave to Appeal Denied October 25, 2004:

MCCRICKARD v DETROIT MEDICAL CENTER, No. 126986; Court of Appeals No. 254834.

SEARFOSS v THE CHRISTMAN COMPANY, INC, No. 127031; Court of Appeals No. 249925.

Reconsideration Denied October 25, 2004:

PEOPLE v JASON TURNER, No. 124758. Leave to appeal denied at 470 Mich 893. Court of Appeals No. 250395.

KELLY, J. I would grant the motion for reconsideration.

PEOPLE v DALE CLARK, No. 125083. Leave to appeal denied at 470 Mich 889. Court of Appeals No. 240139.

PEOPLE v JONATHON HALL, No. 125330. Leave to appeal denied at 470 Mich 889. Court of Appeals No. 249779.

PIFER v DAIMLERCHRYSLER CORPORATION, No. 125404. Leave to appeal denied at 470 Mich 885. Court of Appeals No. 239638.

PEOPLE v DARRELL PHILLIPS, No. 125469. Leave to appeal denied at 470 Mich 867. Court of Appeals No. 237812.

PEOPLE v APPLEWHITE, No. 125539. Leave to appeal denied at 470 Mich 886. Court of Appeals No. 242359.

PEOPLE v AVERY, No. 125548. Leave to appeal denied at 470 Mich 886. Court of Appeals No. 251625.

REESE v MCCREARY, No. 125655. Leave to appeal denied *ante* at 866. Court of Appeals No. 251487.

PEOPLE v LINZELL, No. 125669. Leave to appeal denied at 470 Mich 888. Court of Appeals No. 237942 (on remand).

RORKE v SAVOY ENERGY, LP, No. 125695. Leave to appeal denied at 470 Mich 888. Reported below: 260 Mich App 251.

PEOPLE v SANDOVAL, No. 125706. Leave to appeal denied at 470 Mich 888. Court of Appeals No. 244566.

WILLIAMS v DEPARTMENT OF CORRECTIONS, No. 125743. Leave to appeal denied *ante* at 867. Court of Appeals No. 252150.

Leave to Appeal Denied October 27, 2004:

CORNELIUS v JOSEPH, No. 123765, 7/October 2004. The cause having been briefed and orally argued, the order of June 3, 2004, 470 Mich 868, granting leave to appeal is vacated, and leave to appeal is denied because the Supreme Court is no longer persuaded the questions presented should be reviewed by this Court. Court of Appeals No. 237956.

MARKMAN, J. (*dissenting*). This Court granted leave to appeal. Following oral argument, the majority has now concluded that leave was improvidently granted. I respectfully disagree. Instead, I would reverse the judgment of the Court of Appeals and reinstate the trial court's order granting summary disposition in favor of defendant.

Defendant began treating plaintiff with a series of injections known as sclerotherapy on October 28, 1996. The injections continued until March 13, 1997, when plaintiff suffered an adverse reaction to an injection. Plaintiff had a total of fourteen injections.

Plaintiff argues that defendant failed to obtain her informed consent for any of the injections because he never informed her of the risks associated with sclerotherapy. Defendant has proffered an informed consent form, purportedly signed by plaintiff on October 28, 1996, that describes the risks of the injections. Plaintiff's expert acknowledged that this form was sufficient to obtain informed consent, but plaintiff contends that she never signed this form.

Plaintiff's expert also testified that the applicable standard of care required defendant to obtain plaintiff's informed consent before the beginning of the series of treatments, but it did not require defendant to obtain plaintiff's informed consent before each subsequent injection.

Plaintiff filed her notice of intent to sue on October 14, 1998, which tolled the period of limitations for 182 days. Therefore, if plaintiff's claim accrued on October 28, 1996, as defendant contends, the period of limitations expired on April 27, 1999. Plaintiff, however, did not file this suit until August 31, 1999.

The trial court granted defendant's motion for summary disposition on the basis that plaintiff's suit was time-barred under the two-year statute of limitations for malpractice, MCL 600.5805(6), because the alleged malpractice—failure to obtain informed consent—occurred on October 28, 1996. The Court of Appeals reversed, concluding that the alleged failure to obtain informed consent before the initial treatment did not eliminate the need for obtaining the patient's informed consent before subsequent treatments, and, thus, the suit was timely, at least with regard to the March 13, 1997, injection.[1]

I agree with the trial court that plaintiff's suit is time-barred by the two-year statute of limitations. MCL 600.5838a(1) provides:

> For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional . . . accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

In this case, the "omission that is the basis for the claim of medical malpractice" was defendant's failure to obtain plaintiff's informed consent on October 28, 1996. Therefore, plaintiff's claim accrued on October 28, 1996.

In order to establish a cause of action for medical malpractice, a plaintiff must establish, among other things, that the defendant breached the standard of care governing the defendant's conduct at the time of the purported negligence. *Craig v Oakwood Hosp*, 471 Mich 67, 86 (2004).

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[1] Unpublished opinion per curiam, February 21, 2003 (Docket No. 237956).

Plaintiff has proffered evidence, by way of expert testimony, that defendant breached the standard of care on October 28, 1996, by failing to obtain plaintiff's informed consent before beginning the sclerotherapy treatment. However, plaintiff has not proffered any evidence whatsoever to indicate that defendant breached the standard of care on any other date. Therefore, plaintiff's claim accrued on October 28, 1996. Because plaintiff filed a notice of intent to sue on October 14, 1998, the period of limitations was tolled for 182 days. The statute of limitations period expired on April 27, 1999. Therefore, as the trial court concluded, plaintiff's claim that was filed on August 31, 1999, is time-barred.

Maintaining the decision of the Court of Appeals would, in the context of a series of medical treatments, replace a statute of limitations that accrues "at the time of the act or omission that is the basis for the claim of medical malpractice," i.e., before the initial treatment, with a statute of limitations that does not accrue until before the final treatment, possibly extending the period of limitations for many years. I simply cannot square such a result with the language of MCL 600.5838a(1).

CORRIGAN, C.J. I concur in the statement by Justice MARKMAN.

Leave to Appeal Granted October 28, 2004:

GLASS v GOECKEL, No. 126409. The motion for leave to file reply brief and the motions for leave to file briefs amicus curiae are also granted. Reported below: 262 Mich App 29.

RORY v CONTINENTAL INSURANCE COMPANY, No. 126747. The Commissioner of Insurance is invited to file a brief 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: 262 Mich App 679.

PEOPLE v STARKS, No. 126756. The parties are directed to include among the issues to be briefed whether *People v Worrell*, 417 Mich 617 (1983), was properly decided, and whether the prosecution presented sufficient evidence in this case to establish a criminal assault and to bind over defendant on the charge of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1). The Court further orders the Wayne Circuit Court, in accordance with Administrative Order No. 2003-03, 468 Mich lxxx, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court. 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. 244478.

Reconsideration Granted October 28, 2004:

CASTLE INVESTMENT COMPANY v CITY OF DETROIT, No. 121598. On order of the Court, the motion for reconsideration of this Court's June 11, 2004, order, 470 Mich 875, is granted, and that order is replaced by the following:

After granting leave to appeal, 468 Mich 869 (2003), this Court has carefully considered the written and oral arguments of the parties. On order of the Court, for the reasons set forth below, the judgment of the Court of Appeals is reversed, and the case is remanded to that Court for further proceedings.

In 1976, the city of Detroit adopted ordinance 124-H, which required inspection of buildings and issuance of a certificate of approval before certain real property could be sold or transferred in the city. Section 26-3-4 of the ordinance (formerly section 12-7-4) provided that the certificate of approval shall be issued only after the city had inspected a building and found it to be in conformance with the guidelines described in section 26-3-6 of the ordinance (formerly section 12-7-6). That section, in turn states, "The guidelines shall not be effective until approved by city council." It is undisputed that the city council never approved the guidelines.

Plaintiff brought this action in 1998, claiming that the ordinance was unenforceable because the guidelines had never been approved. The circuit court granted summary disposition to defendant. The Court of Appeals affirmed in an unpublished opinion. *Castle Investment Co v Detroit* (Docket No. 224411, released March 19, 2002).

An examination of the ordinance leads inescapably to the conclusion that the certificate-of-approval provisions of ordinance 124-H, as amended, cannot lawfully be enforced because the city council never approved the inspection guidelines. Thus, there are no guidelines and, without those guidelines, the city is unable to issue a certificate of approval. For this reason, the circuit court erred in failing to enjoin enforcement of the certificate-of-approval provisions of the ordinance.

The circuit court and the Court of Appeals held that the defendant was entitled to summary disposition on the ground of laches. We reject that analysis. Without expressing any opinion on the validity of laches as a defense to a challenge to the enactment of an ordinance, we determine that defendant did not meet the standard for summary disposition. Defendant did not show that the delay in bringing the action resulted in the kind of prejudice that would support a laches defense.

We remand this case to the Court of Appeals for consideration of the issues raised in the city of Detroit's cross-appeal. Jurisdiction is not retained. Court of Appeals No. 224411.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 28, 2004:

BLACKHAWK DEVELOPMENT CORPORATION v VILLAGE OF DEXTER, No. 126036. 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. 240790.

Leave to Appeal Denied October 28, 2004:

GEROW v CITY OF SAGINAW, No. 120423; Court of Appeals No. 223355.

PEOPLE v DARRIS GREEN, No. 125710; Court of Appeals No. 241743.
KELLY, J. I would grant leave to appeal.

HERMAN v CITY OF DETROIT, No. 125722; reported below: 261 Mich App 141.
KELLY, J. I would grant leave to appeal.

TIMMONS v DEVOLL and TIMMONS v STETLER, Nos. 125757, 125758; Court of Appeals Nos. 241507, 249015.
KELLY, J. I would grant leave to appeal.

PEOPLE v DALY, No. 125788; Court of Appeals No. 243958.
CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for reconsideration in light of *Crawford v Washington,* 541 US 36 (2004).

PEOPLE v MCGHEE, No. 125812; Court of Appeals No. 243383.
KELLY, J. I would grant leave to appeal.

DEITERING v GRAND BLANC CHARTER TOWNSHIP, No. 125824; Court of Appeals No. 244158.
CAVANAGH, J. I would grant leave to appeal.
WEAVER and KELLY, JJ. We would grant leave to appeal because this Court should review the issue presented.

SIKH SOCIETY OF MICHIGAN, INC v SINGH, No. 125850; Court of Appeals No. 244311.
WEAVER, TAYLOR, and MARKMAN, JJ. We would grant leave to appeal.

HERBRANDSON v ALC HOME INSPECTION SERVICES, INC, No. 125855; Court of Appeals No. 244523.
KELLY, J. I would grant leave to appeal.

PEOPLE v ARCHIE EVANS, No. 125864; Court of Appeals No. 244034.

STARK v LINDA CAB COMPANY, No. 125867; Court of Appeals No. 251843.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WANG v SPORLEDER, No. 125869; Court of Appeals No. 244611.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v LEON DAVIS, No. 125962; Court of Appeals No. 243809.

PEOPLE v MARIO EVANS NO 1, No. 125969; Court of Appeals No. 238184.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ROBERT RICHARDSON, No. 125984; Court of Appeals No. 251297.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CITY OF DETROIT v DETROIT FIRE FIGHTERS ASSOCIATION LOCAL 344, No. 126041; Court of Appeals No. 241312.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE OF THE CITY OF WYANDOTTE v LEIGHTON, No. 126097; Court of Appeals No. 252339.

SCHMIDT v GREEKTOWN CASINO, No. 126098; Court of Appeals No. 243789.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

WATERMAN v GREEKTOWN CASINO, No. 126100; Court of Appeals No. 244213.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v MARIO EVANS NO 2, No. 126167; Court of Appeals No. 240357.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v RAYMOND ROSS, No. 126168; Court of Appeals No. 244281.

KELLY, J. I would remand this case to the Wayne Circuit Court for a new trial.

PEOPLE v SPRATT, No. 126200; Court of Appeals No. 253371.

CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals as on leave granted.

Interlocutory Appeal

Leave to Appeal Denied October 28, 2004:

NICOSIA v MANZELLA FRUIT MARKET, INC, No. 126300; Court of Appeals No. 252577.

MARKMAN, J. I would grant leave to appeal.

Reconsideration Denied October 28, 2004:

GOYETTE MECHANICAL COMPANY v WASHTENAW COMMUNITY COLLEGE, No. 125341. The motion to file a brief amicus curiae in support of motion for reconsideration is granted. The motion for reconsideration of this Court's order of May 28, 2004, 470 Mich 866, is denied, because it does not appear that the order was entered erroneously. Court of Appeals No. 238627.

KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal October 29, 2004:

WARDA v CITY OF FLUSHING CITY COUNCIL, No. 125561. 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 file supplemental briefs within 28 days of the date of this order, and are directed to include among the issues briefed whether the city council's decision is subject to judicial review. See *House Speaker v Governor,* 443 Mich 560, 574 (1993), *Messmore v Kracht*, 172 Mich 120 (1912), and the concurrence in *Bendix Safety Restraints Group, Allied Signal, Inc v City of Troy*, 215 Mich App 289 (1996). Court of Appeals No. 241188.

CAVANAGH and KELLY, JJ. We would entertain argument on the issues raised by the parties and not include an issue not raised by either party but created by this Court.

CORRIGAN, C.J. I concur with this Court's order directing oral argument on the application. I write separately to note that this Court can always address the question of its authority to decide a case. Such issues are jurisdictional questions that courts may raise sua sponte. This Court discussed this principle in *In re Fraser Estate*, 288 Mich 392, 394 (1939):

> Courts are bound to take notice of the limits of their authority, and a court may, and should, on its own motion, though the question is not raised by the pleadings or by counsel, recognize its lack of jurisdiction and act accordingly by staying proceedings, dismissing the action, or otherwise disposing thereof, at any stage of the proceeding.

Thus, this Court has authority to direct the parties to address whether the city council's decision is subject to judicial review because it relates to this Court's jurisdiction.

PEOPLE v GATSKI, No. 125740. 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 correctly interpreted the recreational trespass statute, MCL 324.73102. The parties may file supplemental briefs within 28 days of the date of this order. Reported below: 260 Mich App 360.

Summary Dispositions October 29, 2004:

PIONTEK v ARMSTRONG, No. 123075. In lieu of granting leave to appeal, the December 27, 2002, judgment of the Court of Appeals is vacated and the case is remanded to that Court for reconsideration in light of *Halloran v Bhan,* 470 Mich 572 (2004). MCR 7.302(G)(1). Court of Appeals No. 235792.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I would deny leave to appeal because the decision of the Court of Appeals was correct.

LUTHER v MORRIS, No. 125668. 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* and *Straub v Collette*, 471 Mich 109 (2004). MCR 7.302(G)(1). Court of Appeals No. 244483.

CAVANAGH, J. I would grant leave to appeal.

WEAVER, J. (*dissenting*). I would grant leave to appeal. I would reconsider *Kreiner v Fischer*, 471 Mich 109 (2004), for the reasons stated in the *Kreiner* dissenting opinion.

KELLY, J. I join in the statement of Justice WEAVER.

PEOPLE v JESSIE WILSON, No. 125796. 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. 253063.

CORRIGAN, C.J. I concur with the order remanding this case to the Court of Appeals for consideration as on leave granted. An important question here is whether defendant waived any objection to the length of his sentence. Pursuant to a *Cobbs*[1] agreement, the trial court stated that it would sentence defendant at "the low-end of the guidelines." When defendant tendered his plea, the guidelines range was preliminarily calculated at 43 to 86 months, and at 43 to 129 months as enhanced by defendant's status as a third-offense habitual offender. At that time, the trial court informed defendant that "if the court has to change its preliminary evaluation at sentence, at the time of sentencing you have a right to withdraw your plea, do you understand that?" The *Cobbs* agreement was reduced to a writing that the prosecutor, defense counsel, and defendant signed.

At sentencing, the guidelines were recalculated to 50 to 150 months. The trial court sentenced defendant to 96 to 180 months. Although the trial court had informed defendant that he could withdraw his plea if the preliminary sentencing evaluation changed, defendant did not do so. Rather, defense counsel argued that the preliminary sentencing evaluation, with the low end of the minimum range at 43 months, should govern defendant's sentence. Because defendant could have withdrawn his plea but chose not to do so, it appears that he may have waived any objection to the length of the sentence imposed.

TAYLOR, J. I concur with the order remanding this case to the Court of Appeals for consideration as on leave granted.

Chief Justice CORRIGAN suggests in her concurring statement that defendant may have waived any objection to the length of the sentence imposed because he did not withdraw his plea when the guidelines range was recalculated so that the low end of the range increased from 43 to 50 months. While this is an issue for the Court of Appeals, I note that it is likely that defendant did not withdraw his plea upon the recalculation because he was content to receive a sentence at the low end of the guidelines range as recalculated. If this were so, it would have made no

[1] *People v Cobbs*, 443 Mich 276 (1993).

sense to withdraw his guilty plea. It does not seem to me that defendant's failure to withdraw his guilty plea negated in any way the agreement that he would receive a sentence at the low end of the guidelines range.

KELLY, J. I join in the statement of Justice TAYLOR.

PEOPLE v MILBANK, No. 126113. In lieu of granting leave to appeal, the case is remanded to the Wayne Circuit Court for a determination whether defendant received good-time credit from the county sheriff under MCL 51.282(2) when he was incarcerated in 2000. MCR 7.302(G)(1). If the trial court determines that defendant was awarded good-time credit, the court shall amend the judgment of sentence by crediting defendant's sentence with the number of good-time days he was awarded, and forward a copy of the amended judgment of sentence to the Department of Corrections. Jurisdiction is not retained. Court of Appeals No. 253634.

CORRIGAN, C.J. I concur in the decision to remand to the trial court for consideration of the amount of good-time credit to be awarded. Defendant contends in this Court that he is entitled to 143 days of credit; the authority for this claim is not obvious. Under MCL 51.282(2), it appears that defendant should have received good-time credit according to the following ratio: one day of good-time credit for every six days of sentence served. Defendant served 222 days, so it appears that under the statute he would be entitled to 37 days of credit.

Leave to Appeal Denied October 29, 2004:

CHERNOFF v SINAI HOSPITAL OF GREATER DETROIT, No. 121640; Court of Appeals No. 228014.

MARKMAN, J. (*concurring*). Plaintiff's decedent died on September 29, 1995, and plaintiff was appointed personal representative of decedent's estate on April 23, 1997. This appointment expired on June 18, 1998. Plaintiff then filed a notice of intent on April 16, 1999, and a complaint on September 17, 1999. After defendant filed a motion for summary disposition, the probate court reappointed plaintiff as the personal representative *nunc pro tunc*. The trial court denied defendant's motion for summary disposition. The Court of Appeals affirmed, concluding that under the common-law relation-back doctrine, the probate court's order related back to the date of the filing of the complaint.[1]

MCL 700.3701 states that "[a] personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment." Accordingly, plaintiff's appointment as personal representative relates back to her filing the notice of intent.[2] However, this results not on the basis of the common-law relation-back doctrine,

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[1] Unpublished opinion per curiam, issued March 22, 2002 (Docket No. 228014).

[2] The Court of Appeals concluded that plaintiff's appointment relates back to the date of the filing of the complaint. However, in order to avoid

but on the basis of MCL 700.3701. Therefore, I concur in this Court's decision to deny defendant's application for leave to appeal.

PEOPLE v MONTAGUE, No. 123851; Court of Appeals No. 232314.

CORRIGAN, C.J. I respectfully dissent from the order denying leave to appeal. I would remand this case to the Court of Appeals to consider whether *People v Cornell*, 466 Mich 335 (2002), should apply retroactively to this case, in light of *People v Phillips*, 470 Mich 894 (2004).

In *Phillips*, this Court reaffirmed the limited retroactive effect of *Cornell* to cases pending on appeal when *Cornell* was decided: "The Court's decision in *People v Cornell*, 466 Mich 335, 367 (2002), applies only to cases pending on appeal in which the issue has been raised and preserved, and to cases arising after *Cornell*."

In this case, defendant was charged with second-degree murder, MCL 750.317. The trial court instructed the jury on the lesser-included, cognate offense of assault with intent to commit great bodily harm less than murder, MCL 750.84.[1] The jury convicted defendant of the lesser offense. The Court of Appeals applied *Cornell* retroactively to reverse defendant's conviction, in light of the holding in *Cornell* that instructions on cognate, lesser-included offenses are not permissible. The Court of Appeals failed, however, to address retroactivity principles or to explain why its retroactive application of *Cornell* was appropriate.

The prosecutor argues that *Cornell* should not apply retroactively because defendant failed to adequately preserve and raise the *Cornell* issue. Defense counsel objected to the instruction in the trial court. The bases for the objection were that defendant lacked adequate notice of the lesser offense and that the elements for the offenses differed. In the Court of Appeals, defendant filed his brief before *Cornell* was decided and argued that insufficient evidence existed to warrant the instruction on the cognate offense.

The prosecutor argues: "Defendant never objected to or argued in the trial court or the court of appeals that their [sic] instruction was improper as a cognate lesser-included offense, nor was a post *People v Cornell*, 466 Mich 335 (2002) supplemental brief filed." Rather, a Court of Appeals judge raised the *Cornell* issue sua sponte at oral argument. The

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the bar of the statute of limitations, the appointment arguably had to relate back to the date plaintiff filed her notice of intent because the notice of intent tolls the period of limitations and if the period of limitations was not tolled, it would have expired on April 23, 1999. See my concurring statement in *Halton v Fawcett*, 471 Mich 912 (2004).

[1] The prosecutor argues that assault with intent to do great bodily harm less than murder is, in truth, a *necessarily* lesser-included offense of second-degree murder, rather than a mere cognate offense, contrary to *People v Bailey*, 451 Mich 657 (1996). I express no view on that issue because I instead advocate a remand to the Court of Appeals on the separate question whether *Cornell* applies retroactively to this case.

Court of Appeals then reversed the conviction, but failed to address whether defendant had adequately preserved and raised the *Cornell* issue to warrant retroactive application.

I believe it is a close question whether defendant preserved the *Cornell* issue with sufficient precision to warrant retroactive application. Defendant did not argue at trial that cognate offense instructions are never appropriate, and thus did not advance an argument that tracks our holding in *Cornell*. Defendant did, however, object on grounds that underlie some of the concerns that gave rise to the holding in *Cornell*. Thus, a reasonable argument may be available that he preserved the issue.

But even if defendant *preserved* the *Cornell* issue, I am less confident that he adequately *raised* that issue *in the Court of Appeals*. His argument on appeal was merely that the evidence at trial was insufficient to warrant the cognate offense instruction. That argument is further removed from the rationale underlying *Cornell* than the objection at trial. A mere challenge to the sufficiency of the proofs does not seem to amount to an argument against cognate offense instructions in general. Therefore, while the issue may arguably have been preserved, it may not have been adequately *raised in the Court of Appeals* to warrant retroactive application of *Cornell*.

For these reasons, further review in the Court of Appeals is appropriate. The Court of Appeals reversed defendant's conviction on the basis of an issue that a judge, not defendant, had raised during oral argument. I would therefore remand this case to the Court of Appeals for reconsideration and direct it to address whether defendant adequately preserved and raised the *Cornell* issue to warrant retroactive application of that decision.

HALTON v FAWCETT, No. 125359; reported below: 259 Mich App 699.

MARKMAN, J. (*concurring*). Plaintiff's decedent died on February 10, 2001, and plaintiff filed a notice of intent on March 7, 2001. Plaintiff was appointed personal representative of the decedent's estate on April 12, 2001, and filed a complaint on September 28, 2001. The trial court denied defendants' motion for summary disposition, and the Court of Appeals affirmed, concluding that the notice of intent was not defective even though it had not been signed by the personal representative of the estate.[1] In other words, the Court of Appeals concluded that a person does not have to be appointed as personal representative before a person can file a notice of intent. I am not certain that I agree.

MCL 600.2912b states that a person cannot bring a medical malpractice action until that person gives the defendant written notice of the action at least 182 days before commencing the action. MCL 600.2922(2) states that only a personal representative can bring an action for the wrongful death of a decedent. When these statutes are read together, a reasonable argument can be made that only a personal representative can file a notice of intent to sue.

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[1] 259 Mich App 699 (2003).

However, MCL 700.3701 states that "[a] personal representative's powers relate back in time to give acts by the person appointed that are beneficial to the estate occurring before appointment the same effect as those occurring after appointment." Accordingly, plaintiff's appointment as personal representative relates back to her filing the notice of intent. Therefore, I concur in this Court's decision to deny defendants' application for leave to appeal.

BRANCH COUNTY BOARD OF COMMISSIONERS v INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS of AMERICA, UAW, No. 125811; reported below: 260 Mich App 189.

Interlocutory Appeal

Leave to Appeal Denied October 29, 2004:

SCHMITZ v CITIZENS INSURANCE COMPANY OF AMERICA, No. 127034. Motion to add defendant Citizens Insurance Company as a party is granted. Court of Appeals No. 256599.

Reconsideration Denied October 29, 2004:

POCUS v DETROIT COKE CORPORATION, No. 124000. See 470 Mich 881. Court of Appeals No. 246612.

CAVANAGH and KELLY, JJ. We would grant reconsideration and, on reconsideration, would deny leave to appeal, or at least grant leave to appeal for full briefing and argument rather than peremptorily reversing a longstanding and fundamental tenet of Michigan law.

Leave to Appeal Granted November 4, 2004:

PEOPLE v HOUSTON, No. 126025. The issues are limited to (1) whether Offense Variable 3, MCL 777.33, was properly scored and (2) whether a sentence of life imprisonment falls within the statutory sentencing guidelines for second-degree murder for a defendant who is an habitual offender. Reported below: 261 Mich App 463.

CLOUGH v BALLIET, No. 126122. The parties are to include among the issues to be briefed whether a court may extend the coverage of a statute to remedy an equal protection violation. See *North Ottawa Community Hosp v Kieft,* 457 Mich 394, 408 n 14 (1998). The Attorney General of the state of Michigan, the Family Independence Agency, the Children's Law and Family Law sections of the State Bar of Michigan, and the United States Department of Health and Human Services, Administration for Children and Families 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. 243090.

PEOPLE v HENDRICK, No. 126371. The parties are to include among the issues briefed whether MCL 771.4, which addresses sentences imposed following the revocation of a probation order and states that "the court may sentence the probationer in the same manner and to the same penalty as . . . if the probation order had never been made," permits a trial court to find that the conduct giving rise to the probation violation constitutes a substantial and compelling reason to depart from the sentencing guidelines. 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: 261 Mich App 673.

PEOPLE v CURVAN, No. 126538. The application for leave to cross-appeal is denied. Court of Appeals No. 242376.

PEOPLE v DAVID PERKINS, No. 126727. The parties are to include among the issues briefed (1) whether larceny from a person is a "specified felony" for the purpose of MCL 750.224f(6)(i) and (2) whether under MCL 750.224f(2)(b) the lack of restoration of the right to possess a firearm is an element of the offense or an exemption or exception to which MCL 776.20 applies. In addressing the second issue, the parties should consider the significance, if any, of the fact that the statute at issue in *People v Pegenau*, 447 Mich 278 (1994), involved a controlled substance violation, with regard to which MCL 333.7531 expressly places the burden of proving an exemption on the defendant. Reported below: 262 Mich App 267.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal November 4, 2004:

CURTIS v CITY OF DETROIT, No. 125652. 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 city of Detroit was required to give plaintiff notice under MCL 125.540 or Detroit City Code 290-H, § 12-11-28 and whether the city of Detroit was required to renew its notice of lis pendens, MCL 600.2701. The parties may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 241632.

JARRAD v INTEGON NATIONAL INSURANCE COMPANY, No. 126176. 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 may file supplemental briefs within 28 days of the date of this order. Court of Appeals No. 245068.

Leave to Appeal Denied November 4, 2004:

MAYBERRY v PAROLE BOARD, No. 125123; Court of Appeals No. 251022. CAVANAGH, KELLY, and MARKMAN, JJ. We would grant leave to appeal.

PEOPLE v MOONEY, No. 125278; Court of Appeals No. 236424.

KELLY and MARKMAN, JJ. We would grant leave to appeal.

HAYNES v BRANAM, No. 125662; Court of Appeals No. 243076.

CRUMP v STATE FARM MUTUAL AUTO INSURANCE COMPANY, No. 126076; Court of Appeals No. 253814.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied November 4, 2004:

COOPER v AUTO CLUB INSURANCE ASSOCIATION, No. 126755; Court of Appeals No. 254659.

Leave to Appeal Granted November 5, 2004:

GHAFFARI v TURNER CONSTRUCTION COMPANY, Nos. 124786, 124787. The parties are to include among the issues briefed: (1) Should the open and obvious danger doctrine have any application in a claim under the common work area doctrine described in *Ormsby v Capital Welding, Inc*, 471 Mich 45, 54 (2004)? (2) If so, how should the open and obvious danger doctrine be reconciled with *Hardy v Monsanto-Chem Systems, Inc*, 414 Mich 29 (1982), in which this Court concluded that the policy of promoting safety in the work place would be enhanced by the application of principles of comparative negligence? The Michigan Trial Lawyers Association and the Michigan Defense Trial Counsel 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: 259 Mich App 608.

CITY OF GROSSE POINTE PARK v MICHIGAN MUNICIPAL LIABILITY & PROPERTY POOL, No. 125630. The issues are limited to (1) whether sewage is a "pollutant" under the applicable insurance policy's pollution exclusion clause, (2) whether extrinsic evidence may be used to establish an ambiguity in the pollution exclusion clause, and (3) whether defendant may be estopped from asserting the pollution exclusion. The application for leave to appeal as cross-appellant is denied. Court of Appeals No. 228347.

WEAVER, J. I would not limit the grant of leave to appeal, but would allow the parties to address all the issues that they have raised.

KELLY, J. I join the statement of Justice WEAVER.

DETROIT EDISON COMPANY v PUBLIC SERVICE COMMISSION NO 2, MICHIGAN ELECTRIC COOPERATIVE ASSOCIATION v PUBLIC SERVICE COMMISSION, and CONSUMERS ENERGY COMPANY v PUBLIC SERVICE COMMISSION NO 2, Nos. 125950, 125954, 125955. The parties are directed solely to brief whether the December 2000 and October 2001 orders of the Public Service Commis-

sion are unlawful because they were not promulgated in conformity with the rulemaking provisions of the Administrative Procedures Act, MCL 24.201 *et seq*. Reported below: 261 Mich App 1.

WEAVER, J. I would not limit the grant of leave to appeal, but would allow the parties to address all the issues that they have raised.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal November 5, 2004:

ECHELON HOMES, LLC v CARTER LUMBER COMPANY, Nos. 125994, 125995. 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 limit their presentation to whether the Court of Appeals correctly held that constructive knowledge that property is stolen, embezzled, or converted is sufficient to impose liability under MCL 600.2919a. Supplemental briefs may be filed within 28 days of the date of this order. Reported below: 261 Mich App 424.

WEAVER, J. I would not limit oral argument but would allow the parties to argue all the issues raised in the application and response.

Summary Dispositions November 5, 2004:

RANTA v EATON RAPIDS PUBLIC SCHOOLS BOARD OF EDUCATION, No. 126802. 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 pay particular attention to whether the State Tenure Commission had jurisdiction over this dispute. See, e.g., *Farrimond v Bd of Ed of East Jordan*, 138 Mich App 51 (1984). Jurisdiction is not retained. Court of Appeals No. 256108.

Leave to Appeal Denied November 5, 2004:

PEOPLE v ABRAHAM, No. 123975; reported below: 256 Mich App 265.

Justices WEAVER and MARKMAN concur in statements below. Justice KELLY joins Justice WEAVER's statement.

WEAVER, J. I concur with the denial of leave to appeal. Defendant was eleven years old when he was charged as an adult, MCL 712A.2d, with first-degree murder, assault with intent to commit murder, and possession of a firearm during the commission of a felony. A jury convicted defendant of second-degree murder, MCL 750.317, and acquitted defendant of the remaining charges. Defendant was twelve years old during trial and thirteen at sentencing. Experts testified at trial that defendant was developmentally disabled and functioned at the level of a six- to eight-year-old child.

In a carefully considered and reasoned decision, and in accordance with the sentencing options then available under MCL 712A.18(1)(n), the trial court sentenced defendant to placement at the Maxey Boys Training

School within the juvenile justice system until his twenty-first birthday. The court reasoned that sentencing defendant to placement in the juvenile system, rather than in an adult prison, was in the best interests of the public and would best ensure that the focus during defendant's incarceration would be on his rehabilitation. The focus on rehabilitation in the juvenile system, the court noted, would better ensure that defendant would not pose a threat to society upon his release.

While this appeal of defendant's conviction slowly proceeded through the appellate system, defendant has reached the age of majority. He is eighteen and is scheduled to be released on January 19, 2007. If this Court were to grant leave and eventually reverse, defendant would face a new trial and the possibility of life in prison. The public would bear the cost.

Given the unique facts and circumstances of this case, I do not believe a grant of leave to appeal in this case would be in the best interests of the defendant or the public. Therefore, I concur in the denial of leave to appeal.

MARKMAN, J. (*concurring*). Defendant was eleven when he killed Ronnie Green with a rifle. After defendant and his mother signed a document waiving defendant's *Miranda*[1] rights, defendant gave the police an inculpatory statement. Defendant was charged with first-degree murder, assault with intent to commit murder, and two counts of possession of a firearm during the commission of a felony. The trial court granted defendant's motion to suppress the statement defendant made to the police, finding that defendant did not understand his rights or their waiver. In a split decision, the Court of Appeals affirmed the denial of defendant's motion to quash the information, reversed the granting of the motion to suppress the statement, and remanded for further proceedings. 234 Mich App 640 (1999). This Court denied leave to appeal on the basis that the questions presented should not be reviewed before the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals. 461 Mich 851 (1999). Following a jury trial, defendant was convicted of second-degree murder. The Court of Appeals affirmed. 256 Mich App 265 (2003).

Defendant again argues that his statement to the police should have been suppressed. An appellate court must not disturb " 'a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights "unless that ruling is found to be clearly erroneous." Credibility is crucial in determining a defendant's level of comprehension, and the trial judge is in the best position to make this assessment.' " *People v Daoud*, 462 Mich 621, 629 (2000) (citations omitted). At the *Walker*[2] hearing, when asked what the right to remain silent means, defendant responded, "Can't go nowhere." When asked if he knew what it meant to have an attorney present, defendant responded, "Not really." A doctor testified

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Walker* (*On Rehearing*), 374 Mich 331 (1965).

that defendant's abstract verbal reasoning ability and short-term auditory memory are at the level of a six-year-old and his expressive language skills, practical problem-solving skills, and fund of general information are at the level of an eight-year-old. " '[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.' " *Daoud, supra* at 633 (citation omitted). After listening to and watching the defendant testify, the trial court concluded that it was "clearly satisfied that [defendant] did not understand his *Miranda* warnings."

I am not convinced that the trial court clearly erred in concluding that defendant did not knowingly and intelligently waive his *Miranda* rights, but it is unnecessary, in my judgment, to finally resolve this issue. The waiver issue has been preserved by the defendant, and thus, if he is correct that the waiver was ineffective, the prosecutor has the burden to demonstrate that the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand),* 446 Mich 392 (1994). Besides defendant's confession, this is what the jury heard: about a week before the fatal shooting, defendant tried to buy a gun from Carl Turner to shoot "Buster"; two days later, defendant told Stephanie Saldana that he was going to shoot someone; that same day, Frederick Jenkins saw defendant shoot balloons tied to a tree in an alley with a rifle; on the day of the shooting, Marcel Moolhuiszen saw defendant walking down the street with a gun and when Michael Duncan and Michelle Boykin asked if defendant's gun was loaded, defendant fired a shot into the ground and said, "that's your answer"; later, that same day, defendant shot at a stop sign, a streetlight, and a garage, and when Michael Hudack heard a shot whiz past his head, he saw defendant wide-eyed with a gun in his hand; and then, later that evening, after the fatal shooting, defendant told Frederick Jenkins that he thought he shot someone; then defendant went to Stacie Kay's home and seemed "upset and perplexed"; the next day, defendant gave the gun to Michael Hudack and told him to get rid of the gun "before I get in trouble with it"; finally, two days after the fatal shooting, defendant told Marcel Moolhuiszen and Stephanie Saldana, "I ain't playing no more. I got that nigga." Although the only direct evidence against defendant was apparently his custodial statement, there was substantial circumstantial evidence against defendant—so much so, in my judgment, that I believe that the admission of defendant's custodial statement, if in error, was harmless error. Accordingly, I believe that the prosecutor has satisfied his burden of proof and I therefore concur in this Court's decision to deny defendant's application for leave to appeal.

UNITED STATES PIPE AND FOUNDRY COMPANY, INC v UNDERGROUND SPECIALISTS, INC, No. 127241; Court of Appeals No. 257183.

Leave to Appeal Denied November 12, 2004:

CARR v MIDLAND COUNTY CONCEALED WEAPONS LICENSING BOARD, No. 125315. Leave to file a brief amicus curiae is granted. Reported below: 259 Mich App 428.

YOUNG, J. (*concurring*). I disagree with the assumption of the Court of Appeals that the offense of which defendant was charged, obtaining a controlled substance by fraud, MCL 333.7407(1)(c), is one of the enumerated offenses within the scope of MCL 333.7411. Nevertheless, because the prosecutor never challenged the applicability of § 7411 to defendant's offense and the Court of Appeals never addressed this point, I am disinclined to address the issue.

CORRIGAN, C.J. I join the statement of Justice YOUNG.

PEOPLE v RILEY, No. 127245; Court of Appeals No. 257094.

In re WARE (FAMILY INDEPENDENCE AGENCY v WARE), No. 127291; Court of Appeals No. 256355.

Summary Disposition November 19, 2004:

PEOPLE v HERZBERG, No. 127106. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration of defendant's delayed application. MCR 7.302(G)(1). Defendant's delayed application was not untimely under MCR 7.205(F)(4) because defendant's delayed application was filed within forty-two days of the filing of a transcript relating to the probation violation proceeding. The transcript of the June 14, 2002, hearing, filed on April 20, 2004, and the transcript of the May 9, 2002, proceeding, filed on April 22, 2004, are transcripts of matters relating to the probation violation proceeding. Court of Appeals No. 255779.

Leave to Appeal Denied November 19, 2004:

In re YOUNG (FAMILY INDEPENDENCE AGENCY v YOUNG), No. 127306; Court of Appeals No. 254079.

COOPER v MOURER-FOSTER, INC, No. 127307; Court of Appeals No. 253304.

In re TUCKER (FAMILY INDEPENDENCE AGENCY v TUCKER), No. 127321; Court of Appeals No. 252651.

Leave to Appeal Denied November 22, 2004:

PEOPLE v BURRELL, No. 125704; Court of Appeals No. 250459.

PEOPLE v WALDROUP, No. 125705; Court of Appeals No. 252282.

PEOPLE v DERICO THOMPSON, No. 125799; Court of Appeals No. 237602.

PEOPLE v BRADLEY, No. 125852; Court of Appeals No. 240746.

LOCKWOOD BUILDING COMPANY, INC v DEMPSEY, No. 125865; Court of Appeals No. 241508.

MOSZYK v CITY OF BAY CITY, Nos. 125942, 125943; Court of Appeals Nos. 252273, 253547.

WALTER TOEBE CONSTRUCTION COMPANY v DEPARTMENT OF TRANSPORTATION, No. 125981; Court of Appeals No. 244356.

PEOPLE v MCMULLAN, No. 125989; Court of Appeals No. 251977.

PEOPLE v BELTON, No. 126037. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250530.

LINCOLN CENTER BREAD BASKET DELI v SECURA INSURANCE, Nos. 126055, 126056; Court of Appeals Nos. 242686, 244565.

FISHER v WINNIE, No. 126117; Court of Appeals No. 243369.

NIELSEN v PALLISCO, No. 126159; Court of Appeals No. 250535.

PEOPLE v DENNIS, No. 126214; Court of Appeals No. 254314.

BURKHARDT v BAILEY, No. 126225; reported below: 260 Mich App 636.

DEPARTMENT OF TREASURY v COLLER, No. 126232; Court of Appeals No. 244344.

SMITH v AKERLIND, No. 126257; Court of Appeals No. 244661.

PEOPLE v CHISOM, No. 126280; Court of Appeals No. 246027.

PEOPLE v AUNDREY WILEY, No. 126282; Court of Appeals No. 254432.

FANNON v RIX, No. 126296; Court of Appeals No. 243884.

PEOPLE v TITUS, No. 126303; Court of Appeals No. 243642.

PEOPLE v BREWSTER, No. 126305; Court of Appeals No. 246820.

PEOPLE v SANDERS, Nos. 126313, 126314; Court of Appeals Nos. 246346, 246347.

SCAGLIONE v WEST BLOOMFIELD TOWNSHIP, No. 126316; Court of Appeals No. 252652.

PEOPLE v STONE, No. 126317; Court of Appeals No. 246344.

PEOPLE v GOMEZ, No. 126319; Court of Appeals No. 254351.

PEOPLE v BURROS, No. 126320; Court of Appeals No. 244287.

PEOPLE v HILL, No. 126321; Court of Appeals No. 246229.

PEOPLE v MAURICE CARTER, No. 126326. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252498.

PEOPLE v CORNELIUS MCDANIEL, No. 126330; Court of Appeals No. 243638.

PEOPLE v WILLIE DAVIS, No. 126335; Court of Appeals No. 243334.

PEOPLE v FINEHOUT, No. 126338; Court of Appeals No. 253954.

PEOPLE v PAPKE, No. 126347. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253704.

PEOPLE v SCHNORR, Nos. 126353, 126361; Court of Appeals Nos. 242306, 244183.

PEOPLE v SIERRA-OLIVA, No. 126354; Court of Appeals No. 245846.

PEOPLE v DONALD PATTERSON, No. 126357; Court of Appeals No. 244691.

PEOPLE v WATKO, No. 126358; Court of Appeals No. 244934.

BRUSHER v BAY HARBOR YACHT CLUB and BRUSHER v BAY HARBOR YACHT CLUB LIMITED PARTNERSHIP, Nos. 126362, 126363; Court of Appeals Nos. 244295, 244322.

PEOPLE v CORDELL POWELL, No. 126366; Court of Appeals No. 244915.

PEOPLE v CAL, No. 126367; Court of Appeals No. 245500.

PEOPLE v DUNCAN, No. 126368; Court of Appeals No. 247617.

PEOPLE v PEARSON, No. 126370; Court of Appeals No. 255213.

BOBILLO v GENERAL MOTORS CORPORATION, No. 126372. Application for leave to cross-appeal is also denied. Court of Appeals No. 253148.

PEOPLE v GENO, No. 126373; reported below: 261 Mich App 624.

PEOPLE v JEFFREY HOLLOWAY, No. 126377; Court of Appeals No. 245844.

PEOPLE v DARRON CURRY, No. 126378; Court of Appeals No. 245254.

PEOPLE v O'BRIEN, No. 126381; Court of Appeals No. 245591.

PEOPLE v DORTCH, No. 126382; Court of Appeals No. 253326.

PEOPLE v CHERRY, No. 126383; Court of Appeals No. 246792.

PEOPLE v FREDDIE SMITH, No. 126384; Court of Appeals No. 245616.

PEOPLE v ROOT, No. 126389; Court of Appeals No. 244319.

PEOPLE v PRICE, No. 126394; Court of Appeals No. 243639.

PEOPLE v BARHITE, No. 126398; Court of Appeals No. 237890.

PEOPLE v BERRY, No. 126400; Court of Appeals No. 244937.

PEOPLE v PRIETO, No. 126401; Court of Appeals No. 254582.

PEOPLE v MCCAIN, No. 126411; Court of Appeals No. 243336.

PEOPLE v SEAN RAMSEY, No. 126421; Court of Appeals No. 245094.

PARKER v DAIMLERCHRYSLER CORPORATION, No. 126428; Court of Appeals No. 245066.

PEOPLE v DECHARLES WEST, No. 126433; Court of Appeals No. 253834.

PEOPLE v LEDESMA, No. 126434; Court of Appeals No. 245156.

PEOPLE v RODGERS, No. 126435; Court of Appeals No. 254518.

PEOPLE v DILLARD, No. 126437; Court of Appeals No. 245182.

PEOPLE v AKINS, No. 126444; Court of Appeals No. 254608.

PEOPLE v GASHAJ, No. 126445; Court of Appeals No. 247487.

PEOPLE v TROWELL, No. 126448; Court of Appeals No. 254381.

EDGEWOOD DEVELOPMENT, INC v LANDSKROENER, No. 126454; reported below: 262 Mich App 162.

PEOPLE v JAMES RAMSEY, No. 126492; Court of Appeals No. 245614.

NEWMAN HOLDINGS, LLC v CITY OF DEARBORN, No. 126803; Court of Appeals No. 254164.

BECKER v RICHARDS, No. 126985. Leave to file a brief amicus curiae is granted. Court of Appeals No. 245423.

Reconsideration Denied November 22, 2004:

CC MID WEST, INC v MCDOUGALL, No. 123237. Leave to appeal denied at 470 Mich 878. Court of Appeals No. 213386 (on remand).

KELLY, J. I would grant reconsideration.

COMERICA BANK v HARBOR NORTHWESTERN-30800, LLC, No. 125565. Leave to appeal denied at 471 Mich 865. Court of Appeals No. 241744.

PEOPLE v ERIC POWELL, No. 125591. Leave to appeal denied at 471 Mich 865. Court of Appeals No. 239310.

PEOPLE v MCADOO, No. 125618. Leave to appeal denied at 471 Mich 870. Court of Appeals No. 242214.

GOLOTA v AMERICAN AXLE & MANUFACTURING, INC, No. 125643. Leave to appeal denied at 470 Mich 887. Court of Appeals No. 252420.

ALLIET v BERENHOLZ, No. 125684. Leave to appeal denied at 471 Mich 866. Court of Appeals No. 242469.

SQUIRES v CITY OF DETROIT, No. 125703. Leave to appeal denied at 471 Mich 866. Court of Appeals No. 240762.

SHOOLTZ v CHAPPELLE, No. 125709. Leave to appeal denied at 470 Mich 888. Court of Appeals No. 242200.

PEOPLE v JEFFERY MOORE, No. 125800. Leave to appeal denied at 471 Mich 868. Court of Appeals No. 243631.

REINHART v CENDROWSKI SELECKY, PC, Nos. 125847, 125849. Leave to appeal denied at 471 Mich 871. Court of Appeals Nos. 239540, 239584.

PEOPLE v MCNORIELL, No. 125906. Leave to appeal denied at 471 Mich 872. Court of Appeals No. 240748.

PEOPLE v KAWAN PAYNE, No. 125922. Leave to appeal denied at 471 Mich 868. Court of Appeals No. 252387.

Leave to Appeal Granted November 29, 2004:

PEOPLE v SCHAEFER, No. 126067. The parties are to include among the issues to be briefed: (1) whether the "substantial" cause language in *People v Lardie*, 452 Mich 231 (1996), is consistent with the statute, (2) whether the requirement of MCL 257.625(4) that the prosecutor establish that the defendant's "operation of that motor vehicle causes the death of another person" requires the prosecutor to establish that the defendant's operation of the motor vehicle was affected by his intoxicated state, (3) whether the statute obligates the prosecutor to show that the defendant's driving at the time of the accident was a proximate cause of another person's death, (4) whether it is sufficient that the prosecutor establish only that the defendant decided to drive while intoxicated, and that a death resulted, and (5) if so, whether the statute violates the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2, or the Equal Protection Clause of the United States Constitution, US Const, Am XIV, or is otherwise unconstitutional. The case is to be argued and submitted to the Court with *People v Large*, No. 127142. Court of Appeals No. 245175.

DEVILLERS v ACIA, No. 126899. The parties are to include among the issues briefed whether the Supreme Court should overrule *Lewis v DAIIE*, 426 Mich 93 (1986), and, if so, whether any such decision should be given prospective effect only. See *Pohutski v City of Allen Park*, 465 Mich 675, 695-699 (2002). The stay previously entered by this Court remains in effect. Court of Appeals No. 257449.

PEOPLE v LARGE, No. 127142. The parties are to include among the issues to be briefed: (1) whether the "substantial" cause language in *People v Lardie*, 452 Mich 231 (1996), is consistent with the statute, (2) whether the requirement of MCL 257.625(4) that the prosecutor establish that the defendant's "operation of that motor vehicle causes the death of another person" requires the prosecutor to establish that the defendant's operation of the motor vehicle was affected by his intoxicated state, (3) whether the statute obligates the prosecutor to show that the defendant's driving at the time of the accident was a proximate cause of another person's death, (4) whether it is sufficient that the prosecutor establish only that the defendant decided to drive while intoxicated, and that a death resulted, and (5) if so, whether the statute violates the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1, § 2, or

the Equal Protection Clause of the United States Constitution, US Const, Am XIV, or is otherwise unconstitutional. The case is to be argued and submitted to the Court with *People v Schaefer*, No. 126067. Court of Appeals No. 253261.

Reconsideration Granted November 29, 2004:

PEOPLE V JOHN SCOTT, No. 124756. The order dated February 27, 2004, 469 Mich 1015, is vacated and, in lieu of granting leave to appeal, the case is remanded to the Kalamazoo Circuit Court, which shall conduct an evidentiary hearing to determine whether the relevant evidence was destroyed in 1996 and, if not, whether it is still in existence, or to determine whether the evidence was destroyed sometime after May 1997 and, if so, under what circumstances. MCR 7.302(G)(l). The Kalamazoo Circuit Court is to determine whether defendant is indigent, and, if so, to appoint counsel to represent him at the hearing. That court, within thirty days of the conclusion of the hearing, is to file with the clerk of the Supreme Court a transcript of the hearing and its findings on the foregoing questions. Jurisdiction is retained. Court of Appeals No. 248415.

REAM V BURKE ASPHALT PAVING, No. 124830. The order dated March 30, 2004, 469 Mich 1025, is vacated and, in lieu of granting leave to appeal, the Court of Appeals decision is vacated in part and the case is remanded to that Court for reconsideration in light of *Kreiner v Fischer* and *Straub v Collette*, 471 Mich 109 (2004), of whether Terry Ream experienced a serious impairment of body function. MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Court of Appeals No. 238824.

CAVANAGH and KELLY, JJ. We would deny reconsideration.

WEAVER, J. (*dissenting*). I would grant leave to appeal. I would not remand to the Court of Appeals in this case, because I would overrule *Kreiner v Fischer,* 471 Mich 109 (2004), for the reasons stated in the *Kreiner* dissenting opinion.

Summary Dispositions November 29, 2004:

KIRKALDY V RIM NO 1, Nos. 122142, 122143. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated in part, and the case is remanded to that Court for consideration of the defendants' argument that the statute of limitations was not tolled by the filing of the plaintiffs' defective affidavit of merit and that, as a result, they are entitled to dismissal with prejudice. MCR 7.302(G)(1). See *Geralds v Munson Healthcare*, 259 Mich App 225 (2003). Reported below: 251 Mich App 570.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

PATENGE V KNIGHT ESTATE, No. 123870. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *Kreiner v Fischer* and *Straub v Collette*, 471 Mich 109 (2004),

of whether plaintiff experienced a serious impairment of body function. MCR 7.302(G)(1). Court of Appeals No. 238893.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

WEAVER, J. (*dissenting*). I would grant leave to appeal. I would not remand to the Court of Appeals in this case, because I would overrule *Kreiner v Fischer,* 471 Mich 109 (2004), for the reasons stated in the *Kreiner* dissenting opinion.

SCHMALTZ v MICHIGAN TRACTOR AND MACHINERY CO, No. 124037. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration of the issues related to the common work area doctrine in light of *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004). MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Court of Appeals No. 237991.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

SMITH v MICHIGAN TRACTOR AND MACHINERY CO, No. 124038. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration of the issues related to the common work area doctrine in light of *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004). MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Court of Appeals No. 237992.

CAVANAGH and KELLY, JJ. We would deny leave to appeal.

H A SMITH LUMBER & HARDWARE COMPANY v DECINA, No. 125193. In lieu of granting leave to appeal, part V of the Court of Appeals decision, which affirms the attorney fee awards and rules that they were granted pursuant to MCL 570.1118(2), is vacated. MCR 7.302(G)(1). The Court of Appeals clearly erred by finding that the Oakland Circuit Court's "final order stated that attorney fees were awarded against Decina pursuant to the CLA [Construction Lien Act, MCL 570.1101 *et seq.*]." 258 Mich App 419, 428 n 3 (2003). The attorney fee awards in the November 7, 2001, Oakland Circuit Court judgment neither refer to nor rely on the CLA. The case is remanded to the Court of Appeals for further consideration consistent with this order. The Court of Appeals, on remand, may, while retaining jurisdiction, remand the case to the Oakland Circuit Court for additional proceedings or hearings, if necessary. In all other respects, leave to appeal is denied. Jurisdiction is not retained. Reported below: 258 Mich App 419.

PEOPLE v DARYLE STEWART, No. 125832. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration, as on leave granted, of the issues (1) whether appellate counsel abandoned defendant's direct appeal pursued by claim and by application, (2) assuming such abandonment, whether defendant was completely deprived of the right to an appeal and effective appellate counsel, and (3) assuming a deprivation of the right to appeal and appellate counsel, (a) whether the trial court's denials of defendant's subsequent pro se requests for counsel continued to deprive defendant of the right to appeal and effective appellate counsel, (b) whether such was structural error requiring that defendant be afforded an appeal of right, and (c) whether

the trial court's denial of defendant's first pro se motion for relief from judgment in 1995 barred it, per MCR 6.508(D)(2), from granting any subsequent request for postconviction relief to correct any deprivation of the right to appeal and effective appellate counsel. MCR 7.302(G)(1). The Court of Appeals, on remand, may, while retaining jurisdiction, remand the case to the Wayne Circuit Court for additional proceedings or evidentiary hearings, if necessary. Jurisdiction is not retained. Court of Appeals No. 252041.

LANGRILL v STINGERS LOUNGE, No. 126327. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated and the matter is remanded to the Macomb Circuit Court for further proceedings. Because plaintiff did not present any evidence to the contrary, there is a presumption that the attorney-client relationship she entered into with her first attorney, who filed the original complaint in this matter, included the purpose of pursuing a claim under MCL 436.1801. MCR 7.302(G)(1). *Chambers v Midland Country Club,* 215 Mich App 573 (1996). On remand, the circuit court shall find whether sufficient information for determining that defendant might be liable under MCL 436.1801 was not known and could not reasonably have been known within 120 days of the beginning of that first attorney-client relationship. The circuit court shall grant defendant's motion for summary disposition under the 120-day notice rule if, and only if, the court finds that this information was known or could reasonably have been known during that 120-day period. Jurisdiction is not retained. Reported below: 261 Mich App 698.

CAVANAGH and KELLY, JJ. We concur in remanding this case to the Macomb Circuit Court.

RICHARD v NORTHVILLE PSYCHIATRIC HOSPITAL, No. 126356. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration of the question whether the circuit court properly dismissed the plaintiff's civil rights claims pursuant to *Nummer v Dep't of Treasury*, 448 Mich 534 (1995), reh den 449 Mich 1204 (1995), cert den 516 US 964 (1995). MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 244918.

Judgment Modified in Part November 29, 2004:

PEOPLE v HENDRIX, No. 126834. In lieu of granting leave to appeal, the judgment of the Court of Appeals is modified in part. MCR 7.302(G)(1). Former MCL 257.625(8)(c), now MCL 257.625(9)(c), provides two alternate mandatory minimum sentences, either of which may be imposed. The provisions of MCL 769.34, including MCL 769.34(2), apply to a sentence imposed under MCL 257.625(9)(c). The Court of Appeals erred to the extent it concluded otherwise. In all other respects, the application is denied as moot because of the circumstances of defendant's sentence, including the fact that defendant has been discharged from probation. Reported below: 263 Mich App 18.

Leave to Appeal Denied November 29, 2004:

KIRKALDY v RIM NO 2, No. 122029; reported below: 251 Mich App 570.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v RODNEY HICKS, No. 125461; reported below: 259 Mich App 518.

HOFER v DAIMLERCHRYSLER CORPORATION, No. 125601; Court of Appeals No. 239870.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

FLANDERS INDUSTRIES, INC v STATE OF MICHIGAN, No. 125641. Leave to file a brief amicus curiae is granted. Court of Appeals No. 240789.

PEOPLE v DAVID SMITH, No. 125656; Court of Appeals No. 239297.

PEOPLE v EDDINGTON, No. 125670. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 248852.
KELLY, J. 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 would 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 that were in fact presented in the motion seeking relief from judgment in the form of resentencing.

PEOPLE v GUERRERO, No. 125685; Court of Appeals No. 242992.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v ARCHIE BAKER, No. 125698; Court of Appeals No. 252014.
CAVANAGH and KELLY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v TOWNSEND, No. 125961. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251336.
KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v FENNELL, No. 126001; reported below: 260 Mich App 261.
CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v RUELAS, No. 126002; Court of Appeals No. 253463.
CAVANAGH and MARKMAN, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v VENTURA, No. 126746; reported below: 262 Mich App 370.

CAVANAGH, J. I would grant defendant's application for leave to appeal.

Interlocutory Appeal

Leave to Appeal Denied November 29, 2004:

NEAL v DEPARTMENT OF CORRECTIONS, No. 126229; Court of Appeals No. 253543.

KELLY, J. I would remand this case to the Court of Appeals for an explanation of its reasons for granting the stay.

TAYLOR, J., not participating.

Reconsideration Denied November 29, 2004:

ILITCH-TREPECK v TREPECK, No. 126965. Leave to appeal denied at 471 Mich 882. Court of Appeals No. 257128.

MARKMAN, J., not participating.

Summary Disposition November 30, 2004:

PEOPLE v LEVIE WILLIAMS, No. 125374. 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 an order granting defendant a new trial. In granting defendant's motion, the circuit court appropriately applied the standards of MCR 6.508(D). MCR 7.302(G)(1). Court of Appeals No. 244652.

Leave to Appeal Denied December 2, 2004:

GORDON v HENRY FORD HEALTH SYSTEM, No. 125335. On October 6, 2004, the Court heard oral argument on the application for leave to appeal the November 18, 2003, judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered, and it is denied. Court of Appeals No. 244596.

KELLY, J. (*dissenting*). I write separately to express my agreement with the opinion[1] of Judge WHITE of the Court of Appeals. I agree that defendant is entitled to a reduction of its obligation to pay worker's compensation benefits to plaintiff. To ascertain the amount of the reduction, I would remand for a determination of the fair market value of plaintiff's work for her company. Defendant is entitled to reduce its obligation to pay benefits only to the extent of plaintiff's "wage-earning capacity."

BACKGROUND

At one time, plaintiff was employed by defendant as a registered

[1] Concurring in part and dissenting in part.

nurse. In 1992, defendant began paying plaintiff permanent disability benefits pursuant to the Worker's Disability Compensation Act (WDCA). MCL 418.101 *et seq*.

While on disability leave, plaintiff founded two adult foster care group homes. She used her nursing experience to establish the homes and obtain the necessary operating licenses. According to plaintiff, the licenses require her to participate actively in the operation of the homes. Thus, plaintiff frequently visits the homes to monitor staff and address residents' complaints. She makes some hiring decisions and exercises some control over the employees. On occasion, plaintiff transports patients and delivers supplies and food to the homes.

Naturally, plaintiff receives profits each year from these homes as their owner. She has reported the profits on her annual tax returns as income. Plaintiff also owns and receives income from several rental properties. In 1998, defendant sought to stop payments and recoup previous payments after learning that plaintiff had these sources of income. The worker's compensation magistrate denied the application. He ruled that plaintiff's income was from investments rather than from wages that defendant is entitled to deduct from its benefit obligations under the WDCA.

The Worker's Compensation Appellate Commission (WCAC) sitting en banc reversed the ruling. Because plaintiff actively managed the foster care homes, the WCAC found that the income she received from them was "real, palpable, and substantial consideration." Citing *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 576 (1999). Thus, under MCL 418.371(1), defendant was entitled to reduce plaintiff's worker's compensation benefits by the full amount of this income.

We remanded the case to the Court of Appeals. It affirmed the WCAC decision in an unpublished split opinion. (Docket No. 244596, issued November 18, 2003). Plaintiff again sought leave to appeal. We directed oral argument on the application to grant leave. In addition to the issues raised, we asked the parties to discuss whether the amount of plaintiff's wages or wage-earning capacity, if any, should be (1) equal to the net profit of the business, or (2) based on the fair market value of the services performed by plaintiff. *Gordon v Henry Ford Health Sys*, 470 Mich 892 (2004), amended 683 NW2d 144 (2004).

Following oral argument, the Court voted to deny leave to appeal.

STANDARD OF REVIEW

This case involves an issue of statutory construction. We review such issues de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80 (1991). The primary goal of statutory construction is to further the Legislature's intent. *Reardon v Dep't of Mental Health*, 430 Mich 398, 407 (1988).

ANALYSIS

It is undisputed that plaintiff remains disabled as defined in the WDCA. Her on-the-job injury continues to preclude her return to any work as a

registered nurse, which is the work suitable to her qualifications and training. MCL 418.301(4). However, plaintiff's disability does not create a presumption of wage loss under existing law. *Id*.

As the Court of Appeals recognized, the purpose underlying the WDCA is to provide income to injured workers. When they have income from gainful work, their benefits should be reduced by the amount of the income. Thus, an employer is not liable to compensate an employee whose "average weekly earnings" have not been diminished according to MCL 418.371(1). MCL 418.361(1).

> The compensation payable, when added to the employee's wage earning capacity after the personal injury in the same or other employments, shall not exceed the employee's average weekly earnings at the time of the injury. [MCL 418.371(1).]

An "employer is permitted to deduct . . . from compensation payable the employee's wages or wage-earning capacity after the injury." *Powell v Casco Nelmor Corp*, 406 Mich 332, 348 (1979), citing *Lynch v Briggs Mfg Co*, 329 Mich 168, 172 (1950). "Wage-earning capacity" is the reasonable ability to earn wages in work suitable to one's qualifications and training. *Sington v Chrysler Corp*, 467 Mich 144, 155 (2002). It usually corresponds to wages actually earned. See *Powell* at 347-348; *Sington* at 181 (KELLY, J., dissenting).

The issue here is the extent to which plaintiff's activities involving her nursing homes demonstrate a wage-earning capacity, making her income from them wages under the WDCA. Plaintiff is designated as the licensee on behalf of the corporation that owns the homes. She testified that she occasionally transports residents of the homes. She obtains and delivers food for the residents and office supplies. She discusses the residents' satisfaction with the care provided and brings deficiencies to the attention of the staff and manager. She makes hiring decisions and establishes wage rates for the employees.

However, plaintiff is not an employee of the corporation, which has several full-time employees, including an office manager who operates the homes and two drivers. Plaintiff is not obligated to perform any particular task with regularity.

The corporation's employees receive bi-weekly paychecks. By contrast, plaintiff receives her income from the corporation annually. She reports this money on her annual tax returns as net profit from the corporation due as its owner, reimbursement of expenses paid on behalf of the corporation, or reimbursement of her initial equity investment in the corporation.[2]

When plaintiff's income from her closely held corporation is analyzed under MCL 418.371(1), some of it may be "wages" that the corporation would otherwise have to pay an employee. Some of it may be consideration

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[2] For example, plaintiff testified that she provided the corporation with its first home and more than $50,000 in start-up funds, and she paid licensing fees of more than $100,000.

in exchange for work on the corporation's behalf. However, it is also clear that at least some of the income is a return on plaintiff's investment or the reimbursement of monies expended.

On the basis of this information, the magistrate concluded that plaintiff's "services . . . were rendered to protect her ownership investment." However, the WCAC concluded that "the correct rule is that an employer may receive credit for the net earnings of an individual- . . . without regard to whether those earnings are . . . wages or profits." It offered no explanation for the conclusion. The Court of Appeals ratified this departure simply because, it said, plaintiff failed to demonstrate that it "is clearly incorrect."

I would correct these misstatements of law. I would hold that defendant is entitled to deduct only that portion of plaintiff's income from the homes that can be considered wages under the WDCA. Plaintiff has acted as a part-time operator of licensed adult foster care group homes. She may have demonstrated a limited "wage-earning capacity." If so, defendant is entitled to deduct the wages plaintiff earned from the wage-loss benefits it owes her. It is not entitled to deduct the return that plaintiff has been paid on her investment in the homes.

CONCLUSION

I would affirm the Court of Appeals decision that defendant is entitled to reduce some of the wage-loss benefits it pays to plaintiff. However, I would hold that the Court erred in reducing plaintiff's benefits by the total income she received from her closely held corporation. Only that which was payment for services rendered should be used to reduce her benefits. I would hold that defendant is entitled to reduce plaintiff's worker's compensation wage-loss benefits by no more than the fair market value of the work plaintiff has performed. I would remand the case to the worker's compensation magistrate to determine the fair market value of the services plaintiff has rendered to her corporation.

CAVANAGH, J. I concur in the statement by Justice KELLY.

CITY OF MONROE v JONES, No. 125289. On October 6, 2004, the Court heard oral argument on the application for leave to appeal the November 18, 2003, judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered, and it is denied. Reported below: 259 Mich App 443.

WEAVER, J. (*dissenting*). I would grant leave to appeal and decide the issues presented in this case because they are of significance to local governments and disabled persons and deserve this Court's full consideration and opinion.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 3, 2004:

MAYBERRY v GENERAL ORTHOPEDICS, PC, No. 126136. 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 file supplemental briefs within 28 days of the date of this order, which shall include among the issues discussed: (1) whether a notice of intent filed when more than 182 days remain in the limitations period has the effect of tolling the period by operation of MCL 600.5856(d), (2) whether the prohibition against tacking successive 182-day periods set forth in MCL 600.2912b(6) applies to a subsequent notice of intent filed after a prior notice period has expired and when fewer than 182 days remain in the limitations period, and (3) whether, under MCL 600.5856(d), the filing of a notice of intent filed when fewer than 182 days remain in the limitations period has the effect of tolling the period if a prior notice of intent did not trigger a tolling. Court of Appeals No. 244162.

Summary Dispositions December 9, 2004:

In re ARVIN ESTATE (LATZ v CARDINAL DEVELOPMENT COMPANY), No. 123474. In lieu of granting leave to appeal, the January 17, 2003, judgment of the Court of Appeals is vacated, and the matter is remanded to that Court for reconsideration in light of *Bryant v Oakpointe Villa Nursing Centre, Inc,* 471 Mich 411 (2004). MCR 7.302(G)(1). Court of Appeals No. 236820.

MULLANEY v KISTLER, Nos. 125230, 125628. 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 *Roberts v Mecosta Co Gen Hosp*, 470 Mich 679 (2004). MCR 7.302(G)(1). The Court of Appeals shall further analyze whether Dr. McGrory was qualified to give an affidavit of merit under MCL 600.2912d(1) and MCL 600.2169. See *Grossman v Brown*, 470 Mich 593 (2004). Jurisdiction is not retained. Court of Appeals No. 239806.

KELLY, J. I would deny leave to appeal.

SMITH v SENNETT STEEL, INC, No. 126250. 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). Court of Appeals No. 253156.

KELLY, J. I would deny leave to appeal.

BILLOPS v ST ANNE'S CONVALESCENT CENTER, No. 126304. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the matter is remanded to that Court for reconsideration in light of *Bryant v Oakpointe Villa Nursing Centre, Inc,* 471 Mich 411 (2004). MCR 7.302(G)(1). Court of Appeals No. 243397.

KELLY, J. I would deny leave to appeal.

NORTH POINTE INSURANCE COMPANY v STEWARD NO 1, No. 126953. In lieu of granting leave to appeal, the Court of Appeals order is vacated, and the case is remanded to that Court for plenary consideration of the issue whether appellant North Pointe Insurance Company is entitled to tax costs on appeal for the premium paid on appellant's letters of credit. MCR 7.302(G)(1). The Court of Appeals should issue a published opinion on this question, so as to resolve the inconsistent treatment of the use of

letters of credit for appeal bonds, cf., e.g., the instant case; *Lewis v Grand Rapids Plastics, Inc*, 453 Mich 886 (1996). Jurisdiction is not retained. Court of Appeals No. 240125.

Leave to Appeal Denied December 9, 2004:

PEOPLE v MANUEL RODRIGUEZ, No. 124776; Court of Appeals No. 249262.

CAVANAGH and KELLY, JJ. We would hold this case in abeyance for *Tesmer v Granholm*, 333 F3d 683 (CA 6, 2003), cert gtd sub nom *Kowalski v Tesmer,* 540 US 1148 (2004).

PEOPLE v SEIDERS, No. 125478; reported below: 259 Mich App 538; 262 Mich App 702.

KELLY, J. I would direct the prosecutor to respond to defendant's claim that he has been denied credit for time served.

WILLIAMS v JOHNSON CONTROLS, INC, No. 126051; Court of Appeals No. 253046.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v PHILLIP COOK, No. 126206; Court of Appeals No. 242698.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v CASTRO-ISAQUIRRE, No. 126230; Court of Appeals No. 242134.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

PEOPLE v CORTLAND KING, No. 126234; Court of Appeals No. 244060.

PEOPLE v ARQUETTE, No. 126245; Court of Appeals No. 244940.

KELLY, J. I would remand this case to the trial court for resentencing.

PEOPLE v PERRIGAN, No. 126253; Court of Appeals No. 243656.

KELLY, J. I would reverse the Court of Appeals judgment and reinstate the trial court order granting a new trial.

PEOPLE v COE, Nos. 126260-126262; Court of Appeals Nos. 243447, 243449, 243450.

CAVANAGH and KELLY, JJ. We would remand this case to the Genesee Circuit Court for resentencing.

NORTH POINTE INSURANCE COMPANY v STEWARD NO 2, No. 126266; Court of Appeals No. 240125.

PEOPLE v JAMES ROSS, No. 126295; Court of Appeals No. 227964.

PEOPLE v RANDALL FIELDS, No. 126431; Court of Appeals No. 246041.

KELLY, J. I would grant leave to appeal.

TUSCOLA COUNTY BOARD OF COMMISSIONERS v TUSCOLA COUNTY APPORTIONMENT COMMISSION, No. 126461; reported below: 262 Mich App 421.

MOTDOCH v BEASLEY, No. 127255; Court of Appeals No. 253504.

CAVANAGH, J. I would grant leave to appeal.

In re MORAN (EVANS v MORAN), No. 127279; Court of Appeals No. 253976.

CAVANAGH, J. I would grant leave to appeal.

In re SCHWERIN (FAMILY INDEPENDENCE AGENCY v SCHWERIN), No. 127327; Court of Appeals No. 253435.

CAVANAGH, KELLY, and MARKMAN, JJ. We would remand this case to the trial court for reconsideration.

Interlocutory Appeal

Leave to Appeal Denied December 9, 2004:

PEOPLE v LANCASTER, No. 127080; Court of Appeals No. 256914.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 10, 2004:

PEOPLE v DERRICK MCDANIEL, No. 123437. 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 file supplemental briefs within 28 days of the date of this order, and are directed to include among the issues briefed whether Offense Variable 13 of the statutory sentencing guidelines, MCL 777.43, was properly scored and, if not, whether defendant has satisfied the plain error standard set forth in *People v Carines*, 460 Mich 750, 763 (1999). Reported below: 256 Mich App 165.

Summary Disposition December 10, 2004:

PEOPLE v DRAIN, No. 125768. In lieu of granting leave to appeal, the judgment of the Court of Appeals pertaining to defendant's sentence for violating MCL 750.531 is vacated, and the case is remanded, for a second time, to the Court of Appeals for reconsideration in light of *People v Babcock*, 469 Mich 247 (2003). MCR 7.302(G)(1). On the earlier remand, the Court of Appeals merely quoted from its original opinion, which is insufficient to support the type of analysis *Babcock* warrants. On second remand, the Court of Appeals is instructed to provide a more thorough analysis and conclusion pursuant to the guidelines set forth in *Babcock*. Court of Appeals No. 224539 (on remand).

WEAVER, J. I dissent from the remand order. Applying the analysis of my dissenting and concurring opinion in *People v Babcock,* 469 Mich 247, 280 (2003), I would deny leave to appeal. The trial court satisfied the requirement for "a substantial and compelling reason" for its departure from the sentencing guidelines, and its decision did not

venture beyond the range of principled outcomes under the circumstances. In its decision on remand, the Court of Appeals correctly affirmed the trial court's sentence.

Leave to Appeal Denied December 10, 2004:

PEOPLE v KENNETH WALKER, No. 126035. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253636.

CAVANAGH, J. I would remand this case to the Court of Appeals as on leave granted.

KELLY, J. (*dissenting*). I would remand this case to the Court of Appeals for consideration as on leave granted. Because the trial judge was under a misapprehension of law at the time of sentencing, a remand is appropriate, even under this Court's decision in *People v Louis Moore*, 468 Mich 573, 579 (2003).

In *Moore,* the defendant was sentenced to life imprisonment. The trial judge denied a motion for relief from judgment, finding that he lacked jurisdiction to review the sentence. The Court of Appeals reversed, ruling that the judge had the authority to resentence. It reasoned that the original sentence had been rendered under the misapprehension that the defendant would be eligible for parole after ten years.

We reinstated the sentencing judge's denial of relief from judgment. Our holding was that, at the time of sentencing, the judge accurately believed that the defendant would be entitled to consideration for parole after ten years. *Id.* at 580. Later, the Parole Board changed its policy, making it unlikely that the defendant would ever be paroled. According to *Moore, supra,* the sentencing judge's failure to accurately predict future actions of the Parole Board is not a misapprehension of the law that can render the sentence invalid. *Id.*

I continue to agree that the defendant in *Moore* was not entitled to resentencing, and I continue to disagree with the rationale expressed by the *Moore* majority.[1] There are many cases in which a trial judge sentenced a defendant to life imprisonment rather than to a term of years. In some of them, the judge stated at sentencing that he or she expected the defendant to be paroled at some future time.

I believe that the defendants in those cases should be allowed to show that the sentencing judge based the sentence on the belief that the defendants should eventually be paroled. The need to make such a showing has been occasioned by the Parole Board's change in policy with respect to life sentences. The board now treats someone sentenced to life in prison as forever ineligible for parole.

When a trial judge sentences a person, he or she attempts to particularize the sentence taking into account the circumstances of that defendant and the crime involved. See *People v Milbourn*, 435 Mich 630, 636 (1990). Among the considerations is the possibility of parole.

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[1] I concurred in the result only. *Moore*, *supra* at 582.

The sentence must be based on accurate information to be valid. *People v Malkowski*, 385 Mich 244, 249 (1971). In cases where the sentencing judge clearly indicates a misunderstanding that the defendant will ultimately be paroled, the judge is basing the sentence on inaccurate information. The inaccuracy lies in the failure to understand that the Parole Board may change its policy.

An injustice is done whenever a judge imposes a sentence misunderstanding the import of the sentence, and the defendant is foreclosed from the relief that the judge intended. Moreover, it is unfortunate whenever this Court fosters a policy of ignoring the clear intentions of trial judges when making sentencing decisions.

The many cases involving "misapprehension" on the part of trial judges when sentencing people to life in prison before the Parole Board's change of policy have led to a systemic problem.[2] For this reason, I strongly question the extension of the *Moore* rationale to cases with markedly different facts than were in *Moore*.[3]

The instant case is one of these cases. Defendant has shown that the sentencing judge and the parties were under a specific misapprehension of law when the sentence was pronounced. During sentencing, the judge stated that, "[a]s part of the guilty plea agreement entered into by the [defendant], the Court indicated that it would not give a sentence *in excess of life imprisonment* on each count." (Emphasis added.)

The judge suffered from a fundamental misapprehension when he decided not to impose on defendant a sentence *in excess* of life. He thought he could have sentenced defendant to a period of years that would have exceeded the sentence of life in prison. He was incorrect. See *People v Timothy Moore*, 432 Mich 311, 317 n 11 (1989).

Thus, defendant raises a valid argument that the judge's implicit misunderstanding about the Parole Board's ability to change the meaning of a life sentence resulted in the imposition of an invalid sentence. I would remand this case to the Court of Appeals for reconsideration of whether defendant is entitled to resentencing.

PEOPLE V CLARENCE GARDNER, No. 126156; Court of Appeals No. 238786.

OIL CAPITAL RACE VENTURE, INC V HUNTER, No. 126287; Court of Appeals No. 244132.

In re AGUIRRE (FAMILY INDEPENDENCE AGENCY V AGUIRRE), No. 127462; Court of Appeals No. 252630.

In re HILL (FAMILY INDEPENDENCE AGENCY V HILL), No. 127464; Court of Appeals No. 254675.

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[2] See, generally, Prisons and Corrections Sections of the State Bar of Michigan, *What Should "Parolable Life" Mean? Judges Respond to the Controversy* <http://www.michbar.org/prisons/pdfs/lifer1.pdf> (accessed November 30, 2004).

[3] In *Moore*, the sentencing judge "did not express any intention that the defendant actually be paroled, merely that he be subject to parole consideration, as he was." *Moore, supra* at 579.

In re MORRIS (FAMILY INDEPENDENCE AGENCY v MORRIS), No. 127486; Court of Appeals No. 255222.

Leave to Appeal Denied December 17, 2004:

REGAN v WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS and ZELANKO v WASHTENAW COUNTY BOARD OF COUNTY ROAD COMMISSIONERS, Nos. 124163, 124164. On December 8, 2004, the Court heard oral argument on the application for leave to appeal the June 10, 2003, judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered, and it is denied. Reported below: (*On Remand*) 257 Mich App 39.

RYAN v RYAN, No. 126011; reported below: 260 Mich App 315.

In re FOONDLE (FAMILY INDEPENDENCE AGENCY v FOONDLE), Nos. 127455, 127456; Court of Appeals Nos. 255548, 255795.

In re BREWER (FAMILY INDEPENDENCE AGENCY v BREWER), No. 127483; Court of Appeals No. 249690.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 17, 2004:

In re BANKS (FAMILY INDEPENDENCE AGENCY v BANKS), No. 127292. Pursuant to MCR 7.302(G)(1), the clerk is to schedule oral argument on January 13, 2005, on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties may file supplemental briefs by January 6, 2005. Court of Appeals No. 252617.

Leave to Appeal Granted December 27, 2004:

TRAXLER v ROTHBART, No. 125948. Among the issues to be briefed, the parties shall address whether a third party may enforce a purchase agreement where, without the third party's knowledge, the trustee exceeded the trustee's authority by entering into the agreement. The Probate and Estates Section of the State Bar of Michigan is invited to file a brief amicus curiae on the issue. Court of Appeals No. 243492.

MCCLEMENTS v FORD MOTOR COMPANY, No. 126276. Application for leave to cross-appeal is also granted. Court of Appeals No. 243764.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 27, 2004:

DEPARTMENT OF CIVIL RIGHTS *ex rel* BURNSIDE v FASHION BUG OF DETROIT, No. 126254. 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. 240325.

HARTER v GRAND AERIE FRATERNAL ORDER OF EAGLES, No. 126255. 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. The motions to file briefs amicus curiae and to file a late reply brief are granted. Court of Appeals No. 244689.

MITAN v CAMPBELL, No. 126451. 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. 242486.

PEOPLE v SESSIONS, No. 126514. 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. 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: 262 Mich App 80.

Summary Dispositions December 27, 2004:

PEOPLE v HULON, No. 126403. In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for reconsideration in light of *People v Holtschlag*, 471 Mich 1 (2004). MCR 7.302(G)(1). Court of Appeals No. 247489.

HYLAND v A L BELROSE COMPANY, INC, No. 126469. In lieu of granting leave to appeal, the Court of Appeals judgment is reversed in part and the Kent Circuit Court judgment is reinstated for the reasons articulated in the partially dissenting opinion in the Court of Appeals. MCR 7.302(G)(1). Court of Appeals No. 245831.

Leave to Appeal Denied December 27, 2004:

HASTINGS MUTUAL INSURANCE CO v RUNDELL, No. 124284; Court of Appeals No. 238549.

PEOPLE v CATHEY, No. 126231; reported below: 261 Mich App 506.

CORRIGAN, C.J. I would grant leave to appeal to consider the dissenting opinion of Judge MURPHY in the Court of Appeals.

PEOPLE v RABIDEAU, No. 126273; Court of Appeals No. 244938.

CAVANAGH and KELLY, JJ. We would direct the Oakland County Prosecutor to respond to the application.

PEOPLE v DOUGLAS BROWN, No. 126281; Court of Appeals No. 243994.

KELLY, J. I would remand this case to the Wayne Circuit Court for a new trial.

SEYFRIED v UAW LOCAL 1292, No. 126337. Application for leave to cross-appeal is denied as moot. Court of Appeals No. 242556.

KELLY, J. I would grant leave to appeal.

CHADWELL v WOJTASZEK, No. 126344; Court of Appeals No. 247303.

PEOPLE v ANDRE HUGHES, No. 126346; Court of Appeals No. 253801.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

AMERISURE MUTUAL INSURANCE COMPANY v FARMERS INSURANCE EXCHANGE, No. 126349; Court of Appeals No. 243085.

FARMERS INSURANCE EXCHANGE v PIZZA CZARS, INC, No. 126350; Court of Appeals No. 243105.

KENNEDY v STATE FARM MUTUAL AUTO INSURANCE COMPANY, No. 126374; Court of Appeals No. 251004.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

HARKEN v GENERAL MOTORS CORPORATION, No. 126386; Court of Appeals No. 245715.

MOYA-JURE v IUNG, No. 126391; Court of Appeals No. 245670.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

CITIZENS FOR UNITED MICHIGAN v BOARD OF STATE CANVASSERS, No. 126432; reported below: 262 Mich App 395.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

SHANK ESTATE v SECORD, No. 126456; Court of Appeals No. 245314.

CAVANAGH and KELLY, JJ. We would grant leave to appeal.

RENSWICK v PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC, No. 126533; Court of Appeals No. 244698.

KELLY, J. (*dissenting*). I would reverse in part the judgment of the Court of Appeals, and would reinstate the plaintiff's claim of malpractice to the extent that it alleges that the second surgery was a result of the nurse's failure to accurately account for the sponge.

PEOPLE v KONG, No. 126554; Court of Appeals No. 249749.

KELLY, J. I would reverse and remand the case for resentencing.

COALITION TO DEFEND AFFIRMATIVE ACTION & INTEGRATION AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN) v BOARD OF STATE CAVASSERS, No. 126620; reported below: 262 Mich App 395.

CAVANAGH, WEAVER, and KELLY, JJ. We would grant leave to appeal.

PEOPLE v DIXON, No. 126996. Application for leave to cross-appeal is denied as moot. Reported below: 263 Mich App 393.

CORRIGAN, C.J., and WEAVER, J. We would grant leave to appeal.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal December 28, 2004:

J & J FARMER LEASING, INC v CITIZENS INSURANCE COMPANY OF AMERICA, No. 125818. 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: (1) What is the effect of the agreement at issue with respect to the tortfeasors' liability, if any, for the unsatisfied portion of the judgment? (2) Under what circumstances can an assignment of a bad faith claim allow the assignee's suit against the insurer to proceed? The parties may file supplemental briefs within 28 days of the date of this order. The Michigan Trial Lawyers Association, Michigan Defense Trial Counsel, and the Michigan Insurance Federation are invited to file briefs amicus curiae on the questions presented. 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: 260 Mich App 607.

MALDONADO v FORD MOTOR COMPANY, No. 126274. 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 reversing the Wayne Circuit Court's dismissal of the case. They may file supplemental briefs within 28 days of the date of this order. The application for leave to appeal as cross-appellant remains pending. Court of Appeals No. 243763.

Summary Disposition December 28, 2004:

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN v BUCKALLEW, No. 126340. In lieu of granting leave to appeal, the judgment of the Court of Appeals is vacated, and the judgment of the Kalamazoo Circuit Court is affirmed for the reasons stated in this order. MCR 7.302(G)(1). The parties agreed to settle defendant's wrongful death action for $300,000. After defendant dismissed the action, plaintiff refused to pay the agreed settlement amount because it exceeded its no-fault policy limit for the underlying accident, a fact that neither party realized when they settled. The parties' settlement and dismissal of the earlier action took the place of a court judgment and, for purposes of this case, was tantamount to a judgment. As such, plaintiff must seek relief under the principles set forth in MCR 2.612, governing relief from judgment. But the facts of this case do not warrant such relief. Plaintiff's mistake in understanding its own policy is not a mistake or excusable neglect that can be a basis for relief under MCR 2.612(C)(1)(a). Plaintiff had access to all the necessary information, and its error is not excused by its own carelessness or lack of due diligence. See 3 Longhofer, Michigan Court

Rules Practice (5th ed), p 507; *Lark v Detroit Edison Co,* 99 Mich App 280, 283 (1980), lv den 410 Mich 906 (1981). Reported below: 262 Mich App 169.

KELLY, J. (*dissenting*). I would deny leave to appeal. I agree with the Court of Appeals analysis and see no reason to disturb its opinion.

Leave to Appeal Denied December 28, 2004:

CITY OF WARREN v CITY OF DETROIT, No. 125996; reported below: 261 Mich App 165.

MARKMAN, J. (*concurring*). Rather than simply deny defendant's application for leave to appeal, I would deny specifically on the ground of mootness. The Court of Appeals properly determined that the substantive issue in this case was moot because "[n]o decision by this Court can transform disclosed records into nondisclosed records."[1] The Court then correctly cited the test for determining when moot issues should be reviewed—when "the issue is publicly significant and 'is likely to recur, yet also is likely to evade judicial review.' "[2] Next, the Court reasonably determined that "the issue presented in this case has public significance and is likely to recur . . . ."[3] However, the Court then proceeded to review the moot issue without addressing whether the issue "is likely to evade judicial review." This issue, in fact, is not likely to evade judicial review. All that is required for a governmental entity to ensure judicial review of a Freedom of Information Act (FOIA) issue is that it refrain from disclosing a requested document and appeal any subsequent judicial disclosure order.[4] A cursory review of recent cases decided by this Court makes it clear that governmental entities are quite capable of obtaining judicial review of FOIA issues.[5] Because the issue presented in this case was in no way likely to evade judicial review, the Court of Appeals erred in addressing the substantive issue in this case—whether the sought-after formula constituted "software," thereby exempting it from disclosure under the FOIA.

As with the principle that a party to a lawsuit must possess "standing,"[6] the principle that this Court does not reach moot questions or declare rules of law that have no practical legal effect in a case is an

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[1] *Federated Publications v City of Lansing*, 467 Mich 98, 113 (2002).

[2] 261 Mich App 165, 166 n 1 (2004) (citation omitted).

[3] *Id*.

[4] *Federated Publications, supra* at 113.

[5] See, e.g., *Breighner v Michigan High School Athletic Ass'n*, 471 Mich 217, 222 (2004); *Federated Publications*, *supra; Herald Co v Bay City*, 463 Mich 111, 116-117 (2000).

[6] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 612 (2004).

essential element of the "judicial power" of our state.[7] Therefore, it is also an integral component of "our constitutional system of separated powers,"[8] and is necessary to ensure the "preservation of a judiciary operating within proper boundaries."[9]

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.
>
> Perhaps the most critical element of the "judicial power" has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute . . . .[10]

The rule against deciding moot controversies has been described by the United States Supreme Court as a "constitutional rule," *Sibron v New York*, 392 US 40, 57 (1968), that derives from the requirements of Article III of the United States Constitution, *Liner v Jafco, Inc*, 375 US 301, 306 n 3 (1964), under which "the exercise of judicial power depends upon the existence of a case or controversy." *Id.*; see also *DeFunis v Odegaard*, 416 US 312, 316 (1974); *Honig v Doe*, 484 US 305, 317 (1988); *id.* at 332-333, 341-342 (Scalia, J., dissenting) ("[W]e have no power under Art. III of the Constitution to adjudicate a case that no longer presents an actual, ongoing dispute between the named parties. . . . It is assuredly frustrating to find that a jurisdictional impediment prevents us from reaching the important merits [of the] issues that were the reason for our agreeing to hear [a] case. But we cannot ignore such impediments for purposes of our appellate review without simultaneously affecting the principles that govern district courts in their assertion or retention of original jurisdiction.").

State courts have also recognized the connection between the doctrine of mootness and the constitutional authority of the judiciary. The Supreme Court of Louisiana has explained in interpreting its constitution, which, like ours, provides that the judiciary is to exercise only the "judicial power," that "the grant of judicial power implicitly restricts our

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[7] Const 1963, art 6, § 1.

[8] *Nat'l Wildlife Federation, supra* at 612.

[9] *Id*.

[10] *Id*. at 614-615.

courts to review only matters which are justiciable, i.e., actual and substantial disputes with adverse parties, not hypothetical, moot, or abstract questions of law." *Duplantis v Louisiana Bd of Ethics*, 782 So 2d 582, 589 (La, 2001). See, also, *Yancy v Shatzer,* 337 Ore 345, 350 (2004) (holding that it will not decide moot questions " 'because of [the court's] regard for the constitution of this state, which separates the power and functions of the departments of government . . . and vests in the courts only the judicial power' ") (citation omitted); *Sullivan v Chafee,* 703 A2d 748, 752 (RI, 1997) (holding that it will not decide moot questions because " 'our whole idea of judicial power' is the power of courts to apply laws to cases and controversies within their jurisdiction") (citation omitted); *Lopez v Pub Utility Comm of Texas,* 816 SW2d 776, 782 (Tex App, 1991) (holding that it will not decide moot questions because to do so would be violative of its constitution's separation of powers provision because the judiciary only has the judicial power); *Poore v Poore*, 201 NC 791, 792 (1931) (holding that it will not decide moot questions because "[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to . . . answer moot questions").

In the present case, the Court of Appeals erred in failing to apply the correct test for mootness and resultantly addressed a moot issue. Therefore, I would vacate its substantive decision and deny leave to appeal exclusively on the ground of mootness.

TAYLOR, J. I join the statement of Justice MARKMAN.

PEOPLE v LEBEAU, No. 126328; Court of Appeals No. 246114.

In re BROWN (FAMILY INDEPENDENCE AGENCY v JIM BROWN) and *In re* THACKER (FAMILY INDEPENDENCE AGENCY v TAMMY BROWN), Nos. 127557, 127558; Court of Appeals Nos. 254733, 254750.

NIXON v CITY OF TRAVERSE CITY, No. 127606; Court of Appeals No. 259124.

EWIN v BURNHAM, No. 127619; Court of Appeals No. 259180.

Summary Dispositions December 29, 2004:

BANKS v LAB LANSING BODY ASSEMBLY, No. 126165. 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. 253264.

NAFSO v CITY OF DETROIT, No. 126181. In lieu of granting leave to appeal, the February 12, 2004, order of the Court of Appeals is vacated, and the case is remanded to that Court for plenary consideration. MCR 7.302(G)(1). Jurisdiction is not retained. Court of Appeals No. 239546.

PEOPLE v MCLILLY, No. 126546. In lieu of granting leave to appeal, the case is remanded to the Genesee Circuit Court for a further determination of defendant's sentencing guidelines score and for resentencing. MCR 7.302(G)(1). The record on appeal indicates that the circuit judge improperly determined a score for Offense Variable 12 (contemporaneous

felonious criminal acts) by considering the dismissed charges of felon in possession of a firearm, MCL 750.224f, and carrying a concealed weapon, MCL 750.227, neither of which is a crime against a person within the meaning of OV 12, and felony-firearm, MCL 750.227b, which is precluded from consideration by MCL 777.42(2)(b). This order does not preclude the circuit court on remand from considering other conduct that constitutes contemporaneous felonious criminal acts within the meaning of OV 12. Jurisdiction is not retained. Court of Appeals No. 255406.

Leave to Appeal Denied December 29, 2004:

PEOPLE v ODELL TAYLOR, No. 125190; Court of Appeals No. 241310.

PEOPLE v AKRAWI, No. 125840; Court of Appeals No. 241925.
MARKMAN, J., not participating.

PEOPLE v ROCKWELL, No. 126000. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251166.

LEVITT v COLLINS, No. 126019; Court of Appeals No. 241212.

PEOPLE v TELLO, No. 126073. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249706.

PEOPLE v DARION TURNER, No. 126074. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252830.

PEOPLE v LELAND DRAPER, No. 126077. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 250783.

PEOPLE v AGUILLON-PADRON, No. 126078. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252778.

PEOPLE v SABIN, No. 126079. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251663.

PEOPLE v LARRY GIBBS, No. 126080. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252537.

PEOPLE v VILLARREAL, No. 126084. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252670.

PEOPLE v GUSTAFSON, No. 126085. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249723.

PEOPLE v KINDRED, No. 126086. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 249730.

PEOPLE v TORBERT, No. 126087. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251595.

PEOPLE v JANIK, No. 126093. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251789.

PEOPLE v CARR, No. 126094. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251014.

PEOPLE v BURDEN, No. 126103. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252804.

PEOPLE v ABRAM, No. 126106; Court of Appeals No. 243820.

PEOPLE v SELF, No. 126107. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 248997.

PEOPLE v NUNEZ, No. 126109. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252228.

PEOPLE v HARDISON, No. 126111. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251970.

PEOPLE v MCARTHUR, No. 126132. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252231.

PEOPLE v MICHAEL SAMEL, No. 126146. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252477.

CITY OF SOUTHGATE v JOHNSON, No. 126148; Court of Appeals No. 252917.

CITY OF SOUTHGATE v HAVRILLA, No. 126149; Court of Appeals No. 252918.

CITY OF SOUTHGATE v SKIFF, No. 126150; Court of Appeals No. 252919.

CITY OF SOUTHGATE v MILLER, No. 126151; Court of Appeals No. 252920.

CITY OF SOUTHGATE v WHITMAN, No. 126152; Court of Appeals No. 252921.

PEOPLE v SIDNEY MCKINNEY, No. 126157. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 253874.

PEOPLE v BAUM, No. 126164. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 254643.

PEOPLE v MARDENLI, No. 126166. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251553.

PEOPLE v SHEPARD, No. 126171. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252837.

PEOPLE v DOWNING, No. 126191. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 251845.

PEOPLE v VONTE SHAW, No. 126197. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253097.

PEOPLE v WILLIE LEE, No. 126217. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 254722.

PEOPLE v JEREMY CARTER, No. 126218. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253956.

PEOPLE v CAMPBELL, No. 126224. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 246967.

PEOPLE v ROBERTS, No. 126236. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254098.

PEOPLE v WILLIAM HICKS, No. 126239. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253950.

PEOPLE v WENDT, No. 126240; Court of Appeals No. 246342.

PEOPLE v FLOWERS, No. 126241. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 253223.

PEOPLE v RITCHIE, No. 126243; Court of Appeals No. 247490.

PEOPLE v KELP, No. 126244. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252353.

PEOPLE v PENNY, No. 126248. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254721.

BURGHER v PULTE OF MICHIGAN CORPORATION (BURGHER v DANSEY), No. 126251; Court of Appeals No. 242462.

PEOPLE v ST CLAIR, No. 126259. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252512.

PEOPLE v KAUFMAN, No. 126306. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252479.

PEOPLE v GUILMETTE, No. 126307. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252592.

PEOPLE v O'DAY, No. 126311. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253221.

PEOPLE v SANTOS-ROSARIO, No. 126312. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253724.

PEOPLE v GILL, No. 126318. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252633.

KNORR v VEGA HELMET CORPORATION, No. 126323; Court of Appeals No. 252890.

PEOPLE v WILBURN STEWART, No. 126324; Court of Appeals No. 253810.

PEOPLE v KENNETH BURTON, No. 126331. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252520.

PEOPLE v BENOIT, No. 126332; Court of Appeals No. 246512.

PEOPLE v ANDRE MARTIN, No. 126334. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254189.

PEOPLE v ROMANS, No. 126336; Court of Appeals No. 245088.

PEOPLE v KIRK, No. 126341; Court of Appeals No. 246625.

SOUTHEAST HOLDING CO, LTD v FRIENDLY INN, INC, No. 126342; Court of Appeals No. 252672.

PEOPLE v SCHOOLER, No. 126343; Court of Appeals No. 254274.

PEOPLE v MCCANN, No. 126345. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253937.

PEOPLE v ANDREW WILLIAMS, No. 126351. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253354.

BURTWELL v ALLSTATE INSURANCE COMPANY, No. 126355; Court of Appeals No. 253361.

PEOPLE v CLAYTON, No. 126360; Court of Appeals No. 245260.

AMERICAN BUMPER & MANUFACTURING COMPANY v NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, Nos. 126364, 126365; reported below: 261 Mich App 367.

MARKMAN, J., not participating.

PEOPLE v KENNETH CURRY, No. 126376; Court of Appeals No. 252884.

MOELKE v MCPHERSON HOSPITAL EMERGENCY DEPARTMENT, No. 126387; Court of Appeals No. 245415.

PEOPLE v CHARLTON, No. 126390; Court of Appeals No. 253772.

PEOPLE v BREWER, No. 126392; Court of Appeals No. 251724.

MCKINNEY v FORD MOTOR COMPANY, No. 126395; Court of Appeals No. 252907.

PEOPLE v SAMUEL NEAL, No. 126396. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 254580.

PEOPLE v ISCARO, No. 126404; Court of Appeals No. 246077.

PEOPLE v MCMILLIAN, No. 126405; Court of Appeals No. 244711.

PEOPLE v FRY, No. 126407. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253385.

PEOPLE v DRUMM, No. 126412. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253672.

PEOPLE v LAWS, No. 126414; Court of Appeals No. 252689.

PEOPLE v GREGORY ANDERSON, No. 126415; Court of Appeals No. 246187.

PEOPLE v KEVIN BROOKS, No. 126416; Court of Appeals No. 255061.

PEOPLE v ERNEST THOMAS, No. 126417; Court of Appeals No. 246796.

PEOPLE v DAVID KING, No. 126419; Court of Appeals No. 254704.

PEOPLE v MITCHELL BAKER, No. 126420; Court of Appeals No. 242144.

PEOPLE v HAMM, No. 126422; Court of Appeals No. 245799.

PEOPLE v CLEMENS, No. 126424; Court of Appeals No. 239527.

PEOPLE v GALE, No. 126425; Court of Appeals No. 243283.

SARR v SCOTT A SMITH, PC, No. 126426; Court of Appeals No. 242395.

PEOPLE v LUMPKIN, No. 126429; Court of Appeals No. 245440.

PEOPLE v BORTHWELL, No. 126439; Court of Appeals No. 243976.

PEOPLE v TRESSLER, No. 126441; Court of Appeals No. 240587.

PEOPLE v GONZALEZ, No. 126446; Court of Appeals No. 247312.

PEOPLE v AGBO, No. 126447; Court of Appeals No. 247143.

PEOPLE v LANDERS, Nos. 126449, 126450; Court of Appeals Nos. 235918, 235919.

CITY OF ROCHESTER HILLS v SUBURBAN SOFTBALL, INC, Nos. 126458, 126459; Court of Appeals Nos. 254947, 254948.

PEOPLE v ERVIN, No. 126460; Court of Appeals No. 245255.

SD WARREN COMPANY v CONSUMERS POWER COMPANY, No. 126462; Court of Appeals No. 241293.

PEOPLE v ADELSON, No. 126464; Court of Appeals No. 255858.

PEOPLE v ELLIOTT, No. 126466; Court of Appeals No. 246773.

PEOPLE v MAKIDON, No. 126467. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 254702.

PEOPLE v LEONARD HALE, No. 126468; Court of Appeals No. 248706.

TENNYSON v BOTSFORD HOSPITAL GROUP, INC, No. 126470; Court of Appeals No. 234302 (on remand).

PEOPLE v DAVID, No. 126474. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254438.

PEOPLE v FAWCETT, No. 126476. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 255106.

PEOPLE v WALTER CUMMINGS, No. 126478; Court of Appeals No. 246883.

PEOPLE v BILLIE BROOKS, No. 126479; Court of Appeals No. 246269.

PEOPLE v HINOJOSA, No. 126481. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255210.

HUDSON v DEPARTMENT OF CORRECTIONS, No. 126483; Court of Appeals No. 253535.

PEOPLE v SCHULTZ, No. 126485; Court of Appeals No. 254288.

PEOPLE v MCCRAY, No. 126487; Court of Appeals No. 247046.

PEOPLE v LONGGREAR NO 2, No. 126491; Court of Appeals No. 246889.

PEOPLE v ADKINS, No. 126493; Court of Appeals No. 254193.

PEOPLE v SHARP, No. 126494; Court of Appeals No. 244059.

PEOPLE v STONEY HARRIS, No. 126495; Court of Appeals No. 246158.

PEOPLE v NATHAN JOHNSON, No. 126497; Court of Appeals No. 244058.

PEOPLE v GARLAND WELCH, No. 126498; Court of Appeals No. 241083.

PEOPLE v MAZAK, No. 126500; Court of Appeals No. 248200.

PEOPLE v WILDER, No. 126501; Court of Appeals No. 242320.

PEOPLE v MCCLELLAN, No. 126502; Court of Appeals No. 245097.

PEOPLE v PAULA HUGHES, No. 126503; Court of Appeals No. 254352.

PEOPLE v DENNIS WALLACE, No. 126504; Court of Appeals No. 246725.

PEOPLE v HOBBY, No. 126506. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252836.

PEOPLE v BRASWELL, No. 126507; Court of Appeals No. 246328.

PEOPLE v CLAYBRON, No. 126510; Court of Appeals No. 254276.

PEOPLE v RANDLE, No. 126511; Court of Appeals No. 246800.

PEOPLE v WATKINS, No. 126515. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254207.

SOUTHFIELD OBSTETRICAL SERVICES, PC v VITAL WORKS INC, No. 126519; Court of Appeals No. 246254.

ZAHER v SIMON, No. 126525; Court of Appeals No. 245024.

PEOPLE v TERRILL JOHNSON, No. 126536; Court of Appeals No. 246160.

DEPARTMENT OF NATURAL RESOURCES v LECUREUX, No. 126537; Court of Appeals No. 242695.

PEOPLE v PROFIT, No. 126539; Court of Appeals No. 246412.

PEOPLE v WADE, No. 126540; Court of Appeals No. 247208.

PEOPLE v HIATT, No. 126541; Court of Appeals No. 255108.

PEOPLE v TRAYLOR, No. 126542; Court of Appeals No. 245496.

PEOPLE v REID, No. 126543; Court of Appeals No. 255267.

KELLEY v GENERAL MOTORS CORPORATION, No. 126545; Court of Appeals No. 253485.

PEOPLE v ANTHONY JONES, No. 126549; Court of Appeals No. 247353.

PEOPLE v GLENN, No. 126550; Court of Appeals No. 246624.

PEOPLE v JUNDI, No. 126552; Court of Appeals No. 254250.

PEOPLE v CHRISTY, No. 126553; Court of Appeals No. 252636.

PEOPLE v PABLO RODRIGUEZ, No. 126555. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253486.

PEOPLE v ROGERS, No. 126557; Court of Appeals No. 246880.

PEOPLE v OUSLEY, No. 126558; Court of Appeals No. 246936.

HUTCHINSON v PAROLE BOARD, No. 126563; Court of Appeals No. 253509.

PEOPLE v PAGE, No. 126564; Court of Appeals No. 254958.

PEOPLE v FORWARD, No. 126565; Court of Appeals No. 254137.

FOWLER v DOAN, No. 126566; reported below: 261 Mich App 595.

In re ROSS FAMILY TRUST (REISING v MICHELS), No. 126567; Court of Appeals No. 253503.

PEOPLE v FAIR, No. 126568; Court of Appeals No. 244283.

PEOPLE v COVELL, No. 126569; Court of Appeals No. 254647.

PEOPLE v GRAVES, No. 126571; Court of Appeals No. 247659.

PEOPLE v MCCOLOR, No. 126572; Court of Appeals No. 246534.

PEOPLE v HERRON, No. 126574; Court of Appeals No. 246010.

PEOPLE v TRAINI, No. 126575; Court of Appeals No. 255134.

PEOPLE v BOHN, No. 126576; Court of Appeals No. 255141.

PEOPLE v STANLEY JACKSON, No. 126577; Court of Appeals No. 254840.

PEOPLE v QUAWN GREEN, No. 126596; Court of Appeals No. 246363.

AMBROSE v EATON CIRCUIT JUDGE, No. 126597; Court of Appeals No. 254512.

PEOPLE v BOBO, No. 126598; Court of Appeals No. 246628.

PEOPLE v MCLEOD, No. 126600; Court of Appeals No. 246325.

DEJARNETTE v LUMBERMANS MUTUAL CASUALTY COMPANY, No. 126601; Court of Appeals No. 246695.

PEOPLE v MUELLER, No. 126602; Court of Appeals No. 247660.

PEOPLE v BENSON WRIGHT, No. 126604. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252728.

PEOPLE v OLIVE, No. 126605; Court of Appeals No. 253232.

PEOPLE v HINTON, No. 126606; Court of Appeals No. 246221.

PEOPLE v COWANS, No. 126607; Court of Appeals No. 245589.

JONES v JONES, No. 126608; Court of Appeals No. 243882.

PEOPLE v RUSSELL, No. 126610; Court of Appeals No. 243747.

PEOPLE v SHAWNDRELL DORSEY, No. 126611; Court of Appeals No. 255060.

PEOPLE v JEFFREY BROOKS, No. 126616; Court of Appeals No. 253831.

PEOPLE v BEAVERS, No. 126623; Court of Appeals No. 246226.

PEOPLE v FAIDLEY, No. 126624; Court of Appeals No. 254782.

PEOPLE v CAVIN, No. 126626. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254270.

MCCORMICK v MCCORMICK, Nos. 126628, 126629; Court of Appeals Nos. 254424, 254827.

PEOPLE v KEYES, No. 126631; Court of Appeals No. 253538.

PEOPLE v CUSTER, No. 126633; Court of Appeals No. 254442.

PEOPLE v MARIA RODRIGUEZ, No. 126636; Court of Appeals No. 245441.

PEOPLE v STEPHEN, No. 126637; reported below: 262 Mich App 213.

PEOPLE v NELSON, No. 126638; Court of Appeals No. 246156.

PEOPLE v FOX, No. 126639; Court of Appeals No. 244936.

PEOPLE v MORROW, No. 126640; Court of Appeals No. 254785.

PEOPLE v STEPHEN HALL, No. 126641; Court of Appeals No. 245139.

PEOPLE v MATHIS, No. 126643. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255504.

PEOPLE v TEMPLE, No. 126644; Court of Appeals No. 245143.

PEOPLE v ERIC MARTIN, No. 126645. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 254963.

PEOPLE v THOMAS PARKER, No. 126648. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252835.

PEOPLE v WITHERSPOON, No. 126649; Court of Appeals No. 245007.

PEOPLE v FISHER, No. 126650; Court of Appeals No. 246335.

PEOPLE v MCDANIELS, No. 126651; Court of Appeals No. 247035.

PEOPLE v WEISHAAR, No. 126652; Court of Appeals No. 246311.

PEOPLE v ISAAC JONES, No. 126656; Court of Appeals No. 245595.

PEOPLE v HUTCHINS, No. 126657; Court of Appeals No. 246175.

PEOPLE v DAVID SNYDER, No. 126659; Court of Appeals No. 246727.

PEOPLE v ROWLS, No. 126662; Court of Appeals No. 253399.

PEOPLE v COCKREAM, No. 126663. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252953.

PEOPLE v DELAROSA, No. 126664; Court of Appeals No. 246018.

PEOPLE v HARPER, No. 126665; Court of Appeals No. 230717 (on remand).

PEOPLE v FREDERICK MILLER, No. 126667; Court of Appeals No. 245096.

PEOPLE v DANIEL, No. 126668; Court of Appeals No. 244552.

PEOPLE v DANLEY, No. 126669; Court of Appeals No. 248423.

PEOPLE v LOUKAS, No. 126670. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253365.

PEOPLE v CHISOLM, No. 126671. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252997.

PEOPLE v MARION MITCHELL, No. 126672; Court of Appeals No. 242773.

PEOPLE v NEUHARDT, No. 126675. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 254498.

PEOPLE v MOFFETT, No. 126684; Court of Appeals No. 255110.

PEOPLE v SIMS, Nos. 126686, 126687; Court of Appeals Nos. 245565, 249964.

PEOPLE v ALVARADO, No. 126689. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 254607.

PEOPLE v JAMES HALE, No. 126691. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252900.

PEOPLE v LYLES, No. 126693. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253095.

PEOPLE v RAYMOND WILSON, No. 126694. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253038.

PEOPLE v MCDADE, No. 126695; Court of Appeals No. 249423.

PEOPLE v DAWAN SMITH, No. 126696; Court of Appeals No. 246809.

PEOPLE v LAROSA, No. 126699; Court of Appeals No. 255328.

PEOPLE v ARTHUR HUDSON, No. 126703; Court of Appeals No. 244411.

BOSCAGLIA v KIRSCH, No. 126709; Court of Appeals No. 245414.

PEOPLE v KARL LITTLE, No. 126715. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253818.

PEOPLE v DERRICK LYONS, No. 126720; Court of Appeals No. 242319.

PEOPLE v WOODALL, No. 126721; Court of Appeals No. 247216.

PEOPLE v ERIC GARDNER, No. 126722; Court of Appeals No. 245726.

PEOPLE v TILLMAN, No. 126724; Court of Appeals No. 245442.

PEOPLE v TORREZ, No. 126728. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253274.

PEOPLE v SAEJAR PARKER, No. 126733; Court of Appeals No. 245894.

PEOPLE v BRUCK, No. 126736; Court of Appeals No. 253428.

PEOPLE v TERRENCE WILLIAMS, No. 126737; Court of Appeals No. 245443.

PEOPLE v ZIMMERMAN, No. 126739. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253459.

PEOPLE v BUTLER, No. 126743. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252414.

PEOPLE v SAUL WILLIAMS, No. 126744; Court of Appeals No. 247536.

PEOPLE v BROCK, No. 126752. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253409.

PEOPLE v CHRISTOPHER WILLIAMS, No. 126753. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252882.

PEOPLE v CALABRESE, No. 126760; Court of Appeals No. 246795.

PEOPLE v CLIFTON BOYD, No. 126787. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 255547.

PEOPLE v RAHIM JONES, No. 126816; Court of Appeals No. 244278.

PEOPLE v BASNER, No. 126824. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253423.

PEOPLE v GAERTNER, No. 126835. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252662.

PEOPLE v JOELY JACKSON, No. 126839; Court of Appeals No. 254195.

PEOPLE v BRIAN THOMAS, No. 126841. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 256200.

PEOPLE v JOHNNY GIBBS, No. 126842. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253094.

PEOPLE v MATTOX, No. 126853. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253324.

PEOPLE v MENDOZA, No. 126864. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253191.

PEOPLE v MALTOS, No. 126868. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 255935.

PEOPLE v POLLARD, No. 126872. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253250.

PEOPLE v LLOYD HICKS, No. 126874. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 252632.

PEOPLE v TRAVIS, No. 126884. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 253458.

PEOPLE v SONES, No. 126927; Court of Appeals No. 248198.

WELKE v VSM TRUCKING, INCORPORATED, No. 126933; Court of Appeals No. 255245.

PEOPLE v JAMES REYNOLDS, No. 126948; Court of Appeals No. 242771.

NORWOOD v DEPARTMENT OF CORRECTIONS, No. 127226; Court of Appeals No. 254841.

PEOPLE v TRANDALL, No. 127294. The denial of the application is without prejudice to defendant raising in the trial court the defense that his failure to register was not willful. Court of Appeals No. 255522.

DALBEC v DALBEC, No. 127405; Court of Appeals No. 255288.

Interlocutory Appeals

Leave to Appeal Denied December 29, 2004:

LACKIE v DRAPER, No. 127130; Court of Appeals No. 256146.

CASTILLO v EXCLUSIVE BUILDERS, INC, No. 127471; Court of Appeals No. 256524.

Reconsideration Denied December 29, 2004:

PEOPLE v USHER, No. 125615. Leave to appeal denied at 471 Mich 883. Court of Appeals No. 242233.

PEOPLE v BOND, No. 125660. Leave to appeal denied at 471 Mich 888. Court of Appeals No. 253030.

KELLY, J. I would grant reconsideration.

PEOPLE v KEITH WILLIAMS, No. 125727. Leave to appeal denied at 471 Mich 884. Court of Appeals No. 232255 (on remand).

ESTON v PHILIP R SEAVER TITLE COMPANY, INC, No. 125909. Leave to appeal denied at 471 Mich 872. Court of Appeals No. 247298.

BURNETT v WAR MEMORIAL HOSPITAL, No. 125949. Leave to appeal denied at 471 Mich 873. Court of Appeals No. 253154.

PEOPLE v MAKI, No. 126127. Leave to appeal denied at 471 Mich 885. Court of Appeals No. 245983.

PEOPLE v CALVIN WILEY, No. 126195. Leave to appeal denied at 471 Mich 886. Court of Appeals No. 243627.

PEOPLE v HANN, No. 126475. Leave to appeal denied at 471 Mich 886. Court of Appeals No. 252386.

COOPER v AUTO CLUB INSURANCE ASSOCIATION, No. 126755. Leave to appeal denied at 471 Mich 915. Court of Appeals No. 254659.

Leave to Appeal Denied January 7, 2005:

PEOPLE v WEEDER, No. 126104. Application for leave to cross-appeal is also denied. Court of Appeals No. 217454 (on remand).

TAYLOR, C.J. I concur in the denial of leave to appeal because I believe the Court of Appeals reached the correct result. I write separately,

however, to indicate that it appears the Court of Appeals erred in concluding that negligent vehicular homicide, MCL 750.324, is a necessarily lesser included offense of second-degree murder. Because the use of a motor vehicle is not an element of second-degree murder, negligent vehicular homicide cannot be a necessarily lesser included offense of that crime. I further note that pursuant to MCL 750.325 the Legislature requires that a jury be instructed regarding negligent vehicular homicide whenever the crime of manslaughter has been charged in connection with the operation of a vehicle.

Leave to Appeal Granted January 13, 2005:

FISHER v W A FOOTE MEMORIAL HOSPITAL, No. 126333. The issue is limited to whether MCL 333.21513(e) creates a private cause of action. The motion for leave to file a brief amicus curiae in support of the application is granted, and the American Osteopathic Association, Michigan Osteopathic Association, and American College of Osteopathic Surgeons are also granted permission to file an appellate brief as amici. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 261 Mich App 727.

REED v YACKELL, No. 126534. The issue is limited to whether plaintiff was an employee within the meaning of MCL 418.161(1)(l) and (n). The Worker's Compensation Section of the State Bar of Michigan is invited to file a brief 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. 236588 (on remand).

Summary Dispositions January 13, 2005:

PEOPLE v LOONSFOOT, No. 126473. 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. 253157.

PEOPLE v JOURDAN, No. 126488. In lieu of granting leave to appeal, the February 11, 2004, order of the St. Clair Circuit Court ordering the Department of Corrections to direct funds in excess of $4.99 from defendant's institutional account to the St. Clair Circuit Court is vacated, and the case is remanded to that court for reconsideration in light of *Fuller v Oregon*, 417 US 40, 47-54 (1974). MCR 7.302(G)(1). In all other respects, leave to appeal is denied. Court of Appeals No. 254957.

PEOPLE v DWIGHT SMITH, No. 126528. 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). Court of Appeals No. 254149.

Leave to Appeal Denied January 13, 2005:

PEOPLE v SHAMMAS, No. 124339; Court of Appeals No. 248946.

PEOPLE v VICK, No. 126237; Court of Appeals No. 243843.
KELLY, J. I would grant leave to appeal.

In re ENGLISH ESTATE (HOLLY v WASHTENAW COUNTY), No. 126309; Court of Appeals No. 243693.
KELLY, J. I would grant leave to appeal.

PEOPLE v LEEK, No. 126413; Court of Appeals No. 246781.
KELLY, J. I would grant leave to appeal.

PEOPLE v WILKEY, No. 126522; Court of Appeals No. 245055.
KELLY, J. I would remand this case to the Court of Appeals for further consideration of the confrontation clause issue.

PEOPLE v FORD, No. 126661; reported below: 262 Mich App 443.

OPTION ONE MORTGAGE CORPORATION v URSERY, No. 127318; Court of Appeals No. 257844.
KELLY, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

Reconsideration Denied January 13, 2005:

PEOPLE v GENO, No. 126373. Leave to appeal denied at 471 Mich 921. Reported below: 261 Mich App 624.
KELLY, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

Leave to Appeal Granted January 21, 2005:

PEOPLE v GILLIS, No. 127194. The parties are directed to include among the issues to be briefed: (1) whether the plain language of MCL 750.316 permits a conviction for first-degree murder "in the perpetration of" a first-degree or second-degree home invasion where the homicide occurs several miles away from the dwelling and several minutes after the defendant has left the dwelling; and (2) whether, under the separation of powers doctrine, the Court of Appeals had the authority to direct the circuit court, on remand, to limit the charges on retrial to those that the Court of Appeals determined should have "properly" been brought. The State Appellate Defender, the Criminal Defense Attorneys of Michigan, and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Court of Appeals No. 245012.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal January 21, 2005:

PEOPLE v WESTCARR, No. 126477. 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)(l). The parties shall include among the issues to be addressed whether the Wayne Circuit Court abused its discretion in denying defendant's request for a continuance. Defendant may request appointment of counsel by filing, within 21 days from the date of this order, an affidavit concerning his present financial status with the Wayne Circuit Court. In accordance with Administrative Order No. 2003-3, the Wayne Circuit Court shall determine whether defendant is indigent, and, if so, appoint counsel to represent defendant in this Court. The Wayne Circuit Court remains free to consider appointing former counsel who represented defendant in the Court of Appeals. If counsel is appointed to represent defendant, or if the Wayne Circuit Court determines that defendant does not lack the financial means to retain counsel, the parties may file supplemental briefs within 35 days from the date of the Wayne Circuit Court's order. If defendant does not file an affidavit concerning his present financial status within 21 days from the date of this order, the parties may file supplemental briefs within 56 days from the date of this order. Court of Appeals No. 243042.

Summary Disposition January 21, 2005:

PEOPLE v TATE, No. 123641. In lieu of granting leave to appeal, the Court of Appeals judgment is vacated in part, and the case is remanded to the Wayne Circuit Court for a determination, either on the existing record or after an appropriate hearing, whether the defendant's typewritten confession was voluntary and therefore admissible under *People v Walker (On Rehearing)*, 374 Mich 331 (1965). MCR 7.302(G)(1). Under *Lee v Mississippi*, 332 US 742 (1948), and *Boles v Stevenson*, 379 US 43 (1964), the defendant had the right to challenge both the authenticity and the voluntary nature of the typewritten confession. In all other respects, the application for leave to appeal is denied. Jurisdiction is not retained. Court of Appeals No. 237039.

CORRIGAN, J. (*dissenting*). I would deny leave to appeal. The majority vacates the Court of Appeals judgment in part and remands this case to the trial court to determine whether defendant was coerced into making a confession that was admitted at trial. Defendant, however, has *already* testified that he did not even make this statement, and he presented no evidence at his original *Walker*[1] hearing that this statement was coerced. Yet the majority now inexplicably grants defendant an opportunity to contradict his own sworn testimony and to relitigate an issue that has already been resolved.

The majority observes that a defendant may advance alternative and conflicting claims that a confession was coerced and that it was never made. See, e.g., *Boles v Stevenson*, 379 US 43 (1964); *Lee v Mississippi*,

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

332 US 742 (1948). For either alternative claim to succeed, however, it must, of course, have evidentiary support. A court's finding on a factual issue must always be based on evidence—not speculation, not arguments by lawyers, but evidence. A court may not logically find that a defendant's confession was coerced if no evidence has been presented to support such a finding.

Defendant testified that he signed a handwritten statement, and that this statement was coerced. But no such statement was ever admitted at trial. Rather, a *separate*, typewritten statement was admitted. Defendant testified that he did not sign the typewritten confession. Moreover, he presented no evidence that the typewritten confession was coerced. In short, defendant's testimony suggests that two separate statements are at issue: (1) a signed, handwritten statement that was allegedly coerced, and (2) a separate, typewritten statement that defendant claimed he did not sign.

The trial court submitted to the jury the question whether the typewritten statement was authentic. The Court of Appeals affirmed,[2] and its analysis of this issue is persuasive:

> Here, defendant did not make allegations of a fabricated statement with a forced signature. Rather, he claimed that he was coerced into making *a* statement in violation of his constitutional rights, but that the prosecution was attempting to introduce a *different* statement. Defendant did not testify at the *Walker* hearing that the typewritten statement introduced by the prosecutor was the same statement he allegedly gave involuntarily. Accordingly, whatever allegations defendant made regarding involuntariness and unconstitutional tactics were irrelevant to the statement. The trial court properly determined that, under these circumstances, it was not required to make findings on the issue of voluntariness, because the jury would resolve the questions pertaining to the statement's authenticity and credibility. The statement was therefore admissible, regardless of which witness was more credible as to defendant's allegations that the police coerced him to speak or that they ignored his invocation of his right to counsel. [Emphasis in original.]

The majority has not articulated why it believes the Court of Appeals analysis is flawed.

The majority further does not explain the portion of its order providing that the trial court on remand must make its determination "either on the existing record or after an appropriate hearing." This language suggests that defendant may be allowed to present additional evidence regarding the typewritten confession. The majority does not explain why or how the existing record might be insufficient. Nor does

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[2] Unpublished opinion per curiam, issued March 18, 2003 (Docket No. 237039).

the majority explain why defendant should be entitled on remand to present evidence, including, perhaps, his own testimony, contradicting his previous sworn testimony that he did not sign the typewritten confession.

The majority also does not acknowledge that, at the original *Walker* hearing, the defense was free to present whatever admissible evidence it wished regarding the typewritten confession, including testimony from defendant or other evidence. For whatever reason, the defense presented *no* evidence that the typewritten statement was coerced. The trial court thus could not logically have found that this statement was coerced because there was no evidentiary basis for such a finding. The majority now grants defendant a second bite at the apple by remanding for another hearing, even though it has not identified a single flaw in the original *Walker* hearing or the decision by the trial court to warrant this extraordinary action.

Leave to Appeal Denied January 21, 2005:

PEOPLE V BARLOW, No. 124965; Court of Appeals No. 239038.

CAVANAGH, J. (*dissenting*). To violate the statute at issue, one must not only coerce the victim, but he must coerce her "by threatening to use force or violence on the victim . . . ." MCL 750.520e(1)(b)(ii). That simply did not occur in this case.

Neither proof of the victim's lack of consent nor proof of the victim's subjective, unverbalized fear will satisfy the elements of MCL 750.520e(1)(b)(ii). See *People v Carlson*, 466 Mich 130, 139-141 (2002). In *Carlson*, two high-school students parked their car in a parking lot and began touching each other. The male asked the female to engage in sexual intercourse, and she repeatedly told him no. Ignoring her protest, he penetrated her. This Court rejected the argument that the act of penetration itself was force or coercion within the meaning of the statute. It likewise rejected the idea that showing that a defendant overcame the victim was force or coercion. This Court held that "the prohibited 'force' encompasses the use of force against a victim to either induce the victim to submit to sexual penetration or to seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." *Id.* at 140. It must be force that allows the defendant to accomplish the sexual act "when absent that force the penetration would not have occurred." *Id.*

Here, there was no evidence that defendant in this case used force in this manner. He touched the victim's breasts with nothing more. He told the victim to take off her clothes with nothing more. He made no threats "to use force or violence on the victim . . . ." MCL 750.520e(1)(b)(ii). To allow this conviction to stand would be to fundamentally alter, i.e., obliterate, the requirement that a defendant must threaten to use force or violence on the victim. The courts below erred, and defendant's conviction should be reversed. Alternatively, I would grant leave and take further briefing and oral argument from the parties.

MARKMAN, J. I concur with the statement of Justice CAVANAGH.

PEOPLE v STEVEN BROWN, No. 126443; Court of Appeals No. 245006.

PEOPLE v KENNETH JONES, No. 126465; Court of Appeals No. 238557 (on remand).

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.

Leave to Appeal From Attorney Discipline Board Denied July 29, 2004:

GRIEVANCE ADMINISTRATOR v WARREN, No. 125640.

Order Entered July 30, 2004:

PEOPLE v MORSON, No. 124083. Motion for permission to file a supplemental brief discussing *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is granted. Given our resolution of the sentencing issues in this case, it is unnecessary to address whether due process requires that the prosecution prove the elements of a crime that someone else committed before a court can base a defendant's sentence on the actions of the other person. Further, in *People v Claypool*, 470 Mich 715 (2004), it was determined that *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. Reported *ante*, 248.

Leave to Appeal From Attorney Discipline Board Denied August 31, 2004:

GRIEVANCE ADMINISTRATOR v SMITH, No. 125612.

Rehearings Denied September 14, 2004:

BRYANT v OAKPOINTE VILLA NURSING CENTRE, INC, Nos. 121723, 121724. Reported *ante* at 411.

CRAIG v OAKWOOD HOSPITAL, Nos. 121405, 121407-121409, 121419. Reported *ante* at 67.

KELLY, J. I would grant rehearing.

NEAL v WILKES, No. 122498. Reported at 470 Mich 661.

CAVANAGH and KELLY, JJ. We would grant rehearing.

ALLSTATE INSURANCE COMPANY v MCCARN (AFTER REMAND), No. 122849. Reported *ante* at 283.

KELLY, J. I would grant rehearing.

WEAVER, J. I would grant the request for rehearing for the reasons stated in my dissenting opinion in *Allstate Ins Co v McCarn (After Remand),* 471 Mich 283, 295-299 (2004).

KREINER v FISCHER and STRAUB v COLLETTE, Nos. 124120, 124757. Reported *ante* at 109.

CAVANAGH and KELLY, JJ. We would grant rehearing.

WEAVER, J. I would grant the request for rehearing for the reasons stated in the dissenting opinion in *Kreiner v Fischer,* 471 Mich 109, 139-157 (2004).

Orders Entered September 14, 2004:

PEOPLE v HOLTSCHLAG, PEOPLE v COLE, and PEOPLE v BRAYMAN, Nos. 123553-123555. In lieu of granting rehearing, the cases are remanded to the Court of Appeals for consideration of the sentencing challenges raised by the defendants in their briefs to that Court. Reported *ante* at 1.

PROPOSED ADOPTION OF NEW MICHIGAN RULES OF PROFESSIONAL CONDUCT. On order of the Court, this is to advise that the Court has extended the comment deadline from December 1, 2004, to February 1, 2005, for the order published July 2, 2004, 470 Mich 1212-1347, regarding the proposed adoption of new Michigan Rules of Professional Conduct.

PROPOSED AMENDMENT OF MCR 3.215. On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.215 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.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 3.215. DOMESTIC RELATIONS REFEREES.

(A) Qualifications of Referees. A referee appointed ~~by the chief judge of the circuit~~ pursuant to MCL 552.507(1) must be a member in good standing of the State Bar of Michigan. A nonattorney friend of the court ~~who is not a lawyer, but~~ who ~~is~~ was serving as a referee ~~at the time of adoption of this rule~~ when this rule took effect on May 1, 1993, may continue to serve. ~~A successor must meet the qualifications established by this rule.~~

(B) Referrals to the Referee.

(1) The chief judge may~~, refer motions of a particular kind to a referee, by administrative order.~~ 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 ~~an~~ 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 ~~written~~ a party's motion ~~by a party,~~ or

(c) on the judge's own initiative.

(3) In a domestic relations matter, the judge to whom an action is assigned, or the chief judge by administrative order, may authorize referees to conduct settlement conferences and, subject to judicial review, schedule conferences.

(C) Scheduling of the Referee Hearing.

(1) Within 14 days after receiving a motion referred under subrule (B)(1) or ~~a referral under subrule~~ (B)(2), the referee must serve ~~schedule the matter for hearing~~.

~~(2) The referee must serve a notice of hearing on~~ the attorneys for the parties, or the parties if they are not represented by counsel a notice scheduling a referee hearing. 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~~, in extraordinary circumstances~~.

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

(E) Posthearing Procedures.

(1) Within 21 days after a hearing, ~~except for a hearing on income withholding~~, 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. If the recommendation for an order is approved by the court and no written objection is filed with the court clerk within 21 days after the recommendation is served on the attorneys for the parties, or the parties if they are not represented by counsel, the order will take effect.

(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 by filing

~~(a) a written objection and notice of hearing within 14 days after the referee's recommended order is served on the attorneys for the parties, or the parties if they are not represented by counsel, if the order is for income withholding, or~~

~~(b)~~ 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~~, if the order concerns any other matter~~. The objection must include a clear and concise statement of the specific findings of fact to which the objection is made.

(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. The referee's recommendation for an order must give prominent notice of all the available 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 the time is extended by the court for good cause.

(2) Subject to subrule (F)(3), the decision after a judicial hearing may be:

(a) a new decision based entirely on the record of a referee hearing, including any memoranda, recommendations, or proposed orders by the referee;

(b) a new decision based only on evidence presented at the judicial hearing; or

(c) a new decision based on the record of the referee hearing as supplemented by evidence that was not introduced at the referee hearing.

(3) The parties may present to the court the same evidence that was presented at the referee hearing and also evidence that could not have been presented at the referee hearing; however, the court may:

(a) exclude evidence that was not offered at the referee hearing, provided the party had an opportunity to offer the evidence at the referee hearing and failed to do so;

(b) use a referee's finding to establish a fact when no objection to that finding has been filed;

(c) make the payment of costs or attorney fees a condition for offering evidence that the party could have offered at the referee hearing; and

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

~~(2) If both parties consent, the judicial hearing may be based solely on the record of the referee hearing.~~

(~~3~~4) 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 of Referee's Recommendation for an Order.

(1) Except as limited by subrule (G)(2), the court may, by an administrative order or by an order in the case, provide that, following an objection to the referee's recommended order, the referee's recommended order will take effect on an interim basis pending entry of a final order by the court. 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 requiring service of a separate court order in the case within 3 days.

(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; or

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

Staff Comment: This proposed amendment would 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.

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 January 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.

PROPOSED AMENDMENT OF MCR 6.445. On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.445 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.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 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 ~~at a contested hearing~~ 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 proposed amendments of MCR 6.445(H)(1)(a) and (b) would require a sentencing judge to convey to a probationer whose probation is revoked that he or she is entitled to appeal by right only where the probationer's underlying conviction occurred as the result of a trial. Where the underlying conviction resulted from a plea of guilty or nolo contendere, the probationer would not be entitled to appeal by right, even where the revocation resulted from a contested 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 this proposal may be sent to the Supreme Court Clerk in writing or electronically by January 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. 2004-11. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered September 23, 2004:

PROPOSED AMENDMENT OF MCR 6.425, 7.210, AND 8.119. On order of the Court, this is to advise that the Court is considering amendments of Rules 6.425, 7.210, and 8.119 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 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 ~~and~~ payment for ~~it~~ the transcript has been made ~~and~~ or secured, ~~and~~ 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 informa-

tion 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 proposed amendments were recommended by the Court of Appeals Record Production Work Group.

The proposed amendment of MCR 6.425(F) would expedite 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 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 proposed amendment of MCR 7.210(B)(3)(a) would enhance 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 proposed amendment of MCR 8.119(D)(1)(c) would also expedite 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 proposed subrule would also be divided for the ease of the reader.

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 January 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. 2003-65. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Rehearing Denied September 27, 2004:

BREIGHNER v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC, No. 123529. Reported *ante* at 217.

CAVANAGH and KELLY, JJ. We would grant rehearing.

WEAVER, J. I would grant the request for rehearing for the reasons stated in my dissenting opinion in *Breighner v Michigan High School Athletic Ass'n*, 471 Mich 217, 233-247 (2004).

Order Entered October 21, 2004:

CATALINA MARKETING SALES CORPORATION v DEPARTMENT OF TREASURY, Nos. 121673, 121674. On May 5, 2004, we issued our opinion remanding this case to the Michigan Tax Tribunal to apply the incidental to service test adopted in that opinion. 470 Mich 13. The tribunal issued its decision on remand on July 29, 2004. Having reviewed the decision and the supplemental briefs filed by the parties, we affirm the decision of the tribunal that the transactions in issue are not subject to the sales tax.

Order Entered November 17, 2004:

PROPOSED AMENDMENT OF MCR 7.211. On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.211 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 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 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 before 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 with 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.

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

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 March 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. 2004-46. Your comments

and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

WEAVER, J. I write separately because I would publish for comment the court rule amendment as it was proposed by the Court of Appeals, rather than the court rule amendment contained in the order above.

The court rule amendment as proposed by the Court of Appeals would not refer to the procedures set out in the text of MCR 8.119(F), but would instead spell out the relevant provisions for sealing a Court of Appeals file. This would be clearer and more straightforward for both the appellate bar and the courts. Further, the court rule amendment as proposed by the Court of Appeals would allow any interested person, not only a party, to move to seal a Court of Appeals file, unlike the procedures in MCR 8.119(F).

The court rule amendment as proposed by the Court of Appeals reads as follows:

[The present language would be amended as 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 Suppress Court of Appeals File in Whole or in Part.

(a) Trial court files that are subject to trial court orders that seal or suppress their contents will continue to be suppressed while they are in the possession of the Court of Appeals. Public requests to view such trial court files will be referred to the trial court for purposes of public access.

(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 before the Court of Appeals.

(c) Except as otherwise provided by statute or court rule, the Court of Appeals may not suppress a Court of Appeals file in whole or in part except by order entered on motion by a party or interested person.

(d) The court must provide any party or interested person the opportunity to file an answer in response to a motion to suppress a Court of Appeals file. Such answers must be filed within 7 days after the motion is served on the other parties, or within 7 days after the motion is filed with the Court of Appeals, whichever is later.

(e) A motion to suppress a Court of Appeals file in whole or in part shall identify the specific interest to be protected.

(f) An order granting a motion shall include a finding of good cause and a finding that there is no less restrictive means to adequately and effectively protect the specific interest asserted.

(g) In determining whether good cause has been shown, the court must consider:

(i) the interests of the parties, including, where there is an allegation of domestic violence, the safety of the alleged or potential victim of the domestic violence, and

(ii) the interest of the public.

(h) The court may not seal a court order or opinion, including an order or opinion that disposes of a motion to seal the record.

(i) An order granting or denying a motion to suppress 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.

(j) Whenever the court grants a motion to suppress a Court of Appeals file, in whole or in part, the court must forward a copy of the order to the Clerk of the Supreme Court and to the State Court Administrative Office.

Leave to Appeal From Attorney Discipline Board Denied November 19, 2004:

GRIEVANCE ADMINISTRATOR v COOK, No. 127356.

Reconsideration Denied November 22, 2004:

GRIEVANCE ADMINISTRATOR v WARREN, No. 125640. Leave to appeal denied at 471 Mich 1201.

Orders Entered November 24, 2004:

PROPOSED MICHIGAN STANDARDS FOR IMPOSING LAWYER SANCTIONS (EXTENSION OF COMMENT PERIOD TO COINCIDE WITH COMMENT PERIOD IN ADM FILE NO. 2003-62). On order of the Court, this is to advise that the Court is extending the comment period from December 1, 2004, to February 1, 2005, for the order published July 29, 2003, 469 Mich 1206, regarding the Proposed Michigan Standards for Imposing Lawyer Sanctions. This matter will be considered, along with ADM File No. 2003-62, at a public hearing before the Court makes a final decision. When filing a comment, please refer to ADM File No. 2002-29.

PROPOSED AMENDMENT OF MCR 7.302. On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.302 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 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 schedule and agendas for public hearings are posted at www.courts.michigan.gov/supreme court.

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 7.302. 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, ~~or~~

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

~~(b)~~(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 proposed amendment of MCR 7.302(C)(4) would allow 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 proposed 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.

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 March 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. 2004-47. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/resources/administrative/index.htm.

Rehearing Denied December 7, 2004:

STEWART v STATE OF MICHIGAN, No. 124676. Reported *ante* at 692.

Order Entered December 7, 2004:

PROPOSED AMENDMENT OF MCR 6.120. On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.120 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.court.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 6.120. JOINDER AND SEVERANCE; SINGLE DEFENDANT.

(A) ~~Permissive~~ Charging Joinder. ~~An~~ The prosecuting attorney may file an information or indictment ~~may charge~~ that charges a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.

~~(B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on~~

~~(1) the same conduct, or~~

~~(2) a series of connected acts or acts constituting part of a single scheme or plan.~~

~~(C) Other Joinder or Severance. On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.~~

(B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

(a) the same conduct or transaction, or

(b) a series of connected acts, or

(c) a series of acts constituting parts of a single scheme or plan

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

(C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

Staff Comment: The December 7, 2004, amendments of the rule reflect the recommendations of the Committee on the Rules of Criminal Procedure as requested by the Court in *People v Nutt*, 469 Mich 565 (2004).

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 April 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. 2004-52. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered December 21, 2004:

PROPOSED AMENDMENT OF MCR 2.504. On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.504 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.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 2.504. DISMISSAL OF ACTIONS.

(A) Voluntary Dismissal; Effect.

(1) ~~*By Plaintiff; by Stipulation.*~~ Subject to the provisions of MCR 2.420 and MCR 3.501(E), an action may be dismissed by the plaintiff ~~without an order of the court and on the payment of costs~~

(a) by filing a notice of dismissal or a proposed order of dismissal, or by otherwise requesting dismissal before service by the adverse party of an answer or of a motion under MCR 2.116, whichever first occurs; or

(b) by filing a stipulation of dismissal signed by all the parties.

Unless otherwise stated in the notice or order of dismissal or stipulation, the dismissal is without prejudice, except that a dismissal under subrule (A)(1)(a) operates as an adjudication on the merits when filed by a plaintiff who has previously dismissed an action in any court based on or including the same claim. Where a plaintiff obtains a dismissal under subrule (A)(1)(a), the adverse party is entitled to reimbursement for any costs incurred before the dismissal.

(2) ~~*By Order of Court.*~~ Except as provided in subrule (A)(1), an action may not be dismissed at the plaintiff's request except by order of the court on terms and conditions the court deems proper.

(a) If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the court shall not dismiss the action over the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

(b) Unless the order specifies otherwise, a dismissal under subrule (A)(2) is without prejudice.

(B)-(E) [Unchanged.]

Staff Comment: The proposed amendment of MCR 2.504(A) would clarify that any second voluntary dismissal pursuant to subrule (A)(1) constitutes an adjudication on the merits, even where the plaintiff obtains a court order finalizing the dismissal and whether or not the plaintiff is ordered to pay costs.

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 April 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. 2004-13. Your comments will be posted on the Court's website, along with the comments of others, at www.courts.mi.gov/supremecourt/Resources/Administrative/index.htm.

Leave to Appeal From Attorney Discipline Board Denied December 29, 2004:

GRIEVANCE ADMINISTRATOR v WARREN, No. 127192.

Index-Digest

INDEX–DIGEST

ACCOMPLICES—*See*

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ACTIONS

See, Also, ENVIRONMENT 1

MEDICAL MALPRACTICE

1. A plaintiff may not commence a medical malpractice action unless written notice of intent to file suit is provided to the defendant; after providing the notice, the plaintiff must wait for the applicable notice period to pass before filing suit; an action filed before the expiration of the notice period does not toll the period of limitations applicable to the action (MCL 600.2912b, 600.5856[a]). *Burton v Reed City Hosp Corp*, 471 Mich 745.

APPELLATE ATTORNEY FEES—*See*

PRETRIAL PROCEDURE 1

APPELLATE COSTS—*See*

PRETRIAL PROCEDURE 1

COMMON WORK AREA DOCTRINE—*See*

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COMPARATIVE NEGLIGENCE—*See*

NEGLIGENCE 6

CONSTITUTIONAL LAW—*See*

INDIANS 1

MINES AND MINERALS

SAND DUNE MINING

1. The Michigan environmental protection act affords no basis for judicial review of a decision by the Department of Environmental Quality to issue a sand dune mining permit in a critical dune area pursuant to MCL 324.64702(1), because the focus of the act is to protect Michigan's natural resources from harmful conduct; only a basis for permit invalidation related to the permit holder's conduct can be reviewed under the act (MCL 324.1701 et seq.). *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508.

NEGLIGENCE

GENERAL CONTRACTORS

1. The elements necessary for liability by a general contractor under the common work area doctrine exception to the general rule of nonliability of a general contractor for the negligent acts of an independent subcontractor are the (1) general contractor failed to take reasonable steps (2) to guard against readily observable and avoidable dangers (3) that create a high degree of risk to a significant number of workers (4) in a common work area. *Ormsby v Capital Welding, Inc*, 471 Mich 45.
2. The retained control doctrine is a doctrine subordinate to the common work area doctrine and applies when the owner assumes the unique duties and obligations of a general contractor by assuming the role of the general contractor. *Ormsby v Capital Welding, Inc*, 471 Mich 45.

LANDOWNERS' LIABILITY

3. The inherently dangerous activity doctrine eliminates nonliability of landowners for injuries to innocent third parties caused by inherently dangerous activity undertaken by an independent contractor on the land of the landowner; the doctrine does not apply to injuries of an

employee of an independent contractor performing the dangerous work. *DeShambo v Anderson*, 471 Mich 27.

MEDICAL MALPRACTICE

4. The first issue in any purported medical malpractice action is whether the action is being brought against someone who, or an entity that, is capable of malpractice; the second issue is whether the claim sounds in medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411.
5. A medical malpractice claim is distinguished by two defining characteristics; first, medical malpractice can occur only within the course of a professional relationship; second, medical malpractice claims necessarily raise questions involving medical judgment beyond the realm of common knowledge and experience. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411.
6. The trier of fact in a personal injury, property damage, or wrongful death tort action, including a wrongful death action based on an underlying claim of medical malpractice, may consider the plaintiff's pretreatment negligence in offsetting a defendant's fault where reasonable minds could differ with regard to whether such negligence constituted a proximate cause—a foreseeable, natural, and probably consequence—of the plaintiff's injury and damages (MCL 600.6304). *Shinholster v Annapolis Hosp*, 471 Mich 540.

WRONGFUL DEATH

7. The term "plaintiff" as used in MCL 600.6311 refers, for purposes of a wrongful death action, to the decedent. *Shinholster v Annapolis Hosp*, 471 Mich 540.

NONECONOMIC DAMAGES—*See*

DAMAGES 1

NOTICE—*See*

TAXATION 1, 2

OFFENSE VARIABLE NINE—*See*

SENTENCES 2

OFFENSE VARIABLE ONE—*See*

SENTENCES 1

OFFENSE VARIABLE THREE—*See*

SENTENCES 1

SENTENCES

SENTENCING GUIDELINES

1. The sentencing guidelines for offense variable 1 (aggravated use of a weapon) and 3 (physical injury to a victim) require a sentencing court to assess the same score for a defendant as for a previously sentenced accomplice in the absence of inaccurate or erroneous scoring with respect to the accomplice (MCL 777.31[2][b], 777.33[2][a]). *People v Morson*, 471 Mich 248.
2. For the purpose of scoring offense variable 9 (number of victims), a person who was shot by a perpetrator of armed robbery during a chase of the perpetrator is a victim, as is the person who was robbed, because both have been placed in danger of injury or loss of life (MCL 777.39[2][a]). *People v Morson*, 471 Mich 248.

SERIOUS IMPAIRMENT OF BODY FUNCTION—*See*

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STANDING—*See*

ENVIRONMENT 1

STATUTES

NO-FAULT ACT

1. Tort liability for serious impairment of body function requires an evaluation of the injury's effect on the plaintiff's general ability to lead his normal life, which requires a comparison of the plaintiff's lifestyle before and after the accident, but a minor change in how a person performs a specific activity does not alter the fact that the person is still generally able to perform the activity; an objective analysis of the plaintiff's actual capabilities and capacities is undertaken to determine the plaintiff's general ability to lead his normal life; the analysis requires evaluation of the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery; self-imposed restrictions based on real or perceived pain do not establish the extent of any residual impairment that affects the plaintiff's general ability to lead his normal life (MCL 500.3135[1]). *Kreiner v Fischer*, 471 Mich 109.